IN THE COURT OF APPEAL OF NEW ZEALAND

CA796/2009
[2011] NZCA 100

BETWEEN	HICKMAN & ORS Appellant
AND	TURN AND WAVE LIMITED Respondent

CA797/2009

AND BETWEEN	LESTER & ORS Appellant
AND	GREENSTONE BARCLAY TRUSTEES LTD Respondent

CA798/2009

AND BETWEEN	COLLINGWOOD & ORS Appellant
AND	ICON CENTRAL LTD Respondent

Hearing:	31 August to 3 September 2010
Court:	O'Regan P, Hammond and Randerson JJ
Counsel:	P J Dale, D W Grove and N R Campbell for Appellants D J Chisholm and G P Blanchard for Respondent Turn & Wave Ltd R B Stewart QC and D J Neutze for Respondent Greenstone Barclay Trustees Ltd B O'Callahan and J Puah for Respondent Icon Central Ltd
Judgment:	29 March 2011 at 11.30 a.m.

JUDGMENT OF THE COURT

A **The application by the appellants to amend the pleadings in each case is dismissed.**

B **The appeals relating to the five appellants named at [19] are dismissed.**

C **Counsel for the remaining appellants are to confer with counsel for the other parties and inform the Court by memorandum within one month from the date of this judgment how the appeals by the other appellants are proposed to be dealt with.**

D **Costs are reserved. Counsel are to confer and file a memorandum within the same period on that subject.**

REASONS OF THE COURT

(Given by Randerson J)

APPENDIX

Introduction

[1] When the Blue Chip group of companies collapsed in February 2008, hundreds of investors suffered substantial losses. Many also found they were facing liabilities they had not counted upon having to meet. These appeals are concerned with investors who, as part of their investments with Blue Chip, signed agreements to buy apartments in three separate developments in Auckland City.

[2] They bought "off the plans" on the basis that the apartments would be constructed with settlement to take place usually 18 to 24 months later. The respondent developers were not part of the Blue Chip group and when the construction of the apartments was complete they called upon the investors to settle the purchases. The investors declined to do so and purported to cancel the sale and purchase agreements (which we will refer to as "SPAs").

[3] Selected investors then sought declarations to the effect that they were entitled to cancel the agreements on a variety of grounds we discuss below. The High Court ordered under r 10.15 of the High Court Rules that it would determine, prior to trial, whether the selected investors were obliged to settle or whether they had validly cancelled their agreements.

[4] In three judgments issued on the same day, Venning J found that the investors had not validly cancelled the SPAs.[1] The investors now appeal against those decisions.

The parties

[5] It is convenient to refer first to the respondent developers and to the developments for which they were responsible:

(a) Greenstone Barclay Trustees Limited (Greenstone) undertook a development known as the Barclay.

(b) Turn and Wave Limited (TWL) was responsible for a development known as the Bianco.

(c) Icon Central Limited (Icon) undertook a development known as the Icon.

[6] We will refer to the three separate sets of proceedings as the Greenstone, TWL and Icon proceedings respectively.

[7] In the Greenstone proceeding there were more than 90 plaintiffs of whom 12 were selected for the purpose of determining the preliminary question. In the TWL

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1 *Lester v Greenstone Barclay Trustees Ltd* [2010] 3 NZLR 67 (the *Greenstone* judgment); *Hickman v Turn & Wave Ltd* HC Auckland CIV-2008-404-5871, 25 November 2009 (the *TWL* judgment); *Icon Central Ltd v Collingwood* HC Auckland CIV-2008-404-7424, 25 November 2009 (the *Icon* judgment).

proceeding, there were more than 50 plaintiffs from whom 12 investors were selected. And in the Icon proceeding 11 were selected from some 30 investors. The investors were plaintiffs in the Greenstone and TWL proceedings but were defendants in the Icon proceeding. The cancellation issue was raised as part of their defence in that proceeding.

The proceedings

[8] Venning J was careful to clarify the limited nature of the proceedings:

- The judgment could only formally bind the parties selected as plaintiffs who participated in the hearing.
- Separate causes of action against lenders, mortgage brokers, valuers, Blue Chip entities and solicitors were left for another day.
- The judgments were concerned solely with the cancellation issue; they did not address whether the court should order specific performance of the SPAs against the individual plaintiffs.

[9] The grounds on which the investors asserted they were not obliged to settle were:

- Actionable misrepresentation giving rise to a right to cancel under the Contractual Remedies Act 1979.
- Misleading and deceptive conduct under the Fair Trading Act 1986.
- Breach of the Securities Act 1978 through failure to provide a prospectus.

[10] The causes of action for misrepresentation and breach of the Fair Trading Act relied on misrepresentations made by Blue Chip sales agents. In order to give rise to the claimed right of cancellation, it was essential for the investors to establish that, in making the alleged misrepresentations, the Blue Chip agents were also acting as agents for the developers such that their statements should be attributed to the developers as principals.

[11] Strictly speaking, a breach of the Securities Act is not a ground entitling the investors to cancel the SPAs. However, if the separate arrangements between Blue Chip and the investors could be shown to have breached the Act, they would be

invalid and of no effect.[2] The next step would be to attempt to establish that the SPAs were tainted by that illegality and were also invalid and of no effect.

[12] In order to establish this ground, it was necessary for the investors to show that:

- The separate arrangements made between Blue Chip and the investors were "debt securities" or "equity securities" under the Securities Act.
- The SPAs had as their purpose or object the assistance or promotion of the illegal transactions.
- The developers knew of the illegality.

The Judge's findings

[13] In very brief summary, the principal findings made by Venning J were:

- The relevant sales agents were appointed as agents by the respective developers and had actual authority to market and sell the apartments on their behalf.
- The scope of the agency was limited to marketing and selling the apartments.
- The developers were not liable for misrepresentations by sales agents about the Blue Chip investment products as they were outside the scope of the task the sales agents were engaged to perform for the developers.
- Any actionable misrepresentations about Blue Chip or the Blue Chip investment products that may have amounted to misleading conduct were outside the scope of the agency from the developers.
- The Fair Trading Act causes of action could not succeed.
- There were no other grounds for cancellation.
- The Blue Chip investment products did not constitute debt securities under the Securities Act (with the possible exception of the joint venture agreement we mention below).
- Even if the relevant Blue Chip investment products were debt securities, the exemption for agreements relating to the sale of land under s 5 of the Securities Act applied.
- Even if the Blue Chip investment products were marketed unlawfully in terms of the Securities Act, the SPAs were not made for the purpose of assisting in the illegal arrangement.
- Greenstone and TWL had no knowledge of the alleged illegality. For this purpose, the knowledge of the Blue Chip entities and the sales agents

[2] Securities Act 1978, s 37(4).

about the detail of the Blue Chip investment products could not be imputed to Greenstone or TWL and they had no reason to be put on inquiry.

- Icon knew of the detail of the relevant Blue Chip investment products but did not know of the alleged illegality.

Issues on appeal

[14] The ground has shifted considerably since the hearing before Venning J:

- Any cause of action based on misrepresentation, whether under the Contractual Remedies Act or as constituting misleading or deceptive conduct under the Fair Trading Act, is no longer pursued.
- The appellants confirmed they do not appeal against Venning J's finding that the liquidation of the Blue Chip entities nominated as lessee of the apartments does not provide a ground upon which the investors were entitled to cancel.

[15] We note also that an argument based on unconscionability was abandoned at the close of the High Court hearing and that the investors elected in the High Court not to pursue a possible argument based on a collateral or conditional contract.

[16] The issues under the Securities Act remain. The appellant investors also now seek to amend their pleadings to introduce three new causes of action which they assert mean that they would not be obliged to settle the SPAs. These are:

- A claim based on promissory estoppel in which it is alleged that the Blue Chip agents told the investors they would not be required to settle the SPAs or that they would only be obliged to do so if Blue Chip did not perform its obligations in relation to the transactions.
- A claim based on an implied term of the SPAs that the investors would not be required to settle if Blue Chip did not perform its obligations.
- A claim that the SPAs and the separate agreements entered into between the investors and the relevant Blue Chip entities were interdependent with the result that the failure by the relevant Blue Chip entities to perform their obligations meant that the investors had no obligation to settle the SPAs.

[17] The investors' application to amend the pleadings (which had already been much amended in the High Court) was only made at a late stage after detailed grounds of appeal had been filed. The application to amend was strongly opposed by the developers who maintained they would be prejudiced not only in preparing

for the appeals but also because the trial would have been run differently in evidential terms if the new grounds had been live issues at trial. The developers also pointed out that the possibility of amending the pleadings in the High Court to include promissory estoppel had been raised by counsel for the appellant investors but this was abandoned in the closing stages of the trial. No amended pleading including an allegation of promissory estoppel was ever filed in the High Court.

[18] In order to address the concerns raised by the developers, O'Regan P directed that the appellant investors could present argument before us in relation to the new grounds but the developers would not be required to respond unless we decided that leave to amend should be granted. In that event, time would be allowed to the developers to respond to the new arguments. For reasons which we canvass in this judgment, we decided that leave should not be granted and the developers were informed accordingly.

[19] Mr Dale agreed to limit the scope of the argument on appeal initially to a much reduced number of investors. These were Mr and Mrs Lester and Ms Janes in relation to the Greenstone proceedings; Mr and Mrs Britton, Mr Dwight and Ms Hunt in respect of TWL; and Mr McFarlane in respect of Icon. However, the written submissions made on behalf of the investors addressed the evidence of all of them. We have decided, on reflection, we should consider all appellants and we have reviewed the evidence and the investors' submissions accordingly.

[20] The other investors who were plaintiffs in the TWL and Greenstone proceedings and defendants in the Icon proceeding in the High Court were named as appellants but, strictly speaking, their appeals were not to be advanced at the hearing before us. However, the submissions made on behalf of investors by their counsel did, in fact, address evidence relating to all of the appellant investors. We are conscious that the findings we have made effectively dispose of the applications by the other investors to amend their pleadings and may also resolve their appeals for all practical purposes. Having heard argument on their behalf we decided that it was appropriate to review the evidence relating to their cases to satisfy ourselves that the facts of their cases did not raise issues that would require us to adopt a different approach to those cases. We have, therefore, reviewed the evidence of all of the

appellants named in the original notices of appeal, not just the small number of investors whose appeals were to have been advanced before us. However, this judgment formally resolves only the appeals of the appellants named at [19].

[21] We have decided to decline leave to amend the pleadings and to amend the grounds of appeal. This judgment will address the following issues:

- The reasons for our decision declining leave to amend the pleadings and the grounds of appeal.
- Whether any of the relevant Blue Chip investment products breached the Securities Act.
- Whether the developers are tainted with any illegality in that respect.

[22] Before dealing with these issues, it is necessary to set out some background relating to the Blue Chip companies, the relevant investment products, and the Blue Chip marketing methods. Much of this material is drawn from the judgments of Venning J for which we are grateful.

The Blue Chip companies

[23] Blue Chip (New Zealand) Ltd was established in 2000 as a promoter of property investments. It later changed its name to Blue Chip Financial Solutions Ltd and, more recently, to Northern Crest Investments Ltd. In 2004 it was listed on the New Zealand Stock Exchange. It was also listed on the Australian Stock Exchange.

[24] The company had a number of subsidiaries and related entities. In this judgment, we refer to the group generically as "Blue Chip" unless it is necessary to stipulate a particular company within the group. Mr Mark Bryers was the driving force behind Blue Chip.

[25] A common theme in the investors' evidence was the reliance they placed on prominent directors on the board of the Blue Chip parent company including Mr Jock Irvine (a senior lawyer), Mr Wyatt Creech (a former Deputy Prime Minister), and Mr John Luxton (a former member of Parliament and former Minister).[3] Promotional material emphasised the New Zealand Stock Exchange

[3] Messrs Irvine, Creech and Luxton had resigned from the board prior to the collapse of the Blue Chip Group.

listing of the parent company and the existence of Macquarie Bank Ltd as a "cornerstone" shareholder.

[26] Blue Chip's first public report was issued in March 2005. It reported an annualised net profit after tax of $9.6 million. The report described the Blue Chip investment model:

> Blue Chip's primary product allows people to tap into dormant equity or put spare cash to rewarding use. ...
>
> Our investment products are based on Auckland's residential property. Few other property markets in New Zealand have such a strong record of growth and yield. It is a robust and rewarding base for generating wealth, delivering:
>
> - Security ...
> - Capital growth and yield ...
> - Market performance ...
>
> **Proven Products**
>
> Blue Chip products deliver positive cash flow on a weekly basis. This cash flow is underpinned by long-term fixed leases for clients, supported by annual tax benefits and the potential for attractive capital gains if the property is sold.
>
> Clients achieve these benefits either by investing cash or by using dormant equity in their own home or business.
>
> In most cases, a Blue Chip New Zealand subsidiary, Auckland Residential Tenancies Limited (ART), leases a client's property. As part of that lease, the Lessee undertakes to pay the rent to the client in each week of the lease, whether or not the property is occupied by a subtenant. ...

[27] The 2005 Annual Report recorded that the Group had made a number of positive advances during the year. The company had expanded into Australia, had carried out 800 property transactions and had 1500 properties under the management of one of its subsidiaries (Bribanc Property Group Limited("Bribanc")). The report continued:

> Blue Chip currently sources its clients from a network of Licensees and Advisers in New Zealand and Australia.
>
> That network is supported by Blue Chip's own team of more than a dozen dedicated account managers who oversee the technical aspects of structuring client portfolios.

> One of Blue Chip's core value propositions is that the company undertakes the full sequence of roles from property sourcing through to a packaged ownership solution, including full asset management. As such, it provides one seamless service rather than the investor/owner needing to deal with anything up to eight separate intermediaries.
>
> The integrated nature of the Blue Chip business model provides mutual benefits for clients, developers and Blue Chip itself. For example, by approaching developers and committing to a significant volume of residential dwellings during the development stage, Blue Chip mitigates the developers' largest single risk – demand. By accessing the property early, Blue Chip optimises the single most important criterion in the investment equation – price. The next biggest hurdles for investors are finance and property management and they are also solved by Blue Chip.

[28] The 2005 report identified the benefits for investors of a Blue Chip investment as:

> Blue Chip New Zealand's point of difference remains providing a financial planning solution that utilises property, rather than just providing a property itself. Offering the associated services continues to appeal as a hassle free investment without sacrificing the returns. Investors know up-front the returns to expect, which is more akin to a financial product than a standard property investment.

[29] At the time of the hearing before Venning J, a number of the Blue Chip companies were in liquidation but this did not include the Blue Chip parent company now known as Northern Crest Investments Limited. The Judge heard evidence from an expert witness to support the allegation made on behalf of the investors that the Blue Chip group was insolvent from the latter part of 2004 onwards. He also heard an opposing expert. The Judge did not accept the investors' contention.[4] He accepted that certain companies within the Blue Chip group were vulnerable because of advances made to a private company then known as Ingot which was liquidated in June 2008. He also found that, towards the end of 2006, some personnel within the Blue Chip group had identified issues with the joint venture product. This led to the development of the PIP product which we shortly describe. Venning J observed that the assumption that underlay the continued viability of the joint venture product, namely the continued increase in value of the Auckland property market was, at best, optimistic.[5] He concluded, however, that there was insufficient information before the Court to make a conclusive finding on the solvency or otherwise of companies within the Blue Chip group at any particular time.

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4 At [68] and [70] of the *Icon* judgment.

5 At [69] of the *Icon* judgment.

The Blue Chip investment products

[30] Blue Chip marketed four different forms of investment products:

- The mainstream agreement.
- The joint venture agreement.
- The premium income agreement (PIP).
- The put and call agreement (PAC).

[31] Although we will shortly mention the mainstream product, the focus of these appeals is on the other three products. Key features of the other three forms of Blue Chip investment were:

- The investor signed an unconditional SPA for an apartment yet to be built.
- Finance was usually arranged by Blue Chip.
- The apartment was to be leased to generate income.
- The investor was to receive an immediate return by way of fortnightly payments during the period of the investment which varied according to the nature of the product and the extent of the funds invested.
- Under the PIP and PAC agreements, a Blue Chip entity was granted an option to assume the investor's obligations as purchaser under the SPA. Under the PAC agreement the investor could also require the Blue Chip entity to exercise its option.

The mainstream product

[32] Mainstream investors purchased the relevant property in their own names or using company or trust structures established on the advice of Blue Chip. The apartments were bought subject to a deed of lease with the rent guaranteed by Blue Chip New Zealand Ltd. There were associated agreements for the sale and purchase of a furniture pack and for property management through Bribanc.

The joint venture product

[33] Under this form of investment, the investor agreed to purchase an apartment but also agreed, jointly with Blue Chip Joint Ventures Ltd, to establish a joint venture entity to engage in the business of owning and leasing the apartment. By

way of example, the documents relevant to the joint venture for the Greenstone development were:

- The agreement for sale and purchase between the investor and the vendor (in this case Greenstone).
- An addendum to the agreement for sale and purchase between the investor and vendor, pursuant to which the investor requested the vendor to enter into a lease of the apartment and acknowledged the apartment was sold subject to a lease.
- A deed of lease with ART Apartments as lessee (guaranteed by Blue Chip New Zealand Ltd) and the vendor as lessor. The initial lessee was Barclay Management Ltd – a company associated with Greenstone, (as required by Greenstone's financiers) but, on settlement, Greenstone agreed to assign the lease to ART Apartments.
- An agreement for sale and purchase of a furniture pack between the investor and Blue Chip New Zealand Ltd.
- The joint venture agreement between the investor and Blue Chip Joint Ventures Limited.

[34] The central feature of this product was the joint venture agreement. The property was described as the apartment and associated chattels. The investor's initial contributions were stated to be:

> The obligation and responsibility for all Borrowings on the property together with such sums as shall be necessary to pay for that part of the Property representing the land, buildings and improvements ... together with a contribution towards all costs and disbursements associated with the Joint Venture which obligation and responsibility shall represent 75% of the Joint Venture Units.

[35] The obligations of the Blue Chip entities under the joint venture agreement were:

> Arranging and causing all loans to be made to the Joint Venture for the Property, providing an agreement to indemnify the Joint Venture and [the investor] against all or any liability for operating cash shortfall from the Property ... and an agreement to assume management responsibility for the Property and the Joint Venture together with a contribution towards all costs and disbursements associated with the Joint Venture which sum, contributions and agreements shall represent 25% of the Joint Venture Units and that part of the Property representing the chattels, internal fittings and improvements ...

[36] The return to the investor came in the form of a fortnightly procurement fee payable by Blue Chip Joint Ventures Ltd. This company also agreed to pay the

interest on the costs of borrowing incurred by the investor and to indemnify the investor for any operating shortfall in the joint venture.

[37] Venning J succinctly summarised the effect of the joint venture agreement to be:[6]

> … that in return for the investor providing the equity to enable the joint venture to purchase the apartment, (either by a direct investment or borrowing), Blue Chip Joint Ventures Limited agreed to pay the investor the procurement fee and meet all outgoings on the borrowing and property.

[38] The joint venture was to continue until wound up unless the parties earlier resolved to sell the property or terminate the joint venture. In general, investors were told the investment would last for approximately four years at which point it was intended that the property would be sold with 95 per cent of any capital gain for the benefit of Blue Chip and 5 per cent to the investor. On a winding-up of the joint venture, the investor was entitled to receive 100 per cent of the net proceeds of sale.

[39] The joint venture agreement in relation to TWL's Bianco development was in similar terms but with some variations in respect of the lease as we later mention. The joint venture agreement does not arise in relation to the Icon development.

Premium Income Product (PIP)

[40] The Judge described the documents and features of the PIP agreement in Greenstone's case in the following terms:

> [35] The documents relevant to the PIP agreement were:
>
> - the agreement for sale and purchase between the investor and the vendor Greenstone Barclay;
> - an addendum to the agreement for sale and purchase between the investor and vendor, pursuant to which the investor requested the vendor to enter into a lease of the apartment and acknowledged the apartment was sold subject to a lease;
> - a deed of lease with ART Apartments as lessee (guaranteed by Blue Chip New Zealand Limited) and the vendor as lessor. The initial lessee was Barclay Management Ltd (as required by Greenstone Barclay's financiers) – a company associated with Greenstone Barclay, but on settlement Greenstone Barclay agreed to assign the lease to ART Apartments;

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6 At [34] of the *Greenstone* judgment.

- an agreement for sale and purchase of a furniture pack between the investor and Blue Chip New Zealand Limited; and
- the premium income product agreement;
- a deed of nomination.

[36] The particular features of the PIP investment were the deed of nomination and PIP agreement. The immediate return to the investors was by option fee.

[37] The PIP agreement was between Blue Chip Premium Income Limited and the investor. Under the PIP agreement:

- The investor granted Blue Chip Premium Income Limited the option to accept the deed of nomination in exchange for which Blue Chip Premium Income Limited was to pay the investor an option fee;
- Blue Chip Premium Income Limited could exercise the option to accept the deed of nomination at any time during the period 30 working days before settlement date;

[38] The deed of nomination provided for the investor to nominate Ravine Limited to take title to the property. The nomination was expressed to be operative from, and to take effect from the date the option was exercised by Blue Chip Premium Income Limited pursuant to the PIP agreement.

[39] The PIP agreement also provided in cl 4 that:

(a) The Investor acknowledges and agrees that the Purchase Agreement is binding on the Investor unless Blue Chip exercises the Option. The Investor also acknowledges they will settle the purchase of the Property with the Vendor if Blue Chip does not exercise the Option and that nothing contained in this Agreement shall be construed to constitute a representation by any party to the contrary.

[40] Clause 5 provided for the situation that would apply in the event Blue Chip Premium Income Limited did not exercise the option. It provided that if:

(a) ... [Blue Chip] does not exercise the Option and the Investor settles the purchase of the Property ... Blue Chip shall pay the Investor's reasonable costs (excluding the purchase price) relating to the settlement of the Property, including (without limitation) the Investor's interest costs on the borrowing relating to the settlement of that property, on an after tax basis.

(b) Blue Chip will pay the Investor's reasonable costs in accordance with clause 5(a) by procuring the Lessee to enter into the Lease and as a result thereof the Lessee will pay rent to the Investor which shall be in an amount equivalent to the Investor's reasonable costs specified under clause 5(a), annualised and paid monthly on the dates set out. ...

(c) In the event the Investor is required to settle the purchase of the Property under the Purchase Agreement, the Lease shall be amended to include an option for the Lessee to purchase the Property at any

> time during the term of the Lease, or any renewal term, at the same purchase price paid by the Investor under the Purchase Agreement. ...
>
> [41] In short, under the PIP agreement, the investor took on the obligation to purchase the apartment, but the Blue Chip entities had the option to accept nomination and settle the purchase. In exchange for the investor granting the option, Blue Chip Premium Income Limited agreed to pay the investor an option fee. In the event Blue Chip Premium Income Limited did not exercise the option, the investor was obliged to settle the purchase, but Blue Chip Premium Income Limited agreed to pay the investor's costs of settlement, (apart from the balance of the purchase price, which was to be provided by the investor), including the investor's costs of borrowing to settle. If the investor settled the purchase, the lessee [ART Apartments Ltd] was to have the option to purchase the property at the original purchase price.

[41] Clause 2 of the PIP agreement stipulated certain conditions including the execution of the SPA, the developer being described as the vendor:

> This Agreement is conditional upon:
>
> (a) the Investor contemporaneously executing and delivering to Blue Chip:
>
> (i) two copies of the Purchase Agreement with the Vendor; and
>
> (ii) two copies of the Deed of Nomination.
>
> (b) Blue Chip arranging signing of the Purchase Agreement by the Vendor and signing of the Deed of Nomination by Blue Chip within 10 Working Days after the date of this Agreement.
>
> (c) the approval of an authorised officer of Blue Chip within 10 Working Days after the date this Agreement is executed. This condition can be waived by Blue Chip.

[42] Associated with the PIP agreement was the Deed of Nomination in terms of which the investor nominated a Blue Chip entity as nominee. The investor agreed to comply with the obligations of the purchaser under the SPA up to the "operative date" which was defined as the date Blue Chip exercised the option to accept the Deed of Nomination. In turn, the nominee agreed to comply with the purchaser's obligations under the SPA if the option was exercised. Blue Chip also agreed under the Deed of Nomination to reimburse the investor for all money paid by the investor to the vendor under the SPA and all legal and other costs reasonably incurred by the investors in relation to the SPA.

[43] A schedule to the PIP agreement summarised the essential terms of the SPA and another schedule summarised the principal terms of the lease agreement which would apply if Blue Chip did not exercise the option.

[44] The terms of the PIP agreements were the same for all three developments except that in the case of the Icon agreement there were some changes to the terms of the lease which would apply in the event of the Blue Chip entity not exercising the option. These related to the definition of the investor's costs which Blue Chip agreed to meet in that event. The PIP agreement for the TWL development was between the investor and Blue Chip Premium Income Ltd. In Icon's case it was with another Blue Chip entity, Amelia Ltd ("Amelia").

[45] As we later discuss, cls 4 and 5 of the PIP agreement constitute a significant difficulty for the investors in relation to the new grounds they seek to argue so far as they relate to the PIP agreements.[7] The object of the amended grounds was to establish that the investors were misled about their settlement obligations under the SPAs. The proposed new pleadings alleged the investors were led to believe they would not be required to settle because Blue Chip would take over that obligation prior to settlement date. The difficulty with this allegation arises because first, cl 4(a) is explicit in providing that the SPA is binding on the investor unless Blue Chip exercises the option. In that case, it is acknowledged that the investor is obliged to settle the purchase. Secondly, cl 5 provides for what is to happen if Blue Chip does not exercise the option and the investor settles the purchase. In that case, Blue Chip Premium Income Ltd agreed to pay the investor's reasonable costs involved in settling the transaction (other than the purchase price itself). In particular, Blue Chip Premium Income Ltd agreed to pay for the investor's interest costs on the borrowing necessary to settle the transaction. Blue Chip Premium Income Ltd agreed to achieve that by procuring the lessee to enter into the lease and to pay a rental equivalent to the investor's costs of settling. As well, if the investor was obliged to settle, the lease was to be amended to grant the lessee an option to purchase the property at the original purchase price.

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[7] Below at [221] – [223] and [254].

[46] The essential terms of the PIP agreement and the associated risks to the investor were also clearly stated in a brochure issued by Blue Chip to investors. The brochure stated, amongst other things, that:

- The client enters an SPA for a property which is anticipated to settle in one to two years and nominates Blue Chip the right to settle the purchase at its option.
- The client pays a ten per cent deposit which is held in the trust account of the property developer's solicitors with interest accruing on the deposit for the benefit of the client or Blue Chip depending on who settles the purchase.
- In the period from payment of the deposit until settlement, Blue Chip pays a monthly option fee amounting to approximately 16 per cent per annum of the deposit.
- If Blue Chip accepts the nomination and takes over the SPA the client receives back the deposit.
- If Blue Chip does not exercise the option and take over the SPA prior to settlement and the client is required to settle the purchase, Blue Chip will lease back the property from the client and will pay the client's costs (as stated in the PIP agreement).

[47] Under the heading "Client Risks" the main risks of the investment are then summarised:

> The Premium Income Product offers an above average return because it carries a greater risk than that associated with traditional investments such as term deposits.
>
> While Blue Chip intends to acquire the relevant property through exercising its Option to do so, there is no guarantee that Blue Chip will do this. Under the terms of sale and purchase agreement, the client is obliged to settle the sale and purchase transaction in the event that Blue Chip does not exercise its Option.
>
> The decision to exercise or not exercise the Option rests solely with Blue Chip (or any assignee, successor or party who has acquired Blue Chip's interests).
>
> The client must be prepared and capable of completing the purchase at the agreed purchase price if Blue Chip does not exercise its Option prior to the settlement date. Failure to do so will be a breach of the sale and purchase agreement and could result in the forfeiture of the deposit and the vendor pursuing other legal remedies.
>
> An investment in the Premium Income Product could lead to the client owning the property detailed in the sale and purchase agreement. In this situation the client will lease the property to Blue Chip and receive a rental stream sufficient to make them financially whole on a post tax basis. Nevertheless, this means the client could have an exposure to any

> fluctuations in the property market and the credit worthiness of Blue Chip as lessee.

[48] The brochure ends by recommending that clients seek professional financial planning and taxation advice before proceeding to invest. It is further recommended that clients consider the portion of available funds and/or equity they place in "higher risk investment opportunities such as this".

Put and Call agreement (PAC)

[49] PAC agreements are now relevant only to the Icon development where they were used extensively during the latter half of 2007.

[50] The PAC agreement was entered into between the investor and Amelia. The PAC recited that the investor and Icon have executed an SPA for an identified apartment. The operative provisions enabled Amelia (or nominee) to exercise an option calling for the right to purchase the apartment on the terms set out in the SPA. They also provided for a put option enabling the investor to require Amelia to purchase the property under the SPA.

[51] Amelia was able to exercise the call option at any time up to and including one calendar month after the date for settlement of the SPA. The investor was able to exercise the put option at any time up to the same date but no sooner than three months before settlement date. Amelia agreed to pay the investor an amount equivalent to the amount of any cash deposit paid by the investor in the event of the put or call option being exercised. Any interest accrued on the deposit was to be paid to Amelia.

[52] In consideration for the investor entering the PAC, Amelia agreed to pay a call option fee which the Judge said was typically $7,500. In some cases the fee was split between the investor and the sales agent. The fee was expressed to be payable within 14 days of Amelia receiving an underwrite fee from the developer. Amelia was entitled to the interest accrued on the deposit made by the investor and held in the trust account of the developer's solicitor.

[53] In a number of cases, the investor's deposit was provided by the investor entering a bond rather than paying cash. The PAC agreement provided that Amelia had the right to approve the bond company and for Amelia to pay the associated reasonable fees.

The SPAs and associated lease documents

[54] The SPAs for units in the three developments varied in a number of respects but their central feature in each case was that, from the point of view of the investor, the contract was unconditional and the investor was obliged to complete settlement upon the settlement date. The parties to the SPAs were the developer as vendor and the investor as purchaser. No Blue Chip entity was a party to the SPAs. The only reference to Blue Chip in the SPAs was in the form of a separate addendum dealing with the lease of the apartments. We deal briefly with each of the SPAs and lease documents in turn.

Greenstone

[55] The SPAs for the Greenstone development were made between Greenstone Barclay Trustees Ltd as trustee of the Greenstone Barclay Trust as vendor and the investor (or nominee) as purchaser. Brookfields was the firm specified as the vendor's solicitors. The contract warned:

> This is a binding contract. If either party has any doubts, legal advice should be sought before signing.

[56] The deposits were usually fifteen per cent of the purchase price with the balance payable on the settlement date. This was defined in terms of cl 18.2 to be the fifteenth working day after the later of the date the vendor provided to the purchaser the certificate of practical completion, notice of the issue of a code compliance certificate or the availability of a search copy of the title. Greenstone agreed to complete construction of the apartments in accordance with plans and specifications attached to the agreement.

[57] In terms of cl 15.1, the SPA was conditional on the vendor obtaining sufficient presales of units in the development by a specific date; the council

granting all necessary building and other consents; and the vendor obtaining practical completion by a specified date. The contract was unconditional so far as the purchaser was concerned.

[58] Clause 27 provided:

> **27 Entire Agreement/Third Party representations**
>
> 27.1 This arrangement records the entire arrangement between the parties relating to the matters dealt with in this agreement and supersedes all previous arrangements, whether written, oral or both, relating to such matters.
>
> 27.2 In particular the purchaser acknowledges that any representations made by representatives of any third party relating to financial packages between the purchaser and any third party are independent of and unrelated to this agreement and may not be relied on by the purchaser in relation to their obligations in respect of this agreement.

[59] The purchaser and Greenstone also signed an addendum in respect of a lease of the apartment. This document stated that it was "to be signed and read in conjunction with the Sale and Purchase Agreement". Under the addendum, the investor as purchaser requested Greenstone as vendor to enter into a lease of the apartment from Barclay Management Ltd (a company associated with Greenstone). The investor acknowledged that the apartment was sold subject to the lease and that Greenstone was entitled to all income and would be liable for all expenses under the lease from the date of commencement of the lease until the date of settlement.

[60] The terms of lease were to be those set out in an attached form of lease between Greenstone as lessor, Barclay Management Ltd as lessee and Blue Chip New Zealand Ltd as guarantor. The lease was to be for a total of four years (two terms of two years each). It contained an option to purchase in favour of the lessee which could be exercised on the termination date. It was agreed that Greenstone could substitute itself as guarantor of the lease in place of Blue Chip New Zealand Ltd if Blue Chip was not able to act as guarantor or defaulted in its obligations in that capacity. As we later note, Westpac required Greenstone to guarantee the lease up to settlement.

TWL

[61] The SPAs for TWL were prepared by CMS Legal which was nominated as the vendor's solicitor. The SPAs were entered into by TWL as vendor and the investor (or nominee) as purchaser. On the second page of the agreement above the place for execution, the SPA stated "it is recommended that the Purchaser seek professional advice before executing this agreement". Although expressed and structured differently from the Greenstone SPA, the TWL SPA did not differ in substance. The agreement was expressed to be conditional upon a minimum level of sales of units in the development and all necessary approvals by a specified date. TWL undertook to complete the unit in accordance with plans and specifications; a deposit of 15 per cent was payable and was to be held by TWL's solicitor in trust with interest for the benefit of the investor as purchaser; the balance of the purchase price was payable on the settlement date as defined by cl 12.1 of the SPA in similar terms to those of the Greenstone agreement. The contract was unconditional so far as the purchaser was concerned.

[62] Clause 20.2 of the SPA provided:

> The parties acknowledge that this agreement, and the schedules and attachments to this agreement, contain the entire agreement between the parties, notwithstanding any negotiations or discussions prior to the execution of the agreement, and notwithstanding anything contained in any brochure, report or other document. The Purchaser acknowledges that it has not been induced to execute this agreement by any representation, verbal or otherwise, made by or on behalf of the Vendor or its agent, which is not set out in this agreement.

[63] TWL and the investor as purchaser also entered an addendum to the SPA in terms of which the investor requested TWL to enter into a lease of the apartment and acknowledged the apartment was sold subject to the lease. Associated with this was a deed of lease with ART Apartments Ltd as lessee and TWL as lessor. The obligations of ART Apartments were guaranteed by Blue Chip New Zealand Ltd. The addendum to the SPA was later varied by agreement between TWL and the investor to provide for TWL to be guarantor under the lease instead of Blue Chip New Zealand Ltd with the proviso that TWL could substitute Blue Chip New Zealand Ltd as guarantor at any time prior to or after settlement. This term was also

varied at Westpac's insistence in the same way as it required for Greenstone's Barclay development.[8]

Icon

[64] The SPAs for the Icon development were between Icon and the investor (or nominee). Walters Law was the firm specified as Icon's solicitors. A deposit of ten per cent was to be paid with the balance due on settlement date (defined under cl 12 in similar terms to the other SPAs). The purchaser was recommended to seek professional advice before executing the agreement. The Icon agreements were signed by Mr Bryers on behalf of the vendor (unlike the SPAs for the other developments which were signed by the developers' representatives who had no prior or current position with Blue Chip). The SPA was conditional on Icon obtaining a minimum level of sales of units in the development to justify completion and obtaining all relevant consents by specified dates. The deposit was to be held by the vendor's solicitor in trust until settlement date with interest accruing to the investor as purchaser. So far as the purchasers were concerned, the SPAs were unconditional.

[65] An entire agreement clause was included in a form identical to that in the SPA for the TWL development.[9]

[66] An addendum to the SPA provided that the unit was sold subject to a lease between Icon Central Ltd as lessor and Icon Central Management Ltd as lessee. The lease was signed by Mr Bryers on behalf of Icon Central Ltd and Mr L J Ross and Mr C Mudgway on behalf of the lessee.

[67] The deed of lease did not, in terms, provide for a guarantor but the addendum provided that Icon Central Ltd would be the guarantor with the proviso that Icon Central could substitute Blue Chip New Zealand Ltd as guarantor at any time prior to or after settlement. This was later varied at Westpac's insistence in the same way as it required for the Barclay and Bianco developments.[10]

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8 As we have mentioned at [60]..
9 See at [62].
10 See at [60].

The relationship between the developers and Blue Chip

[68] The relationship between each of the developers and Blue Chip is relevant for two principal reasons. First, it is relevant to the proposed new grounds of appeal since, in supporting the new grounds, the investors rely in part on their contention that the developers knew (either through actual, constructive or imputed knowledge) about the Blue Chip investment products and that the investors did not have the capacity to settle unless Blue Chip performed its obligations. This knowledge is said to be relevant to the issues of promissory estoppel, implied term and interdependent contracts. Secondly, the relationship is relevant to the issues under the Securities Act. How much did the developers know about the detail of the investment products and did they know of any illegality under the Act?

[69] We deal with each of the developments in turn.

The Barclay

[70] The directors and beneficial owners of Greenstone are Mr John Abel-Pattinson and Mr Kevin Cox. Both are experienced property developers. Mr Abel-Pattinson was generally responsible for managing the development of Greenstone's projects. He would source development opportunities, arrange finance, obtain necessary consents and would structure the development deals. Mr Cox took only an indirect interest in those aspects of the company's business. His role was to project-manage the construction of the buildings.

[71] The Greenstone directors initially met Mr Bryers in early 2005 when he asked them to act as consultants for a range of development projects then being considered or undertaken by companies associated with him. In October 2005, Mr Bryers asked Mr Abel-Pattinson whether Greenstone would consider developing an apartment building. Ingot, a company associated with Mr Bryers, had an option on a site for a proposed development in Albert Street, Auckland. The project was of interest to Mr Abel-Pattinson because Mr Bryers informed him that Blue Chip had a pool of investors available to purchase apartments and because resource consent for a substantial development had already been obtained. It was agreed that Greenstone would buy the site from Ingot and develop the apartment building under a profit-

sharing agreement. An entity associated with Mr Bryers and Blue Chip, Lyell Ltd, was to introduce Blue Chip investors as purchasers for the apartments. The net profits were to be shared between Greenstone and Lyell.

[72] It was further agreed that Lyell would underwrite the sales of the apartments. If Greenstone was unable to achieve a sufficient level of sales, Lyell would be obliged to purchase the unsold apartments. As Lyell was a shelf company, Mr Abel-Pattinson insisted that a guarantee be provided by the parent Blue Chip company. Mr Abel-Pattinson made inquiries which satisfied him it was safe to do business with Blue Chip. Profit share and underwrite agreements were completed between the parties on 24 March 2006.

The profit share agreement

[73] The key terms of the profit share agreement were:

- Greenstone agreed to purchase the land from Lyell and to proceed with the construction of the building and apartments in accordance with agreed plans and specifications.
- Greenstone would settle the sale of the apartments on practical completion in terms of SPAs in an agreed form at agreed prices.
- Immediately prior to settlement of the sale of the apartments, Greenstone would procure Barclay Management Ltd to assign the contemplated leases for each apartment to ART.
- The net profit as defined was to be divided.
- A committee of management was to be set up to make all decisions regarding the development. The committee was to comprise two representatives of each party.
- Lyell's obligations under the profit share agreement were guaranteed by Blue Chip Financial Solutions (NZ) Ltd.

[74] Clause 16.1 of the profit share agreement provided:

> Nothing in this agreement shall create or constitute, or be deemed to create or constitute a partnership between the Parties, nor to constitute or create, or

> be deemed to create or constitute a party as an agent of any other party for any purpose whatsoever. No party shall have any authority or power to bind or commit, act or represent or hold that party out as having authority to act as an agent of, or in any way to bind or commit the other party to any obligation.

[75] A number of documents were attached to the profit share agreement including the standard form of SPA, a schedule of sale prices for the apartments (established by valuation) and the form of lease. The minimum deposits for the SPAs were to be 15 per cent.

[76] Although under the profit share agreement Lyell was to arrange funding to enable Greenstone to purchase the land and complete the development, the finance was, in the end, arranged by Greenstone through its existing relationship with Westpac Bank and a mezzanine financier, Boston MFS.

The Westpac funding

[77] The Westpac Bank was the lead funder for all three developments. A Mr Farrow gave evidence on behalf of Westpac. He was the head of structured property finance in the property finance unit of the Bank.

[78] In the case of Greenstone, Westpac provided a development funding facility to Greenstone for $37 million to develop the Barclay apartment complex. It was secured by a first mortgage. The Bank regarded the SPAs as the means by which its advances would be repaid. To that end, Westpac stipulated a number of conditions which had to be fulfilled before drawdown of funds could occur. Mr Farrow's evidence was that the conditions were reasonably standard for development projects of the types at issue.

[79] The conditions included:

- Greenstone had to achieve pre-sales amounting to a net sales value of $39 million.
- The pre-sales were to be at genuine arms-length in the sense that the purchasers could not be parties related to Greenstone.
- Multiple or bulk sales would only be permitted at Westpac's discretion.

- The obligations of the purchasers under the pre-sale contracts were to be unconditional in all respects at prices disclosed to Westpac (other than conditions relating to completion of construction and issue of title).
- The SPAs were to be in a standard form of agreement supplied to Westpac and were not to be varied.
- The addenda to the SPAs were to be varied to provide that Greenstone would be guarantor under the lease with the right to substitute Blue Chip New Zealand Ltd. Greenstone was to undertake not to substitute Blue Chip New Zealand Ltd prior to settlement without Westpac's consent.
- Barclay Management was to be the lessee of the apartments until settlement.
- Mr Abel-Pattinson and Mr Cox were to personally guarantee the borrowing.

[80] Prior to drawdown, Westpac's solicitors were to certify that the SPAs satisfied the drawdown conditions and that the deposits of 15 per cent had been paid and were held in a solicitor's trust account.

The underwrite agreement

[81] Greenstone and Lyell also entered an underwrite agreement guaranteed by Blue Chip Financial Solutions (NZ) Ltd. The substance of the agreement was that if Greenstone had not sold all the apartments by a specified date, Lyell as underwriter was to purchase, to the maximum of the underwritten amount of $20 million, any apartments remaining unsold. In exchange for providing the underwriting, Lyell was to be paid a fee of 12.6 per cent of the sale price of each unit sold. The fee was to be paid in two instalments, the first on receipt of the deposit and the balance on settlement of the apartments.

[82] For present purposes, the key provision of the underwrite agreement was cl 2.2:

> The Underwriter shall use its best endeavours to procure a real estate firm at the cost of the Underwriter, to introduce purchasers to purchase the Units by the Sunset Date, for the Sale Price and on the terms and conditions set out in the Sale and Purchase Agreement and the Addendum and shall act as liaison between the Vendor and those purchasers as and when required by the Vendor in facilitating payment of deposits under and effecting settlements pursuant to the Sale and Purchase agreement and will actively co-operate with the Vendor's solicitors as required to achieve this.

[83] The Sunset Date was defined as the date by which the vendor was to achieve practical completion under the SPAs.

[84] Clause 9.1 of the underwrite agreement provided:

> In consideration of the Parties entering into this agreement each of them represents and warrants to the other of them that any marketing material or other representations made by either of them for and on behalf of the other of them in respect of the Units prior to the sale thereof are and will be accurate and complete as at the date of the relevant Sale and Purchase Agreement and shall not contain any omission of material facts or be misleading and all reasonable enquiries shall have been made to verify the accuracy of any such information.

[85] The underwrite agreement also attached, among other documents, the form of SPA to be utilised and a schedule of sale prices for the units.

[86] Mr Abel-Pattinson said that, to the best of his knowledge, a real estate firm was not used to achieve the sales as contemplated by cl 2.2. This was unnecessary since Blue Chip had a pool of investors available. He saw the underwrite fee as being several times greater than the commission a real estate agent would earn, reflecting the risk Lyell was taking in agreeing to underwrite the development.

[87] After the profit share and underwrite agreements were completed, Lyell, and through it the Blue Chip licensees and sales agents, commenced marketing and selling the apartments. Greenstone began to receive SPAs from April 2006 and SPAs had been entered into for most of the apartments by October 2006.

[88] It is not in dispute that Greenstone took no part in the marketing and sales of the apartments other than to receive monthly reports from Blue Chip as to the apartments sold and deposits received. At no time prior to Blue Chip's collapse did Greenstone have any dealings with the Blue Chip investors. The SPAs and the deposits paid under them were sent by Blue Chip to Greenstone's solicitors (Brookfields) who arranged for Greenstone to execute the agreements as vendor.

[89] The collapse of the Blue Chip group came as a surprise to Mr Abel-Pattinson and Mr Cox. It was only in February 2008 that they became aware that Blue Chip was in financial difficulties. Mr Dale accepted that neither Greenstone nor the

investors had any reason to suppose that Blue Chip was not going to perform its obligations at the time when the relevant agreements were entered into.

The Bianco

[90] TWL was formed for the purpose of the Bianco development. It sole director was a Mr Manning who was an experienced property developer. Mr Manning first had dealings with Mr Bryers and Blue Chip in 2005 when it was agreed that a Blue Chip entity would purchase one of Mr Manning's companies. Part of the consideration for the sale comprised shares in Blue Chip Financial Solutions Ltd but it was not suggested to us that this had any material bearing on the matters at issue.

[91] Mr Bryers told Mr Manning he had three residential property developments he wished to sell. One of these was a site at Turner and Waverley Streets. Negotiations with Mr Manning commenced in early March 2006 with a view to the land and associated resource consents being purchased by Mr Manning's interests. The project was owned by Monrad Ltd, a Blue Chip subsidiary.

[92] Agreement was reached in principle for a Manning company to buy the land and the resource consents. Monrad agreed to underwrite the project. Initial agreements were signed at the end of March 2006 but, after a process of due diligence, these were replaced by two agreements entered into on 20 June 2006 between Monrad as vendor and TWL (or nominee) as purchaser.

[93] Under the first of these, TWL agreed to buy the land for the development from Monrad for $8.4 million. It was a term of the agreement that Monrad would underwrite the number of units necessary to achieve sales of units in the development equivalent to 75 per cent of their total value which was fixed on the basis of an agreed price list at $76.1 million. An underwrite fee was to be paid to Monrad or its nominee at either 12.6 and 15 per cent of the purchase price of the units depending on whether the unit was to be serviced.

[94] The second of the two agreements provided for TWL (or nominee) to purchase intellectual property from Monrad for $1.6 million. This agreement also provided for Monrad to have a 25 per cent share of any development profit achieved

by TWL to the extent of any excess above $10 million. Mr Manning's undisputed evidence was that TWL's profit was highly unlikely to exceed $10 million.

[95] The sale to TWL of the land and intellectual property settled on 29 August 2006. Shortly afterwards, on 31 August 2006, Monrad (as underwriter) and TWL (as vendor) signed an underwrite agreement. Monrad's obligations under the agreement were guaranteed by a Blue Chip parent. Clause 2 of the agreement provided:

> **2. Underwrite**
>
> 2.1 The underwriter hereby underwrites the sale of the units for the sale prices, subject to clause 2.4 and subject to the underwriter not being obliged to purchase any of the units whatsoever.
>
> 2.2 The underwriter shall use its best endeavours to procure a real estate firm at the cost of the underwriter, to introduce purchasers to purchase the units, for the sale prices and on the terms and conditions set out in the sale and purchase agreement and the addendum and shall act as liaison between the vendor and those purchasers as and when required by the vendor in facilitating payment of deposits under and effecting settlements pursuant to the sale and purchase agreement and will actively co-operate with the vendor's solicitors as required to achieve this.
>
> 2.3 Prior to settlement of a unit under each sale and purchase agreement, the vendor shall enter into and execute the lease in accordance with the addendum, and deliver the lease to the purchaser on settlement pursuant to the sale and purchase agreement.
>
> 2.4 In the event the vendor has not achieved the approved sales threshold by 1 March 2007, or such later date as may be nominated by the vendor but in any event not later than 1 June 2007, either the vendor or the underwriter may cancel this agreement by notice in writing to the other party. ...
>
> 2.5 In the event the underwriter has not achieved the approved sales threshold within six calendar months from the date of this agreement the underwriter shall pay all holding costs including capitalised interest incurred by the vendor in respect of the purchase of the land and the draw down of development funding pursuant to the vendor's loan facility, such sums to be paid initially on the date six months from the date of this agreement and thereafter as and when due by the vendor to that party or of those parties to whom such holding costs are due, provided that this obligation and the underwriter's obligations hereunder shall end immediately if this agreement is cancelled in accordance with clause 2.4.

[96] We observe that the combined effect of cls 2.1 and 2.4 of the underwrite agreement meant that Monrad had no binding obligation to purchase any of the units if the approved sales threshold was not reached by the date specified. In that respect, the agreement as drafted did not provide for an underwrite in the conventional sense of a commitment by the underwriter to buy any units not sold by a specified date. In the event, that issue did not have to be tested because Monrad substantially achieved the threshold within the time specified although there was some downward adjustment of the underwrite fee under cl 2.5.

[97] Other terms of the agreement echoed the terms of the profit share agreement in respect of the sales threshold, prices for the apartments and the underwrite fee. The underwrite fee was to be paid as to 50 per cent upon the first drawdown of TWL's development funding and the balance on settlement of each sale.

[98] Mr Manning said the negotiations leading to the completion of these agreements were protracted and difficult. Amongst other issues, Mr Bryers wanted Walters Law to represent TWL as vendor under the SPAs. This was not acceptable to Mr Manning who insisted that his usual conveyancing solicitors (CMS Legal) act for TWL under the SPAs.

[99] For present purposes, two important points emerge from the underwrite agreement. First, Monrad assumed a best endeavours obligation to introduce purchasers on the agreed terms and conditions. It also agreed to act as liaison between TWL and the purchasers when TWL required for the purpose of facilitating payment of deposits and effecting settlements under the SPAs. Monrad further agreed to actively co-operate with TWL's solicitors as required to achieve this.

[100] Secondly, it is evident from the underwrite agreement itself, and from the evidence of Mr Manning, that the parties to the agreement understood the success of the development was critically dependent on the minimum level of unconditional SPAs being achieved by the date specified. Unless that was achieved, TWL could not satisfy Westpac's funding requirements which were essential to enable the construction of the building to proceed. In turn, Monrad's underwrite fee would be in obvious jeopardy if the sales levels were insufficient.

[101] The importance of this commercial relationship was confirmed by Mr Farrow on behalf of Westpac as TWL's first mortgage lead funder. Westpac had agreed to advance development funding of some $45 million. A mezzanine funder, Boston Finance Ltd, agreed to provide a further $13 million.

[102] Westpac's special funding conditions were much the same as those it specified for the Greenstone development. Prior to drawdown of funds, Westpac required certified copies of SPAs to a total value of not less than $50.05 million. As for Greenstone, the SPAs were to be at genuine arms-length and unconditional (except as to completion of construction and issue of title). Deposits of not less than 10 per cent were required to be paid and held in a solicitor's trust account. Mr Manning personally guaranteed the borrowing from Westpac and Boston Finance Ltd.

[103] Prior to drawdown, TWL's solicitor was to provide Westpac's solicitors with confirmation that the SPAs were unconditional and that deposits of a minimum of ten per cent of the purchase price had been paid and were held in a solicitor's trust account. Westpac also required confirmation that any deposit bonds payable under the agreement had been paid and had an expiry date at least six months after the estimated date of practical completion of the project.

[104] As with the funding provided to Greenstone, Westpac arranged its own quantity surveyor to verify TWL's development costings to ensure the project was achievable. Westpac also obtained an independent valuation report as to the market values for the units which supported the project's feasibility. Westpac's solicitors confirmed, prior to drawdown, that all of the pre-sale contracts were in order and complied with the Bank's conditions. The solicitors also confirmed that the leases to which the sales were subject were in order.

[105] After the underwrite agreement was signed, the sales and marketing of units in the Bianco development began about October 2006. Ms Reynolds, the sales and marketing manager for one of Mr Manning's companies, was responsible for liaising with Blue Chip to monitor progress with sales. At first, sales were slow but began to increase in December 2006. From mid-January to March 2007, sales were achieved

at a very high rate. Many of them were achieved by Blue Chip with its associated PIP agreements. The extent to which Mr Manning and Ms Reynolds were aware of this is disputed and is discussed below.[11]

[106] Between January and March 2007, there were email communications between Mr Manning and Mr Bryers and their respective solicitors. These related to the conditions required by TWL's funders in relation to the first drawdown due on 29 March 2007. One of these requirements was a concern by the funders that Blue Chip would not be available at the time of settlement of the sales of the SPAs and would not be able to provide a guarantee of the lease obligations (thereby affording purchasers the opportunity to avoid settlement).

[107] TWL's solicitor, Ms Smith, suggested in an email to Mr Walters on 8 February 2007 that TWL would provide the guarantee instead while retaining the ability to substitute Blue Chip at settlement. Mr Walters responded on 13 February 2007 stating that the funders' concerns were unreasonable. He said Blue Chip had enjoyed an excellent year with a profit of $20 million. The company was performing exceptionally well. In the end, the change was agreed to with Mr Bryers providing an indemnity in favour of TWL to a maximum of $5 million.

[108] Westpac raised another issue about the purchasers of multiple units. When Mr Manning took this up with Mr Bryers in late February 2007 in relation to a particular investor, Mr Bryers responded by assuring Mr Manning that the purchasers had paid cash and were "very wealthy".

[109] The Judge noted there were difficulties when TWL received the first drawdown at the end of March 2007 and paid the underwrite fee to Monrad. This was at a reduced figure to reflect Monrad's failure to achieve the sales threshold within the stipulated period. Mr Bryers reacted badly to that and, at one point, each party issued a statutory demand against the other. Despite these difficulties, the Bianco development was proceeding well and opened for business just prior to Christmas 2008 notwithstanding Blue Chip's collapse at the beginning of that year.

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[11] See [144]–[150].

[110] As with Greenstone, Mr Dale accepted that neither TWL nor the investors had any reason to doubt Blue Chip's ability to perform its obligations at the time the relevant transactions were entered into.

The Icon

[111] At material times, Icon owned a property at St Martins Lane. From the date of its incorporation on 14 February 2007 until 30 October 2007, Mr Bryers was the sole shareholder of Icon. On 30 October 2007 the shares in Icon were transferred to Paxton Pacific Group Ltd, a company owned by Mr Mudgway and Mr Ross. On the same date, Mr Bryers resigned as director of Icon and Messrs Mudgway and Ross were appointed in his place.

[112] Neither Mr Bryers nor Messrs Mudgway and Ross gave evidence.

[113] It is evident that Paxton intended to acquire Mr Bryers' shares in Icon if sufficient pre-sales were achieved to enable the drawdown of funds from Westpac to enable the Icon development to proceed. Icon already had in place an underwrite agreement which we discuss below.[12]

[114] In early September 2007, Paxton's solicitors (Carter & Partners) received some SPAs relating to the Icon development. Through Carter & Partners, Paxton negotiated with Walters Law (who at that time were acting for Icon) over the terms of the SPAs and the associated lease.

[115] Paxton completed the purchase of Mr Bryers' shares in Icon on 30 October 2007 and the first construction drawdown from Westpac was made soon after on 2 November 2007. Mr Farrow confirmed that the terms of Westpac's advance to Paxton were the same as those for the other two developments including, in particular, a condition that there must be pre-sales to a total of $58.75 million before drawdown, the SPAs were to be unconditional as far as the purchasers were concerned, and deposits of 10 per cent were to be paid for New Zealand residents and 15 per cent for offshore purchasers.

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[12] At [117]–[127].

[116] As in the case of the other developments, Westpac was concerned to ensure that settlement under the SPAs would occur based on the obligations of the purchasers to the vendor alone. Westpac insisted on variations to lease arrangements so that ART Apartments was replaced as lessee by Icon Central Management Ltd. Icon could choose to substitute Blue Chip NZ Ltd as guarantor but Icon required an undertaking from Blue Chip that it would not do so prior to settlement of the sale of any units without Westpac's consent.

The underwrite agreement

[117] On 4 September 2007, Icon entered into an underwrite agreement with BFB Underwriters Ltd (BFB). BFB was controlled by Messrs Bell and Flowerday who held senior positions in the Blue Chip organisation. BFB was a wholly owned subsidiary of Mide Ltd. Mide was incorporated on 31 August 2007 to operate the New Zealand business of Blue Chip. Initially, Mr Bell was the sole director of Mide but Mr Flowerday was appointed an additional director on 4 October 2007.

[118] As the Judge noted, the Icon underwrite agreement differed from those relating to the other two developments. First, under cl 2.1, BFB as underwriter agreed to underwrite the sale of the units in the development for the sale prices up to the maximum of the underwrite amount which was fixed as the total of the sale price. This exceeded some $73 million.

[119] Secondly, Icon (as vendor) assumed the obligation to sell the units. Clause 2.2 provided:

> The Vendor shall use its best endeavours to sell the Units by the Sunset Date for the Sale Prices and otherwise on the terms and conditions set out in the Sale and Purchase Agreement and the Addendum.

[120] That provision was supplemented by cl 4.1 which provided that the vendor was to appoint "Real Estate Agents" to sell the units on behalf of the vendor. The Real Estate Agents were defined as meaning Bayleys or such other licensed real estate agents as nominated by BFB.

[121] Clause 2.4 elaborated on BFB's obligation as underwriter:

> In the event the Vendor has not sold all or any of the Units by the Sunset Date then the Underwriter shall purchase any and all such Units which are not so sold at the Sale Prices and for settlement on the Underwriter's Settlement Date. The Vendor shall give the Underwriter not less than 10 working days' notice of the Settlement Date and the Underwriter shall settle on the Underwriter's Settlement Date.

[122] The Sunset Date was defined as the date by which the units and the SPAs were to achieve practical completion. The Underwriter's Settlement Date was 30 working days after the Settlement Date provided for in the SPAs. In return for assuming the underwrite obligation, BFB was to receive an underwrite fee of 15 per cent of the sale price of each unit sold by Icon (plus GST) payable in full upon payment of the deposits under the SPAs.

[123] Clause 7.1 provided that the deposits under the SPAs were to be not less than ten per cent of the sale prices and were to be held in the trust account of the "conveyancing solicitors" who, in this case, were Walters Law or such other solicitors as the underwriter might nominate.

[124] The underwrite agreement required Icon to inform BFB of the details of Icon's loan facility including when drawdowns were due. Under cl 3.3 Icon was also to authorise its funders to pay the first instalments of the underwrite fees directly to BFB when they became due and payable upon receipt of evidence of the payment of the full deposit under the SPAs and otherwise subject to satisfaction of the terms and conditions of the facility.

[125] Although, as the Judge observed, Icon did not expressly appoint BFB as its agent in relation to the sale of the units, cl 11.1.2 contained at least an oblique indication that the parties contemplated that BFB could have a role in the sale process. In terms of that clause, Icon represented and warranted to BFB that:

> Any marketing material or other representations made by or on behalf of the Vendor and provided to the Underwriter in respect of the Units prior to the sale thereof, are and will be accurate and complete as at the date of the relevant Sale and Purchase Agreement and shall not contain any omission of material facts or be misleading and all reasonable inquiries shall have been made to verify the accuracy of any such information.

[126] The Judge found, nevertheless, that although Icon was entitled to sell units in its development, the evidence was that BFB also (if not exclusively) undertook a marketing and sales role in relation to Icon and that it did so with Icon's implied authority.[13] Indeed, the Judge found there was an aggressive marketing process in September and October 2007 resulting in a large number of SPAs and associated PAC agreements being entered into.[14] There was pressure to achieve the sales target necessary to enable the drawdown of the development funding and the payment of the underwrite fee to BFB. We discuss this below in more detail.[15]

[127] The Icon development was completed in due course and the investors called upon to settle the SPAs.

The Blue Chip marketing methods

[128] The Judge's findings about the Blue Chip marketing methods are not in dispute, but we refer to them briefly as a prelude to discussing the extent to which the developers were aware of Blue Chip's investment products.

[129] The marketing processes adopted in respect of the Greenstone and TWL developments were much the same. Blue Chip's marketing strategy involved the use of licensees and sales agents operating throughout the country. Some of the sales agents were independently operating their own financial advisory businesses. Others were directly licensed by Blue Chip to sell the Blue Chip investment products exclusively. Most investors were introduced to the Blue Chip products through the Blue Chip marketing strategy which included cold calling by telephone and public presentations. Usually, investors were existing clients of the licensees or sales agents or were referred to them by others.

[130] The sales agents obtained the investors financial details and, if borrowing was required, supplied that information to mortgage brokers to determine whether the investors qualified to purchase the proposed property. Investors generally required sufficient equity to support the borrowing. If they qualified for a mortgage,

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13 At [95] of the *Icon* judgment.
14 At [115] of the *Icon* judgment.
15 At [155]–[160].

the sales agent would have the investor sign an authority to proceed. This authority appointed Blue Chip as the agent for the investor and entitled Blue Chip to seek finance on the investor's behalf. A financial analysis was prepared and supplied to the investor setting out the return which might be expected. Usually the process would involve a number of meetings between the sales agent and the investor, culminating in the investor signing the SPA for the relevant apartment and the documentation for the Blue Chip products.

[131] There were some differences in relation to the marketing of investment products for the Icon development. For the PIP products, the process was generally the same as that followed for the Greenstone and TWL developments. The sales agent provided Blue Chip brochures to the investor which described the risks of the investment, particularly the risk that they would have to settle the SPA if Blue Chip did not exercise its option.

[132] However, a materially different process was followed in respect of the PAC products. As the Judge found, a feature of the sales of these products was an aggressive marketing campaign during September and October 2007 in order to reach BFB's underwrite target. There was ample evidence that, during this period, a large number of SPAs were signed for the Icon development using what was described as a "sub underwrite product". The nature of this scheme and the flavour of the circumstances in which it was conceived is captured in an email to Blue Chip licensees dated 10 September 2007 from Mr Flowerday of BFB:

> As you will all appreciate, a significant amount of our cashflow comes from underwrite fees and the sooner we meet the level of presales, the sooner we will receive our underwrite. Therefore we have determined that in order to reach the pre-sales level we have incentivised our licensees, advisers, staff or client through the sub underwrite fee payment.
>
> Accordingly, a payment of $7,500 14 days after we receive our underwrite fee is available for distribution. Each licensee can determine how they wish to apply the fee but we believe a split of $2,500 to the licensee and $5,000 to the client would be an appropriate apportionment.
>
> The deposit can be by way of a bond or cash. Blue Chip will meet the cost of the bond and for cash deposits we will pay the equivalent of the bond fee over and above the sub underwrite fee. There is a limit of three properties per client.

> Upon signing the sale and purchase agreement, the client enters into a put and call option which enables us to call on the client to sell the property to us, or, within three months of settlement of the property the client can call on us to take the property back. The property can be sold by us at any time and once a new sale and purchase agreement is entered into and a deposit received that the bond or cash, as the case may be, will be released back to the client.
>
> At present there are 110 sale and purchase agreements allocated. It is our aim to have all these signed by the end of this week.
>
> I encourage all licensees and advisers to get in behind this initiative. It will significantly improve our cash position as soon as we reach our pre-sales target which we hope to do by the end of September.

[133] Several former employees in the Blue Chip Group gave evidence that they were persuaded to sign SPAs on the footing that they would receive a sub underwrite fee and on the basis of advice that they would not have to settle because a Blue Chip client would be introduced to purchase the property. The pressure to conclude SPAs was driven by the need for BFB to meet its underwrite targets. In turn, Westpac would advance the funds necessary for Paxton to complete the purchase of Icon's shares from Mr Bryers and Icon would pay BFB the underwrite fee. The Judge summarised his conclusions on this issue:[16]

> While, for the reasons given earlier, insolvency of the relevant members of the Blue Chip organisation cannot be established, I find that on the evidence before the Court, by September/October 2007 Mide, which was effectively running the Blue Chip operation in New Zealand, was under considerable financial pressure. It needed significant and ongoing injections of cash to maintain the New Zealand operations. An obvious and significant source of cash was the underwrite fee due to BFB if the target of sales in Icon Central could be met. If the target was met, Westpac would advance the funds to Icon (effectively Paxton), Paxton would settle the purchase of Icon's shares from Mr Bryers and Icon would pay BFB the underwrite fee which would then be available to Mide.
>
> To that end BFB encouraged the licensees and sales agents (and, through them, their families and friends) to sign up for apartments in the Icon, even if they could not raise the required deposit. BFB arranged for the deposit to be provided by Home Bonds and, it seems in some cases paid it itself. In the case of a number of the sales, neither BFB nor the sales agents entering them expected they would have to settle, as they planned to later place the apartments with other Blue Chip clients.

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[16] At [125]–[126] of the *Icon* judgment.

The extent to which the developers were aware of the Blue Chip investment products and the ability of the purchasers to settle

[134] We address first whether the developers had any actual or constructive knowledge of the Blue Chip investment products and the ability of the purchasers to settle. In the next section of this judgment, we will consider whether any such knowledge can be imputed to the developers through agency.

Greenstone

[135] The Judge discussed the evidence on this point in some detail[17] and concluded:[18]

> So in this aspect of the case, I do not accept the evidence supports Mr Dale's submission that Greenstone Barclay was aware of the detail of the Blue Chip investment products. It follows I decline to draw the inference he submitted could be drawn, that Greenstone Barclay knew that the plaintiff investors were relying on Blue Chip's assistance to settle the purchase of the apartments. From Greenstone Barclay's point of view the purchasers had the means to settle their obligations under the agreements for sale and purchase, as evidenced by payment of the deposit. Greenstone Barclay had no interest in the Blue Chip investment products.

[136] On appeal, Mr Dale accepted that Greenstone had no actual knowledge of the PIP product but disputed the Judge's finding in relation to the joint venture product. He said the Judge had accepted evidence from a Mr Kevin Miles that Mr Abel-Pattinson had attended a meeting when sales were reviewed. At this meeting, Mr Miles made a presentation to explain in general terms the joint venture product marketed by Blue Chip. The presentation consisted of six or seven powerpoints which Mr Miles addressed. Mr Dale also referred to certain email traffic in 2006 and 2007 which he submitted showed that Mr Abel-Pattinson was aware of the Blue Chip joint venture product.

[137] We accept that Mr Abel-Pattinson must have been aware in general terms of the existence of the joint venture agreement, but we note that Mr Miles himself accepted the joint venture document was "excessively complex" and that few people would have understood the intricacies of what was involved. Having read the joint

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17 At [127]–[138] of the *Greenstone* judgment.
18 At [139] of the *Greenstone* judgment.

venture agreement, we agree it is a complex document which is difficult to follow. An explanation in a powerpoint presentation would be unlikely to assist a proper understanding of how it worked. Mr Miles accepted in cross-examination that the focus of both Mr Abel-Pattinson and Mr Cox would unquestionably have been on the issue of sales and deposits.

[138] We have reviewed the evidence but we are not persuaded there is any basis to disturb the findings of fact made by the Judge. He was entitled to accept the evidence of Mr Abel-Pattinson that he was unaware of the detail of the investment products marketed and sold by the Blue Chip sales agents. Neither he nor Mr Cox had any dealings with the sales agents (with whom we include the licensees). He, and to a lesser degree, Mr Cox, attended meetings with the sales and procurement managers of Blue Chip's Head Office on a monthly basis, but the focus of these meetings, as the Judge found, was initially on the design and construction of the building. As the development progressed, the meetings were primarily to review the level of sales.

[139] The Judge was also entitled to accept the evidence of Mr Abel-Pattinson that his overriding focus was the progress in the level of sales of apartments and that he had no particular reason to concern himself with the Blue Chip products and any financial arrangements being made by the purchasers. Mr Abel-Pattinson said he took comfort from the fact that the SPAs were signed on the agreed standard form (as attached to the profit share agreement) and that the purchasers were required to pay a substantial deposit of between 10 and 15 per cent in each case.

[140] The Judge also found that if Mr Abel-Pattinson had his attention drawn to the detail of the Blue Chip products then he was the type of person who would have made further inquiries. As an experienced property developer who had personally guaranteed borrowing in excess of $40 million, he would have explored the issue if he had any concerns about the ability of the purchasers to settle in due course.

[141] Mr Dale submitted that Greenstone had attempted to insulate itself from the investors and this was a case where it could be said that Greenstone had been guilty of wilful blindness in relation to the circumstances of the investors. To support that

submission, he referred to the fact that Lyell had been relied upon to achieve sales; the fact that Mr Abel-Pattinson was aware that Lyell had a "pool of investors lined up"; the lack of any direct contact between Greenstone and the investors; and the use of the entire agreement clause in the contract.

[142] We are not persuaded there is any substance in this submission. Greenstone was entitled to rely on Lyell to introduce purchasers in accordance with the contractual arrangements between the respective companies. The entire agreement clause in the SPA was a prudent condition for a contract of this type which involved the sale of a large number of apartments to members of the public and the introduction of purchasers through a third party over which Greenstone as vendor had no direct control. The availability of Blue Chip's "pool of investors" also afforded good reason for Greenstone to leave it to Blue Chip to deal with them.

[143] We are satisfied that there is no basis to disturb the factual conclusions reached by the Judge that Greenstone was not aware of the detail of the Blue Chip investment products and there was nothing to put it on inquiry. There is no evidence that anyone associated with Greenstone had any reason to suppose that the purchasers would be unable to complete the purchases on settlement date, remembering particularly that settlement was not due until 18 to 24 months later. Nor was there any evidence that Greenstone knew of any of the alleged misrepresentations of Blue Chip sales agents about the investors' settlement obligations.

TWL

[144] The Judge found that TWL's principal, Mr Manning, was not aware of the detail of the PIP and joint venture agreements. He was aware that Blue Chip sold investment products to its investors and offered investment advice to them. TWL was also obviously aware that the units were being sold subject to the leases.[19]

[145] Mr Dale challenged the finding of the Judge in this respect. He drew our attention to evidence given by a Ms Reynolds who was a TWL representative responsible for liaising with Blue Chip (including Monrad) in relation to Bianco.

[19] At [131] of the *TWL* judgment.

The Judge found that her primary concern was in securing completed SPAs and she was not aware of the detail of Blue Chip's investment products.

[146] The Judge accepted that Ms Reynolds had attended meetings from time to time but found that neither she nor Mr Manning had any reason to take an interest in Blue Chip's investment products. As with the Greenstone development, the Judge accepted that, given Mr Manning's background as a commercial property developer, if he became aware of matters which could have affected the validity of the SPAs, he would have raised them.[20]

[147] The Judge dealt with a submission made in the High Court and repeated in this Court that Ms Reynolds had become aware of the detail of the PIP agreements in January 2007. There was evidence she had received duplicate copies of PIP agreements and Deeds of Nomination along with a series of signed SPAs. The Judge accepted Ms Reynolds' evidence that she assumed the documents (other than the SPAs) had been sent to her by mistake and that she had returned them as she considered them to be irrelevant to TWL.

[148] The Judge also addressed Mr Dale's submission that Ms Reynolds became aware of the PIP agreements shortly after this when she attended a meeting at Blue Chip's offices to discuss progress with sales. She was accompanied by TWL's finance manager and two other members of TWL's project team. They met Blue Chip representatives including Mr Flowerday. Mr Walters of Walters Law was also present. Ms Reynolds took the minutes of the meeting, recording the first two items discussed as follows:

> **1.0 New PIP product**
>
> 1.1 Essentially an underwrite product returning professional investors 16%.
>
> 1.2 Being sold under this product by Australian licensees and franchise operations as well as in NZ.
>
> 1.3 Bluechip receiving an underwrite fee.
>
> 1.4 Investors all have ability to settle if necessary.

[20] At [129] of the *TWL* judgment.

1.5 Bluechip will, in effect, be selling the development twice. The aim is to sell now to PIP purchasers to achieve threshold targets, and then to re-sell through the normal sales process approx 8 months out from settlement.

1.6 It was confirmed that although PIP purchasers sign and complete a PIP sales pack (copy given to Sue) the T & W S & P is also to be signed at the same time along with the addendum and lease.

2.0 Sales Targets & Strategy

2.1 T & W is now the only development that Bluechip are promoting with the new PIP product. Other developments sold with the PIP product (Barclay, Verve and Pitt have all now reached threshold).

2.2 Bluechip are holding a sales conference for all their licensees and franchisees throughout the country this Thurs and Fri. New incentives being put in place, and another big push with the PIP product target T & W.

2.3 Sue, Bryan, Peter and Rik to meet again next Tues to have an update on how this conference went.

2.4 Rik Flowerday stated he felt it achievable to have T & W sold down to at least 75% by the end of February.

[149] The minutes refer to a copy of a PIP sales pack being given to Sue (Ms Reynolds). She said in evidence she could not recall ever seeing the sales pack and, having reviewed TWL's files, she was unable to find it.

[150] We think it must be accepted that Ms Reynolds was aware in January 2007 that Blue Chip aimed to use the PIP product as part of a "big push" to promote sales of TWL's apartments in the Bianco development. It is also clear that she was aware that it was an underwrite product and that it gave a return to professional investors. She must also have understood that Blue Chip intended to "re-sell" through the normal sales process approximately eight months out from settlement.

[151] TWL must be taken to have been aware through Ms Reynolds of the details referred to in the preceding paragraph. But we accept that the matters revealed to Ms Reynolds at the January 2007 meeting were not such as to put her (and, through her, TWL) on inquiry to establish the full terms of the PIP agreement.

[152] We note that Mr Hutchins, the Credit and Analyst Manager for Blue Chip Financial Solutions Ltd, wrote to Mr Manning on 20 March 2007 in reassuring terms

when asked to give detail of the means by which Blue Chip investors obtained finance to satisfy their purchase obligations. The letter informed Mr Manning that loans were accessed primarily from trading banks and that Blue Chip had assisted its clients in processing over one thousand loans in the 2006 calendar year. Although it was suggested that the letter was referring largely to mainstream investors, the letter is not qualified in any respect and it was reasonable for Mr Manning to take it at face value.

[153] We would add that, in January 2007, there was no reason to suppose that Blue Chip was anything other than a profitable business operating successfully in the property market. Mr Manning's unchallenged evidence was that it was not until late 2007 or early 2008 that he became aware, through media reports, that Blue Chip was experiencing financial difficulties. Our view of the evidence is consistent with the Judge's finding that there was nothing to suggest to Mr Manning that the purchasers would not be in a position to settle the SPAs.

[154] Even if further inquiries had or should have been made to establish the detail of the PIP product, we do not accept that this would, or should, have given any cause for concern on TWL's part. They would have discovered, for example, that the terms of the PIP agreement made it explicit that the SPA was binding on the investor unless Blue Chip exercised the option to purchase and that the terms of the brochure issued by Blue Chip to investors again emphasised this point.[21] This material would have confirmed the verbal advice repeatedly given to Ms Reynolds by Blue Chip representatives that the investors were aware they could be called upon to settle the purchase transaction and the assurances given that the investors had the ability to settle if necessary. This last point was confirmed in the minutes of the January meeting to which we have referred.

Icon

[155] The appellants had a stronger case for establishing knowledge by Icon of the detail of the Blue Chip investment products. They successfully argued in the High Court that Mr Bryers' knowledge of the Blue Chip investment products arising

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[21] See [45]–[48] above.

from his role in Blue Chip should be attributed to Icon by virtue of Mr Bryers' position as sole director of that company.

[156] The Judge found that Mr Bryers knew about the PIP product through his role as a director of Blue Chip and had a working knowledge of that product. The Judge also found that Mr Bryers was aware of the PAC agreements and that they were to be used as sub-underwrites to achieve the required sales level to enable BFB to obtain its underwrite fee. He also knew that Blue Chip employees and licensees were to be approached to sign PAC agreements.[22]

[157] We are satisfied there was a sufficient evidential basis for the Judge to reach this conclusion. The Judge found that, although Mr Bryers had formally resigned from his directorships of Blue Chip entities in February 2007, he remained as a consultant to various Blue Chip entities and was regularly involved with the Blue Chip operations after that time. An important piece of documentary evidence supporting the Judge's conclusion that Mr Bryers was aware of the PAC agreements was an email sent on 16 September 2007 from Mr Flowerday of BFB to, amongst others, Mr Bryers. Attached to the email was a "cash strategies" document. This included reference to the PAC option on all the sub-underwrites which were to be used to sell down and trigger the first underwrite payment.

[158] The Judge went on to conclude that:[23]

> As far as Icon was concerned, from its incorporation in February 2007 until the transfer of Mr Bryers' shares and his resignation as a director on 30 October 2007 Mr Bryers as the sole shareholder and director was the "directing mind" of Icon. In the circumstances, his knowledge of the PIP and PAC agreements was also Icon's knowledge.

[159] The Judge went on to conclude that as Mr Bryers was the directing mind of Icon, the company was fixed with his knowledge of the PIP and PAC agreements.[24] We are satisfied that this finding was appropriate on the evidence. We note too that Mr Bryers did not give evidence.

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22 At [131] of the *Icon* judgment.
23 At [139] of the *Icon* judgment.
24 At [279] of the *Icon* judgment.

[160] On behalf of Icon, Mr O'Callahan did not seek to challenge the Judge's findings about the extent of Mr Bryers' knowledge of the Blue Chip investment products. We are satisfied that the Judge's finding in this respect is supported by the authorities he relied upon.[25] Rather, Mr O'Callaghan challenged the Judge's conclusion that Mr Bryers was the directing mind and will of Icon. We are unable to accept Mr O'Callaghan's submission in this respect. The short point is that until 30 October 2007 Mr Bryers was the sole shareholder and director of Icon. No-one else had lawful authority to make decisions on Icon's behalf. All SPAs prior to that date were signed by Mr Bryers on behalf of Icon. The fact that this occurred by pre-authorised electronic signature does not detract from the force of this evidence which demonstrates that Mr Bryers was continuing to exercise authority on behalf of the company. The fact that Paxton was also taking a close interest in Icon's affairs at this stage is immaterial since there had been no transfer of ownership or resignation by Mr Bryers until the settlement of the sale was concluded. This depended upon the company achieving the sales target to enable the draw-down of funds from Westpac. In all of this, Mr Bryers remained vitally interested.

The scope of the authority of the Blue Chip sales agents to act on behalf of the developers and the issue of imputed knowledge

[161] The scope of any agency relationship between the developers and the relevant Blue Chip entities is relevant to the grounds of appeal in several ways as we outlined above.[26] To recap, this evidence is relevant to:

(a) The promissory estoppel argument for which it must be shown that any representations made by the Blue Chip sales agents to the investors were made within the scope of any agency from the developers.

(b) Whether the knowledge of the Blue Chip sales agents of the financial position of the investors and the extent of their reliance on Blue Chip can be imputed to the developers supports the investors' arguments of

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25 *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 at 705; *Lennard's Carrying Co v Asiatic Petroleum Co Ltd* (1915) AC 705 (HL) at 713–714; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).

26 At [68].

implied term and interdependent contracts.

(c) The arguments under the Securities Act. In particular, whether the Blue Chip investment agreements are severable from the SPAs, and whether any relevant knowledge of the Blue Chip companies or the sales agents can be imputed to the developers so they may be regarded as tainted by any illegality in relation to the Blue Chip investment products.

[162] At the outset, we record that the investors do not suggest that the Blue Chip sales agents had any apparent or ostensible authority to act on behalf of the developers. It follows that we are concerned only with the scope of any actual agency whether express or implied. We also record that, although the developers have contractual relationships only with specific Blue Chip corporate entities (in the form of the profit share and underwrite agreements), the arguments in the High Court and before us have proceeded on the common assumption that, to the extent any agency relationship existed between the developers and the Blue Chip entities who were the underwriters, the sales agents (including both direct employees and licensees of Blue Chip) may be treated as sub-agents for the purposes of this argument.

The Judge's findings

[163] The Judge considered the existence and scope of any agency in the context of the misrepresentation cause of action. He noted that the sales agents were selling both Blue Chip investment products and the developers' apartments. The Judge found that representations by the sales agents about Blue Chip and Blue Chip investment products fell outside the scope of the agency or task granted by the developers to the sales agents.

[164] The Judge drew the general principles from the Supreme Court's decision in *Nathan v Dollars & Sense Ltd*.[27] There, the Court said that:[28]

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27 *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557.
28 At [30]–[31].

> The scope of the task that an agent is appointed to perform must be determined in a commercially realistic way according to the circumstances, especially when there is no general agency and the agent therefore has a limited function. It may matter how that task is framed when the Court is considering whether the agent's conduct was within its scope...
>
> Atiyah has pointed out in his seminal treatise on *Vicarious Liability in the Law of Torts*[29] that there are two stages of inquiry: first, what acts has the principal authorised and, secondly, is the agent's act so connected with those acts that it can be regarded as a mode of performing them? It is, Atiyah said, essential to keep these two stages of inquiry distinct.

[165] The Supreme Court said further:[30]

> Without a sufficiently close connection between the task for which an agent was engaged and the unlawful action of that agent, so that the wrong can be seen as a materialisation of the risk inherent in the task, it will be neither fair nor proper to impose vicarious (strict) liability on a principal who has not necessarily been guilty of any personal negligence and so would not be directly liable to the claimant.

[166] In the High Court, the Judge equated the position of the sales agents with that of real estate agents. He said real estate agents are not normally authorised to make representations regarding matters unrelated to the property as such representations are not within the scope of the agency.[31] The representations about the Blue Chip investment products may have been within the scope of the authority provided by Blue Chip but not within the scope of authority provided by the developers.

[167] The Judge considered the point to be well illustrated by the Australian case of *Saunders v Leonardi*.[32] In that case, a Mr Leonardi had been looking to sell a business. He employed Cabban & Co as agents to do that. Cabban & Co, as well as being real estate agents, also carried out valuations and finance broking. Cabban & Co had found an interested buyer of Mr Leonardi's business and had represented to that buyer, Mr Saunders, that loan finance was available to him in order to complete the contracts. This turned out not to be so, and Mr Saunders, who had already entered into a purchase agreement and paid a deposit, tried to cancel the contract on the basis of that representation as to finance. Holland J found that the representation as to finance was not made by Cabban as an agent of Mr Leonardi. As Venning J

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29 PS Atiyah *Vicarious Liability in the Law of Torts* (Butterworths, London, 1967) at 178.
30 At [40].
31 *McAlpine Snowline Ltd v Wethey* (1986) 2 NZCPR 388 (HC).
32 *Saunders v Leonardi* (1976) 1 BPR 9409 (NSWSC).

observed, this was despite the fact that Mr Leonardi had employed Cabban to sell his business, knew that Mr Saunders needed finance, took Mr Saunders to his own solicitors to seek finance and knew that Cabban claimed to be in a position to procure finance and had offered to do so.

[168] The Judge rejected the investors' arguments that the case before him was distinguishable from *Saunders v Leonardi*. First, Blue Chip might not have been a real estate agent, but the developers certainly did not appoint the Blue Chip Group generally as its agent. The sales agents were appointed by the developers to market and sell the apartments, not to sell Blue Chip investment products. Secondly, the fact that Blue Chip held itself out as offering property-based investments did not advance matters. In *Saunders v Leonardi* Cabban held themselves out as offering financial services, but that did not extend the agency. Thirdly, the developers knew that Blue Chip sold financial products but that did not extend the agency as the Judge found that the developers did not have actual knowledge of the details of the investment products. Fourthly, while Blue Chip guaranteed the underwrite agreement, that was a commercial requirement imposed by the developers and did not extend the scope of the authority the developers gave the sales agents in relation to the apartments.

[169] The Judge also considered there to be a number of other indicia which supported the limited scope of the agency:

- The authority was limited to obtaining offers from the purchasers.
- The SPAs had to be completed using the standard form included in the schedule to the underwrite agreement.
- There was a clause in the underwrite agreement which restricted the scope of the agents' authority regarding representations:

> ... any marketing material or other representations made by either of them for and on behalf of the other of them in respect of the Units prior to the sale thereof are and will be accurate and complete as at the date of the relevant Sale and Purchase Agreement and shall not contain any omission of material facts or be misleading and all reasonable enquiries shall have been made to verify the accuracy of any such information.

- The entire agreement clause in the SPAs expressly recorded that representations about the Blue Chip investment products were outside the scope of the SPA.

[170] The Judge found, after reference to authorities which we discuss below, that any knowledge of the Blue Chip investment products held by the sales agents could not be imputed to the developers. That knowledge had been acquired by the sales agents as agents of Blue Chip and they owed no duty to inform the developers of details of the various investment products.[33]

The scope of agency – Greenstone and TWL

[171] There can be no doubt that the developer authorised the relevant Blue Chip entities as underwriters (and, through them, the Blue Chip sales agents) to undertake certain activities on their behalf. We refer here to the contractual arrangements between Greenstone and Lyell; TWL and Monrad; and between Icon and BFB. The developers' submission that the sales agents were acting as mere intermediaries cannot stand in the light of the terms of the underwrite agreements.

[172] The terms of the arrangements relevant to agency are set out in the underwrite agreements between these parties. We have set these out above.[34] However, we briefly mention cl 16.1 of the profit share agreement between Greenstone and Lyell. Although this clause[35] is explicit in stating that nothing in the profit share agreement is "deemed to create or constitute a party as an agent of any other party for any purpose whatsoever" the position is otherwise under the underwrite agreements.

[173] In relation to both Greenstone and TWL, cl 2.2 of the underwrite agreements is critical. For convenience, we repeat it here.

> The Underwriter shall use its best endeavours to procure a real estate firm at the cost of the Underwriter, to introduce purchasers to purchase the Units by the Sunset Date, for the Sale Price and on the terms and conditions set out in the Sale and Purchase Agreement and the Addendum and shall act as liaison

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33 At [159]–[160] and [330] of the *Greenstone* judgment; at [153] and [347] of the *TWL* judgment; and at [163] and [277] of the *Icon* judgment.

34 At [80]–[85] for *Greenstone* and at [94]–[96] for *TWL*.

35 See [74] above.

> between the Vendor and those purchasers as and when required by the Vendor in facilitating payment of deposits under and effecting settlements pursuant to the Sale and Purchase Agreement and will actively co-operate with the Vendor's solicitors as required to achieve this.

[174] As it happened, the parties saw no need to engage a real estate firm as such since Blue Chip had a pool of potential investors to whom they could turn. The scope of the relevant underwriter's obligations under this clause is narrowly defined. The essential obligation was to introduce purchasers for the apartments. We view this obligation more narrowly than the normal obligations of a real estate agent. In particular, the underwriter had no authority to introduce purchasers other than at the prices stipulated in the underwrite agreement and strictly on the terms stated therein. Neither the underwriters nor the individual sales agents had any authority to negotiate on price or any other terms of the agreement.

[175] The further obligation on the part of the underwriters was to act as "liaison" between the developers and the purchasers, again for limited purposes. These purposes were (as and when required by the developer) to facilitate the payment of deposits and the effecting of settlements of the SPAs (including an obligation to actively co-operate with the developer's solicitors as required to achieve this). It did not form any part of the underwriter's duty to the developer to, for example, arrange finance.

[176] Clause 9.1 of the Greenstone underwrite agreement (and the identical cl 6.1 in the TWL agreement) sheds light on what the parties contemplated as the scope of the task for which Lyell/Monrad was engaged. For convenience we repeat this clause here:

> **REPRESENTATIONS AND WARRANTIES**
>
> 9.1 In consideration of the Parties entering into this agreement, each of them represents and warrants to the other of them that any marketing material or other representations made by either of them for and on behalf of the other of them in respect of the Units prior to the sale thereof are and will be accurate and complete as at the date of the relevant Sale and Purchase Agreement and shall not contain any omission of material facts or be misleading and all reasonable enquiries shall have been made to verify the accuracy of any such information.

[177] The developers were clearly at pains to ensure the accuracy of any representations made by the underwriters. Importantly, the clause refers only to marketing material and representations "in respect of the Units". This suggests that it was not contemplated that the underwriters would market material or make representations on behalf of the developers in respect of any other matter such as the Blue Chip investment products.

[178] As the Judge observed, the entire agreement clauses in the SPAs also confirm the confined scope of the agency given to the underwriters.

[179] A feature of the Blue Chip marketing methods for the Barclay and Bianco developments was the form of authority signed by investors. The authority appointed Blue Chip as the agent of the investor with authority to seek finance on behalf of the investor from lenders approved by Blue Chip (if required for the purchase) and to locate a property for the investor. The authority also provided that, upon satisfaction that funding would be available, Blue Chip was to proceed to prepare the SPA and other necessary documentation. The significance of the letter of authority is that it was specifically addressed to Blue Chip and makes no reference at all to the developer. Any finance required was from lenders approved by Blue chip, not the developer. At the time the authorities were signed, it was usually the case that no specific investment property had been identified.

[180] It is evident that the sales agents were acting in a dual capacity. For the developer, they were acting as sub-agents for the relevant Blue Chip entity (as underwriter) within the narrowly confined scope which we have described. The sales agents were also representing the relevant Blue Chip entities (such as Blue Chip Premium Income Ltd and Blue Chip Joint Ventures Ltd) to whom the investors contracted under the various Blue Chip investment products. We accept the submission made on behalf of the developers that these entities were acting as principals in their own right in respect of the PIP agreements and the joint venture agreements and were not acting as agents for the developers in relation to those agreements.

[181] To the extent that the investors authorised Blue Chip NZ Ltd to proceed to arrange finance and the necessary documentation, Blue Chip NZ Ltd was also acting as agent for the investors.

[182] We are satisfied in the case of Greenstone and TWL that the scope of the agency possessed by Lyell and Monrad (and through them the Blue Chip sales agents) was limited by the express terms of the underwrite agreement. It was confined to the introduction of purchasers; the presentation of executed SPAs upon the terms stipulated in advance by the underwrite agreement; and liaising between the vendor and the purchasers as and when required by the developer for the purpose of facilitating payment of deposits and effecting settlements under the SPAs. The underwriter was also to co-operate with the vendor's solicitors as required to achieve payment of the deposits and effect settlement.

[183] We agree with the Judge that the underwriters and, through them, the Blue Chip sales agents, had authority from Greenstone and TWL to make representations on behalf of the vendor with regard to the subject matter of the purchase, but did not have authority on their behalf to make representations about the Blue Chip investment products. In particular, any representations made by the sales agents that the investors would not be required to settle if Blue Chip did not meet its obligations under its investment agreement, were outside the scope of any agency from Greenstone and TWL. In terms of the test propounded by the Supreme Court in *Nathans v Dollars & Sense Ltd*, there was no sufficiently close connection between the task for which the underwriters were engaged and the representations said to give rise to the proposed promissory estoppel. It follows that any such representations could not, in law, be attributed to Greenstone or TWL.

The scope of agency - Icon

[184] The position is more complicated in the case of the Icon development. As earlier noted, the underwrite agreement is expressed in very different terms from the Greenstone and TWL underwrite agreements. We discussed the terms of the underwrite agreement above[36] noting that Icon (as vendor) assumed the obligation to

[36] At [117]–[127].

sell the units. There was no express obligation on BFB as underwriter to sell the units. Rather, BFB's obligation was to purchase any units remaining unsold by a specific date. The underwrite agreement also provided for Icon to appoint real estate agents to sell the units on its behalf.

[185] Notwithstanding the terms of the underwrite agreement, it is clear that BFB as underwriter assumed the task of selling the apartments through the Blue Chip sales agents. We are satisfied that the Judge was right to conclude that BFB undertook this task with the implied authority of Icon as vendor. It is well-established that an agency relationship can be established by implication from the circumstances including the conduct of the parties. No particular formality is required.[37]

[186] The Judge had a sound basis for reaching this conclusion on the evidence. As the Judge pointed out, BFB could not sell the apartments on its own behalf since they belonged to Icon. It could only have done so with Icon's authority. When BFB or the Blue Chip sales agents presented SPAs, they were accepted and confirmed by Icon. There was also supporting evidence of an implied authority for BFB to sell the apartments in the form of letters sent to financiers in October 2007 on behalf of BFB and Icon.

[187] Our own review of the evidence of the investors in the Icon development shows that they were in fact approached in each case through Blue Chip sales representatives or employees.

[188] We do not accept an argument advanced by Mr O'Callahan on behalf of Icon that the sales agents were acting as principals in their own right, or as agents for the investors and Blue Chip. This submission was based on the decision of this Court in *Credit Services Investments Ltd v Evans*.[38] In the context of a motor vehicle dealership, this Court held that the dealer may, to some extent, be an intermediary

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[37] *Morgans v Launchbury* [1973] AC 127 (HL) at 140–141; *Credit Services Investments Ltd v Evans* [1974] 2 NZLR 683 (CA) at 694; *Ashfordshire Council v Dependable Motors Pty Ltd* [1961] AC 336 (PC); and *Nathan v Dollars and Sense Ltd* at [8].

[38] *Credit Services Investments Ltd v Evans* [1974] 2 NZLR 683.

between the customer and the finance company and may, in a particular case, have some ad hoc agencies to do particular things on behalf of one or the other or both.

[189] Like the Judge, we are satisfied that *Evans* is clearly distinguishable. Plainly, the Blue Chip sales agents had more than one role. They were, on the one hand, marketing the apartments on behalf of Icon as vendor and on the other they were acting as agents for Blue Chip in selling the Blue Chip investment products. We agree with the Judge that the evidence establishes that the Blue Chip sales agents took on a significantly greater role than a mere intermediary.

[190] Despite the differences between the terms of the Icon underwrite agreement and the equivalent agreements for Greenstone and TWL, we agree with the Judge that the scope of the agency from Icon was similarly confined to the marketing of the apartments and the presentation of executed SPAs in the pre-arranged terms. Neither BFB nor the Blue Chip sales agents had authority to make representations on behalf of Icon as vendor in respect of the Blue Chip sales products. It follows that any representations made to investors in relation to the Icon development which are relied upon for the promissory estoppel argument could not be attributed to Icon.

[191] In that respect, we agree with the observations by the Judge that any authority Icon gave the agents could not extend to representations which were contrary to the agency between Icon and the selling agent. [39] A representation to the effect that the investors would not be obliged to settle the transaction if Blue Chip did not meet its obligations would have been inimical to the terms of the underwrite agreement, which required unconditional SPAs. If the investors could have avoided the obligation to settle, the conditions imposed by the funders would not have been met and the project would have failed.

Imputed knowledge

[192] The jurisprudence on the circumstances in which the knowledge of an agent will be imputed to the principal has given rise to much difficulty. The general approach has been that knowledge acquired by an agent is only imputed to the principal if it is derived by the agent within the scope of the agency. In the present

[39] At [162] of the *Icon* judgment.

appeals, counsel for the investors sought to persuade us to adopt a more expansive view than that which has generally been adopted in this field. Counsel submitted that knowledge may be imputed to the principal in a wider range of circumstances and does not depend solely on the scope of the agency. The investors drew support from an article written in 2005 by Professor Peter Watts entitled "Imputed Knowledge in Agency Law".[40]

[193] An early authority identified as supporting the general rule is *Wyllie v Pollen*[41] where Lord Westbury LC said:[42]

> To affect the principal with notice, the agent's knowledge must have been derived in the particular transaction in hand, or be shown to have been in that transaction present to his mind: and further, it must have been knowledge of something material to the particular transaction; and something which it was the agent's duty to communicate to his principal; the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent.

[194] The leading statement in New Zealand on the limits of imputed knowledge is that of Hardie-Boys J speaking for this Court in *Jessett Properties v UDC Finance*:[43]

> The general principle that notice given to or knowledge acquired by an agent is imputed to his principal only if the agent was at the time employed on the principal's behalf is recognised in the texts and the cases: see for example *Bowstead on Agency* (15th ed, 1985) at pp 412-416, Fridman's *Law of Agency* (6th ed, 1990) at p 319, *Société Générale de Paris v Tramways Union Co Ltd* (1884) 14 QBD 424 and *Taylor v Yorkshire Insurance Co Ltd* [1913] 2 IR 1. This accords with good sense and justice. Thus if notice is given to an agent in reliance on his ostensible authority to receive it, the principal will be stopped from denying receipt of the notice: *Blackley v National Mutual Life Association of Australasia Ltd* [1972] NZLR 1038. But there is no reason to prevent the principal from denying receipt in the absence of such reliance. Apart from this kind of case, the reason for imputing to the principal knowledge which the agent has acquired has been variously explained. *Bowstead* at p 412 puts it in terms of a presumption that the knowledge will have been passed on, either because it was acquired in respect of a matter where the agent has power to bind the principal, or because he has a duty to inform the principal.
>
> Fridman's explanation is that the facts are materially connected with the performance of the undertaking, so that the proper exercise of the agent's authority will be affected by his knowledge. In *Taylor v Yorkshire Insurance Co Ltd* at p 20, Palles CB considered it no more than a consequence of the

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40 Peter Watts *Imputed Knowledge in Agency Law* [2005] NZ Law Review 307.
41 *Wyllie v Pollen* (1863) 3 DeGJ & S 596 (Ch).
42 At [60].
43 *Jessett Properties v UDC Finance* [1992] 1 NZLR 138 at 143.

> familiar principle qui facit per alium facit per se. *Whichever be the true basis, it is apparent that knowledge acquired before the agency began, or probably even during its currency but outside the scope of the engagement, should not in general be imputed to the principal.*
>
> (Emphasis added.)

[195] Almost a decade later, this general approach was confirmed in *Niak v Macdonald*.[44] The leading texts also endorse this general principle.[45] We acknowledge immediately that it is made clear in *Bowstead & Reynolds* that the general principle should be regarded as a starting point since there are cases in which knowledge acquired outside the agency has been attributed to the principal.[46]

[196] The rationale for the imputation rule has been variously described. The appellants emphasise two alternatives. Under the first, *qui facit per alium facit per se* (acts done by an agent are acts of the principal), the law does not permit principals to use agents in such a way as to put themselves in a better position than they would have been in had they acted personally. The investors submit that in this case the developers have plainly attempted to insulate themselves by using agents to sell the properties; by not making further inquiries although on notice that there were side agreements; and by using an entire agreement provision to further insulate themselves from their agents' actions.

[197] The second basis for imputation of knowledge is that the agent has a duty to disclose relevant information to his or her principal. The law presumes this to be done whether or not it is actually done. In this case, the investors submit, the knowledge held by the Blue Chip sales agents about the financial circumstances of the investor related to the subject-matter of the agency and there was thus a duty to convey that knowledge to the developers.

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44 *Niak v Macdonald* [2001] 3 NZLR 344 (CA) at 340–341.

45 GHL Fridman *The Law of Agency* (1996) at 348–352; D E Dal Pont *Law of Agency* (2001) at 626 and 627; Peter Watts & FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2010) at art 95(1).

46 *Bowstead and Reynolds* at 483.

Imputed knowledge – Greenstone and TWL

[198] In the case of both Greenstone and TWL, the propositions advanced by the investors are not supported by the facts and the circumstances of the case. We see no basis to differ from the finding by the Judge that Greenstone and TWL did not have either actual or constructive knowledge of the details of the Blue Chip investment products. As the Judge found, Greenstone was comforted by the payment of substantial deposits in support of the unconditional SPAs which were, after all, not due for settlement for some 18 months or two years. There was no obligation on Greenstone's part to inquire further into the means by which the purchasers would meet their obligations on settlement. Indeed, Mr Dale accepted there was no basis to challenge Mr Manning's evidence that Blue Chip kept his company at arms' length from the investors, keeping any contact with them to the Blue Chip agents and staff.

[199] As earlier noted, the use of an entire agreement provision was a sensible provision in the circumstances. The fact that Greenstone and TWL used agents to introduce purchasers could not, without more, support the imputation of knowledge. Nor are we persuaded that there was any duty on the part of the underwriters for the Blue Chip sales agents to disclose to Greenstone and TWL the terms of the investment products or the financial position of the investors. At the time the SPAs and related Blue Chip documentation was entered into, neither the developers nor the Blue Chip sales agents had any reason to suppose that Blue Chip would not be in a position to perform its obligations under its various investment products. All involved expected that Blue Chip would meet its obligations but the investors were warned of their obligations if Blue Chip did not. In short, any knowledge acquired by the Blue Chip sales agents was outside the scope of the confined task they were asked to perform on behalf of Greenstone and TWL. Nor was it material to that task such as to give rise to a duty to disclose.

[200] The investors further submitted that the developers might somehow be held responsible for the actions of the Blue Chip agents because they "stood by" and allowed the agents to enter into the transactions without taking proper steps to ensure they did not exceed any authority that had been given to them. Reliance was placed

on *AJU Remicon Co Ltd v Alida Shipping Co Ltd.*[47] This submission does not have any application in the circumstances of this case. First, we have already rejected the proposition that there was any obligation on the part of Greenstone and TWL to make further inquiries about the nature of the Blue Chip investment products. Secondly, there is no evidence that Greenstone or TWL "stood by" in any relevant sense. How the investors intended to fund their purchases was a matter for them. Thirdly, the principle relied upon is close to an argument based on ostensible or apparent authority. The investors do not place any reliance on that argument.

[201] The final submission made on this subject by the investors is that a principal should not be allowed to take the benefit of an agent's misconduct. There are at least two difficulties with this proposition. First, there is no evidence of any relevant wrongdoing on the part of the Blue Chip agents. The Judge rejected all claims for misrepresentation and these have not been pursued. Fraud (a matter commonly arising in agency cases) is not relied upon here. Secondly, on the facts, the investors were made aware of the risk they might be called upon to settle the transactions.

[202] We acknowledge that the attribution of knowledge in dual agency cases can be problematic. To what extent and in what circumstances should knowledge acquired by the agent outside mandate be attributed to the principal? Current case law in New Zealand has taken a cautious approach to any expansion of the general principle that knowledge acquired outside mandate should not be attributed to the principal. That is appropriate given the potential for greatly widened liability for the principal, if, for example, it were accepted that knowledge should be imputed to the principal in circumstances where it would have been acquired had he undertaken the task himself. This issue may require clarification in another case but we are satisfied there is no justification in the present case for adopting this expansive approach. Given the narrow scope of the agency delegated to Blue Chip by Greenstone and TWL and the clear distinction between the tasks to be performed on behalf of the developers and those to be performed for Blue Chip it would be inappropriate to impute to the principal knowledge gained outside the mandate given to the agent.

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[47] *AJU Remicon Co Ltd v Alida Shipping Co Ltd* [2007] EWHC 246 (Comm).

[203] As the Supreme Court observed in *Nathan v Dollars & Sense Ltd* in the context of the imposition of vicarious liability for the conduct of an agent:[48]

> Strict liability of this kind is exceptional and is not to be imposed unless fully justified by these considerations. Certainly just the opportunity to commit the wrongful act or the existence of some merely incidental connection will not suffice.

[204] We consider a similarly cautious approach is appropriate when considering whether knowledge acquired by an agent outside the scope of the agency should be attributed to the principal.

[205] In summary, in the case of Greenstone and TWL, we agree with the Judge that there is no basis to impute to them any knowledge of the details of the Blue Chip sales arrangements or the financial position of the investors.

Imputed knowledge - Icon

[206] The position is different for Icon. The Judge found that Mr Bryers' knowledge of the detail of the PIP and PAC products was attributable to Icon.[49] He reached that conclusion not by imputing knowledge through agency but on the basis that Mr Bryers was the directing mind of Icon. In consequence, Icon was fixed with his knowledge of those agreements. We are satisfied this was a proper conclusion.

[207] There is no evidence that Mr Bryers was aware of the financial position of individual investors. Nor do we see any basis to attribute to Icon any knowledge of the Blue Chip sales agents about the financial position of the investors. Any knowledge of this type was gained outside the scope of the agency from Icon to BFB to market the apartments. Neither BFB nor the sales agents owed any duty to Icon to disclose this information to Icon.

[208] Mr Bryers was aware of the sub-underwrite arrangements and that these were to be replaced in due course by other investors but there is no evidence to suggest he knew this would not occur.

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48 At [40].

49 At [279] and [280] of the *Icon* judgment.

Summary on the issue of knowledge by the developers

[209] To summarise on the issue of knowledge by the developers:

Greenstone

- The investors accepted that neither Mr Abel-Pattinson nor Greenstone had any actual knowledge of the PIP product.
- We accept the finding made by the Judge that Greenstone did not have any actual knowledge of the detail of the joint venture agreement.
- There is no basis to find that Greenstone had constructive or imputed knowledge of the Blue Chip investment products or of the financial circumstances of the investors and their ability or otherwise to settle if Blue Chip did not perform its obligations.

TWL

- There is no basis to disturb the finding of the Judge that TWL had no actual knowledge of the detail of the Blue Chip investment products.
- There is no basis to conclude that TWL had constructive or imputed knowledge of the Blue Chip investment products or of the financial circumstances of the investors and their ability or otherwise to settle if Blue Chip did not perform.

Icon

- We accept the finding by the Judge that Icon knew through Mr Bryers of the terms of the PIP and PAC agreements.
- There is no basis to attribute to Icon any knowledge held by the Blue Chip sales agents of the financial circumstances of the investors and their ability or otherwise to settle if Blue Chip did not perform its obligations.

The application to amend the pleadings

[210] We decided not to permit the appellants to amend the pleadings in this Court for two broad reasons. First, we were not satisfied that any of the additional causes of action or issues the appellants sought to raise would have any prospect of success. In reaching that conclusion, we undertook an analysis of the evidence given by each of the plaintiffs in the three sets of proceedings. Our factual findings in relation to the promissory estoppel argument are set out in the Appendix to this judgment. The

implied term and interdependent contracts argument are essentially a matter of legal analysis and our findings in that respect are set out below.

[211] The second reason for declining the application to amend the pleadings is that the developers would be seriously prejudiced because their approach to the evidence in the High Court would have been very different if the additional issues had been before the Court at that stage.

Promissory estoppel

[212] The draft promissory estoppel pleading is put on two alternative bases. It is pleaded there were express representations that the investors would not have to settle or that they would only be called upon to do so if the Blue Chip companies fulfilled their contractual obligations.

[213] In a contractual setting, a promissory estoppel argument more commonly arises post-contract when one party promises the other that an existing contractual provision will not be enforced. It is well established that a pre-existing contractual relationship is not necessary before promissory estoppel may operate.[50] But it is less common and more difficult to establish promissory estoppel on the basis of a pre-contractual promise or representation.[51] This is because the party seeking to establish the representation faces obvious evidential difficulties in proving a promise not to enforce a contractual provision when that party subsequently signs a contract in which he or she agrees to perform the relevant obligation notwithstanding the claimed promise that he or she would not have to do so. In such circumstances, statements made in pre-contractual negotiations may be overtaken and contradicted by the written contract.

[214] This obvious difficulty arises very starkly in the present case. Each of the investors signed SPAs to acquire the apartments and assumed an unconditional commitment to settle the purchase upon completion of construction and the

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50 *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513 (HCA); *Burberry Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361; *Juzwa v Hill* [2007] NZCA 222.

51 See *Krukziener v Hanover Finance Ltd* [2008] NZCA 187.

production of title. That obligation was no mere incidental term. It was the purchasers' fundamental obligation under the SPAs.

[215] There is no doubt that, in relation to the PIP and PAC agreements, the investors would continue to have an obligation to settle the SPAs if Blue Chip defaulted after exercising its option to purchase (or, as the case may be, after it has been required to purchase following the investor exercising the put option in the PACs). In this respect, the law is clear that a party to a contract may transfer a contractual obligation to a third party only with the consent of the original contracting party.[52] In the present context, any assignment to Blue Chip by the investor of his or her obligation to settle would require the consent of the developer as vendor. There is no evidence that any such consent was sought or given.

[216] There is nothing in the documentation which affects this general statement of the legal position. The SPAs all contain a standard term that the purchaser was to remain liable for all obligations notwithstanding the nomination of another party as purchaser.[53] The SPAs for TWL and Icon all contained a standard clause prohibiting the purchaser from assigning the benefit of the agreement without the prior written consent of the vendor.[54]

[217] The obligations of the investors and the relevant Blue Chip entities as between themselves were governed by the deeds of nomination for the PIP's, the option deed for the PACs and the PIP agreements. These variously provided for the assumption of responsibility for settlement by the investors or the Blue Chip entity depending on whether the parties made the relevant nominations and exercised the put or call options.[55] But they could not displace the principle that the vendor's consent is required if the original purchaser is to be released from the obligations under the SPA.

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52 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at [17.2.1]. See also *Tolhurst v Associated Portland Cement Manufacturers [1900] Ltd* [1902] 2 KB 660 at 668.

53 Clause 1.3(2) of the Greenstone SPA and clause 23.1 of the TWL and Icon SPAs.

54 Clause 24.1 of the TWL and Icon SPAs.

55 Clauses 2.2, 4.2 and 5.1 of the deeds of nomination; clauses 3 and 4 of the PAC option deed; and cls 3 and 4 of the PIP agreements.

[218] Nevertheless, it is possible that a successful plea of promissory estoppel could overcome the difficulty that the investors have committed themselves unconditionally to purchase the properties. But it would be necessary for the investors to prove that:

(a) A sufficiently unambiguous promise was made to the effect pleaded;

(b) The promise was attributable to the developers and not just to Blue Chip.

(c) The investors relied upon the promises in signing the SPAs and other documentation.

(d) They did so to their detriment.

(e) It would be unconscionable to permit the developers to enforce the SPAs contrary to their promise.

[219] One of the forms of promise pleaded refers to the Blue Chip companies fulfilling their contractual obligations. This expression and its relevance requires some analysis. First, the promise is alleged to have been made in relation to the investor's obligation to settle the SPAs. It follows that the relevant obligations on behalf of Blue Chip are those which relate to the investor's settlement obligations. Secondly, the nature of the relevant obligations on the part of Blue Chip differs according to the nature of the investment.

[220] In respect of the joint ventures, the relevant Blue Chip obligation is to raise the finance necessary for the joint venture to complete the purchase. Future obligations, such as the obligation to pay the periodic procurement fee (or the option fee in respect of the PIPs and PACs) are not material in this context. For the PIP and PAC investments, the Blue Chip obligations potentially relevant to completion of the SPA are those relating to the exercise by Blue Chip of the option to purchase and, more importantly, the completion of the purchase thereafter.

[221] The alleged promise that the investors would only be required to settle if Blue Chip performed its obligations is appropriate for the joint ventures (because the Blue Chip obligation was to raise the finance necessary to enable the joint venture to settle). But it does not fit easily with the PIP and PAC investments. For those

products, the relevant Blue Chip entity did not have any obligation to settle the SPAs unless it exercised the option to purchase under the PIP or PAC agreement or it was obliged to settle by the investor exercising the put option under the PAC agreement. Otherwise, the settlement obligation rested with the investor. Perhaps the alleged promise would have been better pleaded as a promise that Blue Chip would exercise the option and purchase the property itself or introduce another purchaser to do so.

[222] Several common, but not universal, themes emerged from our review of the evidence of the investors. These are:

(a) The investors were generally focused on the financial returns and said they did not read the documents they signed.

(b) They did not read the promotional material which clearly warned them of the risks involved (including the risk they would have to settle if Blue Chip did not perform) and urged them to take professional advice before signing the SPAs.

(c) Although most appreciated they were signing SPAs which involved commitments, they considered there was only a slight risk they would be required to settle relying on representations made by the sales agents about Blue Chip's substantiality and its ability to meet its obligations.

(d) Most investors were aware that Blue Chip's financial substance and ongoing ability to perform was important. Many made inquiries in this respect (usually with the Blue Chip sales agents but not exclusively so) and were comforted by their advice as to the identity of the directors and shareholders and the record of the company in transactions of this type.

[223] We concluded from our analysis, combined with the relevant findings of fact made by the Judge, that the promissory estoppel argument would fail on the facts. In many cases, there was simply no evidence that the relevant promises had been made. In other cases there were representations by the sales agents that Blue Chip would "buy the property back" before settlement; would find another purchaser before

settlement; or that Blue Chip would "step in and exercise the option to purchase". But even in these cases, the statements alleged were not expressed, or understood, in unqualified terms. In particular the investors, as a general rule, understood there was a risk that, if Blue Chip did not perform its obligations, they would be required to settle the purchases. That was entirely consistent not only with the terms of the contractual arrangements under the SPAs and the PIP and PAC investments, but was also consistent with the clear warnings given in the promotional materials. There being no plea of *non est factum* or mistake and no evidence justifying such a plea, the investors must be taken to have known the terms of the documents they signed.

[224] In those cases where there was evidence of a representation along the lines pleaded, the investors appreciated that Blue Chip's ability to relieve them of their obligations to settle by acquiring the property or arranging another purchaser was dependent on Blue Chip's ongoing viability. The obvious inference is that it was for this reason that the investors inquired about Blue Chip's substance and reputation as a promoter of investment properties. They received assurances in this respect from various sources. These included the promotional material distributed by Blue Chip, representations made by the Blue Chip sales agents and, in some cases, advice from other investors or professional advisers.

[225] The Judge rejected claims of misrepresentation in relation to the Blue Chip promotional material and representations made by Blue Chip sales agents as to Blue Chip's standing and financial strength. In some cases, the Judge found that the investors proceeded not in reliance on any representations of the kind now relied upon for the promissory estoppel argument but in reliance on what they understood was Blue Chip's ability to perform its obligations.

[226] Against this background, our conclusion that the promissory estoppel argument must fail may be analysed either on the basis that there was no, or insufficient, evidence of an unqualified promise as pleaded or on the basis that there was no, or insufficient, evidence that the investors relied upon any such promise.

[227] Given our conclusion on the agency issue, any promissory estoppel claim would also fail on the basis that statements made by the Blue Chip sales agents could

not, in law, be attributed to the developers. In that respect, we agree with the conclusion reached by the Judge that any representations made by the sales agents were made on behalf of Blue Chip.

[228] The investors have undoubtedly suffered detriment through entering the SPAs but they did so with an appreciation of the risks and in the absence of any unqualified promise attributable to the developers that they would not have to settle.

[229] Our findings in relation to the promissory estoppel argument are also sufficient to dispose of Mr Dale's alternative submission that an estoppel arose by convention, relying on the principles summarised by Tipping J when delivering judgment for this Court in *National Westminster Finance NZ Ltd v National Bank of NZ Ltd*.[56] There was simply no evidence of a common assumption by the developers and the investors which would be necessary to support such a claim.

The ability of the investors to settle without Blue Chip's support

[230] An important part of Mr Dale's submission in support of promissory estoppel and his other two arguments (implied term and interdependent contracts) was that the investors did not have the capacity to settle the SPAs without Blue Chip's support in the form of raising finance or otherwise fulfilling its contractual obligations. While we accept that the circumstances of some of the investors may well be such that they could not have afforded to settle without Blue Chip's support, that cannot be said to be true of all the investors. The evidence shows that the circumstances of the investors varied markedly both in terms of resources, experience and level of sophistication in financial matters. The resources available to the investors varied from those who had substantial wealth to retired couples with relatively few resources. Some investors had substantial commercial knowledge and were experienced investors. Others had little such knowledge or experience. Some took advice from accountants and lawyers while others did not.

[231] Importantly, the pleadings in the High Court did not include the new arguments that the investors now seek to raise. It was unnecessary on the state of the

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[56] *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549.

pleadings as they stood in the High Court for counsel representing the developers to explore the promissory estoppel allegations or the proposition that the investors could not settle if Blue Chip did not.

[232] In the case of some investors, there was no evidence given as to their ability to settle. In other cases, there was an assertion by the investor that they could not have settled without Blue Chip performing its obligations or acquiring the property before settlement and they were not cross-examined on this issue. In yet other cases, the resources available to the investors were such that it may be they could have settled from their own resources.

[233] If this issue had been raised at trial, the developers would have wished to cross-examine and possibly call evidence to counter the assertions made. Plainly, the ability of an individual investor to settle would be dependent on such matters as the resources available to the investor; the ability to borrow from other sources such as conventional financial institutions; the availability of other providers of the Lo-Doc-type loans; the availability of funds from private resources such as family or friends (who might, for example, have been persuaded to take a share in the investment); whether there were prospects of an early re-sale to recoup at least part of the investment; and the extent to which rental income from the apartment could have off-set borrowings. We were satisfied that the developers have been seriously prejudiced by the failure to make these allegations in the High Court and that it would be unfair to allow them now to be raised in this Court.

Implied term

[234] The investors also seek to amend their pleadings to introduce an allegation that there was an implied term of the SPAs that the investors would not be called upon to settle under those agreements unless the relevant Blue Chip company performed its obligations. The draft amended pleading refers only to the obligations under the PIP, joint venture or mainstream agreements but we have taken the pleading to embrace the obligations of the relevant Blue Chip entity under the PAC agreements as well.

[235] The draft pleading avers that the term is to be implied because the financial circumstances of the investors were such that they were unable to complete settlement or perform their obligations without the support of Blue Chip. It is asserted that the term should be implied because the Blue Chip sales agents knew this and were agents of the developers for the purpose of entering into the SPAs and related contracts. In argument, Mr Dale accepted that the implied term argument could not succeed unless there was evidence to support knowledge of the sales agents which could be imputed to the developers.

[236] We are satisfied that this implied term argument could not succeed for purely evidential reasons. First, as already noted, the evidence about the ability of the investors to settle without Blue Chip was not raised at trial and the developers were entitled to have the opportunity to explore this issue at trial. Secondly, the extent of any knowledge by the Blue Chip sales agents on this issue was not explored at trial. Thirdly, in view of our findings on the agency issue, there is no basis to impute to the developers any knowledge the sales agents may have had about the investors' financial circumstances.

[237] Our finding that the investors appreciated there remained a risk that they might have to settle is also fatal to the implied term argument.

[238] Leaving aside evidential issues, it will be recalled that towards the conclusion of closing submissions at trial, Mr Dale filed a memorandum to support an application to add a cause of action for "breach of collateral obligations". He supported his submission in that respect by reference to *Shanklin Pier Ltd v Detel Products Ltd.*[57] However, in the end, this proposed amendment did not proceed and the argument was abandoned. The Judge considered, in any event, that the *Shanklin Pier* case was distinguishable on the footing that neither Greenstone nor TWL had made any representation to the plaintiffs about Blue Chip performing its obligations under the various agreements.[58]

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[57] *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 KB 854.

[58] At [169] of the *Greenstone* and *TWL* judgments.

[239] The Judge went on to observe that the proposed pleading of collateral contract was rather more an allegation that the SPAs were, at least in some cases, conditional upon performance of the obligations by the Blue Chip companies under the various investment products. He noted there was no express condition to that effect in the SPAs and that there was no basis to imply such a condition on business efficacy grounds. He considered the SPAs to be entirely effective without any such term, citing *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings.*[59]

[240] Also relevant to this issue is the finding by Venning J (when dealing with an alleged oral term that the investors would not have to settle) that such a term contradicted the express provisions of the SPAs and would have effectively meant that they were not binding agreements.[60]

[241] The question of whether terms should be implied arises when the contract does not expressly provide for what is to happen when some event occurs. The tests applied by the Courts have been variously expressed. One of the early decisions was *The Moorcock* where Bowen LJ said: [61]

> In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen …

[242] Later the hypothetical "officious bystander" approach was adopted in *Shirlaw v Southern Foundries (1926) Ltd*:[62]

> Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying.
>
> … [I]f, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course".

[243] The most commonly cited test for the implication of terms in recent decades is the test described in the *BP Refinery* case:[63]

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59 *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 16 ALR 363 (PC) at 376.

60 At [183]–[184] of the *Greenstone* judgment and [178]–[179] of the *TWL* judgment.

61 *The Moorcock* (1889) 14 PD 64 (CA) at 68.

62 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227.

63 At 376.

> In [their Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[244] More recently, in *Equitable Life Assurance Society v Hyman*[64] Lord Steyn said:

> If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.

[245] In 2009, the Privy Council delivered its judgment in *Attorney-General of Belize v Belize Telecom Ltd*[65] discussing the implication of terms in the context of the articles of association of a company providing telecommunications services. In a discussion described by Tipping J in *Dysart Timbers Ltd v Nielsen*[66] as "illuminating", Lord Hoffman (speaking for the Board) discussed the implication of terms in some detail. In a key passage, Lord Hoffman said:[67]

> … The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[246] Lord Hoffman supported this statement[68] by reference to the remarks of Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope and Colls v Northwest Metropolitan Hospital Board*:[69]

> The Court's function is to interpret and apply the contract with the parties have made for themselves. If the express terms are perfectly clear and free

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64 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) at 459.
65 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.
66 *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, 3 NZLR 160 at 168, fn 12.
67 At [16].
68 At [19].
69 *Trollope and Colls v Northwest Metropolitan Hospital Board* [1973] 1 WLR 601 (HL) at 609.

> from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the Court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the Court finds that the parties must have intended that term to form part of their contract …

[247] The business efficacy and obviousness tests were also discussed by Lord Hoffman.[70] He emphasised that these expressions are different ways of saying that "… although the instrument does not expressly say so, that is what a reasonable person would understand it to mean".[71] Lord Hoffman concluded the discussion of implied terms by commenting upon the list of conditions spelled out in the *BP Refinery* case:[72]

> The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.

[248] We agree that the approach adopted in the *BP Refinery* case should not necessarily be regarded as a cumulative list of elements all of which must be satisfied before a term may be implied. However, each element is a useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean. This is to be construed objectively by a notional reasonable person with knowledge of the relevant background.

[249] This point was made succinctly by Lord Hoffman when discussing whether an implied term is "necessary to give business efficacy" to the contract. His Lordship said:[73]

> That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of

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70 At [22]–[25].
71 At [25].
72 At [27].
73 At [22].

> the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[250] Approaching the present case in the light of these principles, we have no doubt that the term which the investors seeks to have implied into the SPAs could not succeed. The obligation of the investors to complete the purchase upon settlement date was unconditional. The effect of the implied term would be to render the contract conditional upon Blue Chip fulfilling its obligations. In the case of the joint ventures, the introduction of the implied term would mean that the purchaser was not obliged to proceed with the purchase if Blue Chip did not arrange the borrowing required. In the case of the PIP and PAC investments (assuming the term was pleaded in the way we have described above), the investors would not be required to settle if Blue Chip failed to exercise the option and settle the purchase either itself or through the introduction of another purchaser.

[251] Plainly, the introduction of the implied term would fundamentally alter the SPAs, rendering them ineffective from the point of view of the developers as vendors if the defined events were to occur. In simple terms, an unconditional contract would be rendered conditional. That outcome would contradict the unambiguous and well-understood meaning of an unconditional contract for the sale and purchase of land.

[252] The implied term suggested by the investors is plainly not necessary to give business efficacy to the SPAs. They are perfectly capable of operating effectively without the implied term. During argument, we posed the question whether a purchaser who signs an unconditional contract to purchase land would not be obliged to settle if anticipated financial arrangements fell through. It would be quite contrary to conveyancing practice in this country if a term were to be implied in unconditional contracts that the purchaser was not obliged to settle in circumstances such as this. That would be so even if the vendor was aware that the purchaser was

dependent upon funding being arranged by the purchaser or knew that the purchaser was dependent on a third party assuming responsibility for the contract.

[253] More fundamentally, the implication of the suggested term would frustrate the business purposes of the parties. As already discussed, Westpac required the developers to achieve the required levels of unconditional pre-sales of the apartments before funds could be drawn down for the construction of the apartment buildings. Without those contracts, the funding would not have been available and the apartments could not have been built. Effectively, the introduction of such a term would have meant the building projects would fail. Such an outcome could not have been in the reasonable contemplation of the parties. It would be contrary to any objective assessment of the purposes each party had in entering into the SPAs.

[254] Finally, the implication of a term in the SPAs along the lines suggested would be inconsistent with the terms of the PIP and PAC agreements the investors had separately entered into with Blue Chip. Unless Blue Chip exercised the option to purchase under those agreements (or was obliged to do so under the put option in the PAC agreements) the investors' obligation was to settle the purchase themselves.

Interdependent agreements

[255] The investors sought leave to amend their pleading to include the contention that the performance of the SPAs was "conditional upon and interdependent upon the performance of ..." the relevant Blue Chip entity. The draft amended statement of claim states that the contracts were interdependent because the investors were not in a financial position to complete the purchase; the Blue Chip sales agents knew that; and the knowledge of the sales agents should be imputed to the developer.

[256] We are satisfied that this argument could not succeed on evidential grounds for the same reasons we have already discussed[74] in relation to the implied term argument. We are also satisfied that there was no substance in the argument that the contractual documents themselves offered a foundation for the proposition that the SPAs were contractually linked to the agreements the investors entered into with the relevant Blue Chip entities.

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[74] At [237]–[238].

[257] Mr Dale referred us to the decision of the Privy Council in *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd*[75] to support the proposition that the Court may conclude that separate contracts may be treated as a whole and may be such that the Court can conclude they are interdependent. We are satisfied that the *Europa Oil* case is clearly distinguishable. The relevant contracts related to the supply of oil. They are referred to in the judgment as a processing contract and a products contract. The Privy Council found that the terms of the contracts pointed "unequivocally towards an interdependence of obligations and benefits under a complex of contracts which, while embodied in separate documents, represent one contractual whole."[76] The relevant contracts referred specifically to each other. A further agreement made it clear that *Europa Oil* never intended to bind itself to the products contract without the benefits gained from the processing contract.

[258] A different result was reached in *DFC Financial Services v Abel*.[77] This was a bloodstock investment case where the promoter had breached the Securities Act by offering the investment without a registered prospectus. Loans had been arranged by a third party, DFC. Fisher J held that the loan agreements were not affected by the illegality of the investment agreements. He held:[78]

> I do not think that it could be implied into this loan contract that the defendants' obligations would be dependent upon the validity of the contract of allotment between the defendants and CF Limited. It would be remarkable to find an independent financier agreeing to forego its contractual right to principal and interest if the venture for which the funds had been advanced failed or proved aborted.

[259] Similarly, in *O'Brien v Melbank Corporation*[79] the loan contracts were distinct and severable from the investment contracts and thus still enforceable despite the illegality of the investment contracts.

[260] As the Judge found, the SPAs, with the exception of the lease and related addendum, are unrelated to any of the other documents entered into by the

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75 *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641.
76 At 651.
77 *DFC Financial Services v Abel* [1991] 2 NZLR 619 (HC).
78 At 630.
79 *O'Brien v Melbank Corporation* (1991) 7 ACSR 19 (VSC).

investors.[80] The obligations under the SPAs are not tied to, or conditional upon, the other documents entered into by investors with the relevant Blue Chip entity. In particular, they are unrelated to the joint venture agreements or the PIP or PAC investment documents. Of course, the developers were not party to any contractual arrangements with the investors other than the SPAs with their associated leases.

[261] The leases have no direct or indirect link to the other documents the investors signed with Blue Chip. They were simply part of a standard investment arrangement to provide income for the investor. As such, they were able to function independently of any other arrangements the investors may have entered into.

[262] We observe that the lease arrangements for all three developments contemplated the possibility that Blue Chip might default on its obligations as the guarantor of the leases. If that occurred, it was agreed that the developer could substitute itself as guarantor. Westpac required these terms of the lease to be varied so that the developer guaranteed the lease up to the date of settlement and could not, prior to that date, substitute a Blue Chip entity without Westpac's consent.

[263] Mr Dale pointed out that the terms of the lease were referred to in the profit share and underwriting agreements entered into between the developers and the relevant Blue Chip entities but we do not consider this adds anything to the interdependence argument. The lease arrangements are not relevant to the issue the investors seek to advance. Rightly, the investors abandoned any argument to the effect that the inability of the Blue Chip entities to implement the lease arrangement had any bearing on the issue of whether the investors were obliged to settle the SPAs. Self-evidently, Blue Chip's obligation to assume responsibility as lessee did not arise until settlement had occurred. Although the apartments were sold subject to the lease, there was no obligation on the part of the developers to assume responsibility as lessee after settlement.

[264] There being no other contractual link between the SPAs and any of the separate arrangements which Blue Chip entered into with the investors, we were satisfied that the interdependence argument could not succeed.

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[80] At [206] and [207] of the *Greenstone* judgment; [186] of the *TWL* judgment; and [167] of the *Icon* judgment.

The effect of the entire agreement clauses

[265] We have already mentioned cl 27 of the SPAs for the Greenstone development and cl 20.2 for both the TWL and Icon developments. Section 4 of the Contractual Remedies Act 1979 applies where a contract contains a provision purporting to preclude a court from inquiring into or determining whether a statement, promise or undertaking was made in negotiations leading to the contract and whether any such statement, promise or undertaking constituted a representation or term of the contract. A court is not precluded by provisions of this type from inquiring into and determining any such question unless the court considers it is fair and reasonable that the provision should be conclusive between the parties.

[266] While, as the Judge recognised, this provision applies to any arguments based on misrepresentation and, we think, could also bear upon the proposed promissory estoppel argument, it cannot have any relevance to the implied term and interdependence arguments. In relation to those issues, the entire agreement clauses represent a further substantial hurdle for the investors to overcome.

Issues under the Securities Act

Introduction

[267] The essence of the investors' argument under the Securities Act (the Act) was that:

(a) The Blue Chip investment agreements constituted "debt securities" for the purposes of the Act.

(b) In the absence of a registered prospectus, the offer and allotment of securities to the public contravened the Act and is of no effect.

(c) The Blue Chip investment agreements were not exempted from the requirements of the Act.

(d) The SPAs could not be severed from the Blue Chip investment agreements and/or were tainted by their illegality.

(e) In consequence, the SPAs were themselves invalid and of no effect.

[268] The Judge found against the investors holding that (with the possible exception of the joint venture agreements), the Blue Chip agreements did not constitute debt securities; the Blue Chip investment agreements were exempt from the Act; and that the SPAs were not tainted by any illegality in the Blue Chip agreements.

[269] The Judge also rejected an argument that the joint venture agreements constituted equity securities.

[270] All of these findings were challenged on appeal in a comprehensive argument presented to the Court by Mr Campbell on behalf of the investors. Mr Neutze led the opposing argument for the developers on this issue. It is common ground that if the Blue Chip investment agreements were debt securities as defined by the Act, then the relevant provisions of the Securities Act were not complied with and that the Blue Chip agreements would be invalid accordingly. The main contested issues we have to decide are:

(a) Whether the Blue Chip investment agreements constituted debt securities.

(b) Whether the Blue Chip agreements are exempted from the operation of the Act.

(c) Whether the SPAs are unable to be severed from the Blue Chip agreements or are tainted by any illegality in the Blue Chip agreements.

[271] Before addressing these issues, we deal with the purpose and scheme of the Act.

The purpose and scheme of the Securities Act

[272] The genesis of the Act is described by Farrar and others, *Company and Securities Law in New Zealand*:[81]

> [The Securities Act] was introduced in the wake of the collapse of the Securitibank group and the losses suffered by a large number of small retail investors. It is based on investor protection through disclosure. In particular, it is based on the premise that the investing public is entitled to the disclosure of sufficient information on which to make an informed decision. …
>
> Whatever type of security is offered, the investor purchases a claim to future cash flows. This claim to future cash flows, which is often uncertain, is usually accompanied by a set of rights. … The intangible nature of such interests makes their offer particularly vulnerable to fraud or over optimism by their promoters, be it innocent or not.

[273] As reflected in the long title to the Act, its purpose was to consolidate and amend the law relating to the offering of securities to the public and to "extend the application thereof". As explained in *Morison's Company and Securities Law:*[82]

> … For the purposes of any new legislation a definition of "security" was required which would cover more than merely shares and debentures, but which would allow a degree of precision over the way in which the word "security" was used and understood in commercial practice.

[274] Part 2 of the Act regulates the offer and allotment of securities to the public. By virtue of s 33(1), no security shall be offered to the public for subscription, by or on behalf of an issuer,[83] unless the offer is made in, or accompanied by, a registered prospectus, or authorised advertisement, or investment statement. Where a debt security is offered to the public, the issuer must appoint a person as trustee in respect of the security and register a trust deed.[84] If there is no registered prospectus, securities cannot be allotted.[85] Any allotment which contravenes the Act in this

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81 John Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008) at 986–987.

82 Cathy Quinn and Peter Ratner *Morison's Company and Securities Law* (online looseleaf edition, LexisNexis) at [6.1].

83 An "issuer" is defined by s 2 of the Securities Act 1978 as "… the person on whose behalf any money paid in consideration of the allotment of a security is paid."

84 Securities Act, s 33(2).

85 Securities Act, s 37(1).

respect is invalid and of no effect.[86] The purpose of the Act is to protect the investing public.[87]

[275] It is not in dispute that the Blue Chip products were marketed to the public as investments but, as counsel acknowledged, the critical question is whether the Blue Chip agreements fell within the specific definitions in the Act.

[276] This Court explained the scheme of the Act and the approach to interpretation of the definitions (specifically, the definition of debt security) in *Culverden Retirement Village v Registrar of Companies*:[88]

> The scheme of the Act appears to cast the net in the widest possible terms, and then to rely on specific exclusions to limit its scope. … We see no reason to read down the wide language of the definition.

[277] Exemptions may be made by regulation,[89] by the Securities Commission[90] or by the Act itself. Of particular significance to this case is the exemption at s 5(1)(b):

> **5 Exemptions from this Act**
>
> (1) Nothing in Part 2 of this Act shall apply in respect of—
>
> …
>
> (b) Any estate or interest in land for which a separate certificate of title can be issued under the Land Transfer Act 1952 or the Unit Titles Act 1972, other than any such estate or interest that—
>
> (i) Forms part of a contributory scheme; and
>
> (ii) Does not entitle the holder to a right in respect of a specified part of the land for which a separate certificate of title can be so issued; or
>
> …

[278] A "contributory scheme" is defined as meaning: [91]

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86 Securities Act, s 37(4).
87 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA) at 391; *Culverden Retirement Village v Registrar of Companies* (1996) 1 BCSLR 162 (CA) at 166; [1997] 2 NZLR 257 (PC) at 261.
88 At 166.
89 Securities Act, s 2D(1).
90 Securities Act, s 5(5).
91 Securities Act, s 2.

Contributory scheme means any scheme or arrangement that, in substance and irrespective of the form thereof, involves the investment of money in such circumstances that—

(a) The investor acquires or may acquire an interest in or right in respect of property; and

(b) Pursuant to the terms of investment that interest or right will or may be used or exercised in conjunction with any other interest in or right in respect of property acquired in like circumstances, whether at the same time or not;—

but does not include such a scheme or arrangement if the number of investors therein does not exceed 5, and neither a manager of the scheme nor any associated person is a manager of any other such scheme or arrangement:

The definitions of "security", "debt security" and "equity security"

[279] The term "security" is broadly defined in s 2D(1) which relevantly provides:

2D Meaning of "security"

(1) In this Act, unless the context otherwise requires, the term **security** means any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person; and includes—

(a) An equity security; and

(b) A debt security; and

(c) A unit in a unit trust; and

(d) An interest in a superannuation scheme; and

(e) A life insurance policy; and

(f) Any interest or right that is declared by regulations to be a security for the purposes of this Act; and

(g) Any renewal or variation of the terms or conditions of any such interest or right;—

but does not include any such interest or right (other than a security referred to in paragraph (f) of this subsection) that is declared by regulations not to be a security for the purposes of this Act.

(2) Where the terms of a security require or allow the subscriber to pay separate amounts of money at different times, each such payment shall, for the purposes of this Act, be treated as payment for the same security as each other payment.

[280] Several points may be made about this definition:

- The expression "interest or right to participate in" is disjunctive.

- The opening language in the definition is broadly expressed, particularly the reference to "other property of any person" which is wide enough to include any form of real or personal property including existing or future debts owed by others.[92]

- Any particular interest or right may be declared by regulation to be a security for the purposes of the Act but may also be exempted from the Act by regulation.

- The definition is non-exclusive.

- Subsection (2) envisages the payment of "money" which is separately defined as including "money's worth".[93]

[281] Mr Campbell submitted on behalf of the investors that, contrary to the view reached by Venning J, if the investment agreements fall within the separate definition of equity security or debt security, then there is no need to ask whether they also fall within the definition of security as described in the opening words of s 2D(1). He accepted however, that, in interpreting the Act, it must be read as a whole in light of its text and purpose.

[282] The relationship between the definitions of "security" and "debt security" has not been considered by the courts. Given the use of the term "security" in the expressions "debt security" and "equity security" and the inclusive nature of the definition of security, one would ordinarily expect some recognition to be given to the opening words of the definition of security when considering whether a particular transaction falls within the definition of debt security or any of the other defined forms of security. In practice, however, the definition of security is so wide that a debt security will usually (if not invariably) also satisfy the definition of security.

[283] The term "debt security" is defined as meaning:[94]

> … any interest in or right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person (whether or not the interest or right is secured by a charge over any property); and includes—

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92 *DFC v Abel* at 626.
93 Securities Act, s 2.
94 Securities Act, s 2.

(a) A debenture, debenture stock, bond, note, certificate of deposit, and convertible note; and

(b) An interest or right that is declared by regulations to be a debt security for the purposes of this Act; and

(c) A renewal or variation of the terms or conditions of any such interest or right or of a security referred to in paragraph (a) or paragraph (b) of this definition;—

but does not include—

(d) An interest in a contributory mortgage where the interest is offered by a contributory mortgage broker; or

(e) Any such interest or right or a security referred to in paragraph (a) or paragraph (c) of this definition that is declared by regulations not to be a debt security for the purposes of this Act.

[284] The investors rely on the words "right to be paid money that is, or is to be, deposited with, lent to, or otherwise owing by, any person ...". They submitted that the reference to money that is "otherwise owing" by any person makes it clear that the right to be paid does not have to arise from the investor depositing money with, or lending money to, the person who is to pay the money. They further submitted that the definition is not confined to rights to be *repaid* money.

[285] This last point is disputed by the developers who submitted that the statutory definitions contemplate the payment of money to the offeror of the securities and the right to the repayment of that money or an equivalent sum by the offeror at a later date.

[286] The term "equity security" is defined as meaning:[95]

… any interest in or right to a share in, or in the share capital of, a company; and includes—

(a) A preference share, and company stock; and

(b) A security that is declared by regulations to be an equity security for the purposes of this Act; and

(c) A renewal or variation of the terms or conditions of any such interest or right or a security referred to in paragraph (a) or paragraph (b) of this definition;—

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95 Securities Act, s 2.

> but does not include any such interest or right or a security referred to in paragraph (a) or paragraph (c) of this definition that is declared by regulations not to be an equity security for the purposes of this Act.

The Culverden case

[287] We have already mentioned *Culverden*. It is of particular interest in the present appeals because it dealt with the application of the Act to agreements for the sale and purchase of land. For reasons on which we later elaborate, we consider the case to be distinguishable from the present. However, it is helpful in terms of explaining some of the concepts central to the application of the Act.[96]

[288] The background facts in *Culverden* are straightforward. The appellant was the owner of a retirement village and offered to the public the opportunity to purchase units in the village. Anyone seeking to purchase a unit was required to enter a sale and purchase agreement which contained a special condition which provided, in effect, that upon the occupier ceasing to occupy the unit:

> (a) The occupier was obliged to sell and transfer the unit to Culverden.
>
> (b) Culverden was obliged to pay to the occupier (or his or her estate) a price fixed according to a formula stipulated in the original agreement for sale and purchase.

[289] As this Court pointed out,[97] the subsequent transfer back to Culverden was not a mere option, but was an obligation imposed on both parties. The Court held that the transaction did amount to a debt security under the Act, focusing specifically on the mutual obligations to re-transfer the unit to Culverden when the original purchaser ceased to occupy the property. The following passage explains the reasoning of the Court:[98]

> We agree that one would not ordinarily expect the term "debt security" to refer to an agreement for the sale and purchase of land. On the other hand, the words "or otherwise owing" are of the widest ambit, and they are not qualified in the definition itself. They are effectively qualified by the provisions of section 5. The scheme of the Act appears to be to cast the net in the widest possible terms, and then to rely on specific exclusions to limit its scope. An agreement for sale and purchase of a dwellinghouse or of other

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96 Some of the relevant definitions have changed since *Culverden* was decided, but the changes are not material for present purposes.

97 At [164].

98 At [166].

> land is excluded, subject to a stated exception, by section 5(b). We see no reason to read down the wide language of the definition.
>
> The issue of debt securities to the public is subject to the provisions of Part II of the Act, including the prospectus and trust deed requirements in section 33. The purpose is to provide protection to the public. There is nothing illogical in applying those requirements to the buy-back provisions, which are an essential part of the package offered by Culverden, and involve a promise by Culverden to pay money to the occupier at a future date. It appears consistent with the purpose of the Act that it should apply to the present situation.

[290] The Court was also satisfied that Culverden was the issuer of the debt security constituted by the occupier's right to be paid money on the eventual re-transfer of the unit. Culverden was the person acting in the promotion or management of the scheme; it was the person allotting the securities by allotting units to the applicants which it agreed to buy back; and it was the person who received the purchase price paid by intending occupiers as consideration for the unit and for the other rights conferred on them under the agreement.[99]

[291] The Court found that it did not matter that only part of the overall transaction was a debt security. It stated:[100]

> There is nothing in the Act to suggest that there must be a discrete contract limited to the offer of a security before the statute can apply. The fact that it was offered as part of a package which also included the unit title cannot assist Culverden.

[292] The Court upheld the finding of the Judge at first instance that Part 2 did not apply to the offer of land. The element of the transaction which constituted the debt security was the offer of money contained in the buy-back provision. The Court said:[101]

> We do not think the exception in respect of land can be read as excluding from the application of Part 2 an offer of debt securities as consideration for the purchase of land. Part 2 does not apply to the land, but it does apply to the debt securities.

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99 At [167].
100 At [167].
101 At [168].

[293] The findings of this Court were upheld by the Privy Council.[102] In delivering the advice of the Privy Council, Lord Nicholls emphasised the point made by this Court that parts of a transaction may fall within the definition of securities under the Act while others may not:[103]

> Financial transactions may be simple or complex. Frequently they involve a bundle of mutual rights and obligations, some to be performed at once and others years later. This does not mean that the Act must apply to the transaction as a whole or not at all. The Act applies to offers of interests or rights which are securities as defined. A single offer may lead to a single transaction containing several components, one or more of which may be within the statutory definition of securities and others not. Separate and quite different securities may be comprised in one contract. The offer of one right in conjunction with other rights and obligations cannot of itself exempt that right from being tested against the statutory definitions.
>
> Nor, furthermore, does it mean that when so tested the right must be considered in isolation from its actual factual and legal setting. When each component in a transaction is being considered, its position within the framework of the transaction as a whole is material and may be crucially important. Any other interpretation of the Act would emasculate its operation.

[294] While accepting that the Act was not intended to protect ordinary buyers of land, their Lordships did not accept that the purchase of a unit in the retirement village was an ordinary purchase of land to which the buy-back provision was ancillary. Rather, it was viewed as a "cardinal feature" of the transaction.[104] As the Privy Council put it:

> This being so, the repayment right cannot be sheltered behind the s 5(1)(b) exemption as an unexceptional term ancillary to the purchase of an interest in land.

[295] The Privy Council also addressed a submission made to it on behalf of Culverden that the definition of debt security envisaged a transaction whereby the consideration on both sides was an obligation to pay or repay money. In response, their Lordships said:[105]

> Their Lordships incline to the view that this is too narrow a reading. But even by this strict criterion this case falls within the definition. The right acquired under the buy back provision was not created in isolation. It cannot

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102 *Culverden Retirement Village v Registrar of Companies* [1997] 1 NZLR 257.
103 At 260.
104 At 260.
105 At 260.

> be equated with the right of a seller under an ordinary contract for the sale of land. It was a right granted to those who signed the sale and purchase agreement. As already noted, the money agreed to be paid by the appellant to the unit holder under the buy back provision in due course was by way of repayment of money previously paid to the appellant by the unit holder. It was not repayment in the sense of repayment of a loan. But it was payment in the sense of payment back of the same amount, subject to adjustment for charges and inflation.

[296] Their Lordships regarded the statutory consequences flowing from their conclusions as "unexceptional":[106]

> Unit holders are at risk that, having paid the original price to the appellant, the appellant may not be able to honour its repayment and commitment. The right granted to the unit holder under the buy back provision is a debt security. The appellant is the issuer of that security: the buy back right is granted by the appellant in consideration of the original price paid to the appellant.

[297] The Privy Council went on to say that the Act was:[107]

> … intended to afford protection to members of the public who are invited to pay, and do pay, substantial sums of money to the appellant against, in part, its promise to repay all or large part of it in due course.

[298] For present purposes, the key points to be drawn from *Culverden* are:

- Ordinary agreements for the sale and purchase of land are exempted from the application of the Act.
- Transactions may involve a bundle of mutual rights and obligations some of which may constitute securities under the statutory definitions and others may not.
- The offer of one right in conjunction with others cannot of itself exempt that right from being tested against the statutory definitions.
- The position of each component in a transaction is to be considered within the overall framework of the transaction.
- To decide whether one right is ancillary to another involves looking at the substance of the overall transaction and determining the significance of the right in that context.
- The statutory purpose of the Act is to afford protection to members of the public who are at risk that the issuer of the securities may not be able to honour its obligations.
- Their Lordships doubted that the definition of debt security envisaged a transaction whereby the consideration of both sides was an obligation to

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106 At 261.
107 At 261.

pay or repay money but their observations on this subject were strictly *obiter*.

Are the Blue Chip investment agreements debt securities?

[299] It is convenient to address the issues identified above[108] in relation to each of the three types of Blue Chip investment agreements. The focus is on whether the agreements constituted an offer of debt securities but we also consider an alternative argument that one element of the JVAs constituted an equity security. We were not asked by the appellants to determine whether any of the investment offerings by Blue Chip amounted to participatory securities.

The JVAs

[300] The JVAs were used for both the Greenstone and TWL developments. They were of some complexity but their key features for present purposes may be summarised:

- The agreements were entered into between the investor and Blue Chip Joint Ventures Ltd (BCJVL).
- The purpose of the JVA was to enable each joint venture party to engage in the business of owning and renting residential property.
- A company was to be incorporated to hold all of the joint venture property as bare trustee for the joint venturers, the investor being entitled to hold all the shares in the company.
- The joint venture property was to comprise the unit and chattels and such other property as might be acquired.
- Each joint venture party was to own a share in the joint venture assets as tenant in common with the other in proportion to the initial contributions of each: 75 per cent for the investor and 25 per cent for BCJVL.
- The initial contributions were defined.[109] The investor's initial contribution was the total purchase price of the property, including all borrowings and a contribution towards costs and disbursements. The initial contribution from BCJVL was arranging the loan, indemnifying the joint venture and the investor against any liability for operating cash shortfall (intended to cover all interest and other costs in excess of rent recovered) and a contribution towards the costs and disbursements of the joint venture. BCJVL agreed to pay monthly into the investor's bank account a sum equivalent to the principal and interest on the investor's

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108 At [270].

109 See [34]–[35] above.

borrowings for the purpose of the acquisition.

- The initial contributions were to be paid to the company to be incorporated which would apply the money in completing the purchase of the property and incidental expenses.
- In consideration of the investor assuming responsibility for all the borrowings, BCJVL agreed to pay to the investor a procurement fee each fortnight.
- There was no obligation to sell the property acquired. The joint venture was to continue until an undefined termination date unless the property was earlier sold or the joint venturers resolved by special resolution to terminate the joint venture.
- In the event of the unit being sold, the net proceeds (after repayment of borrowings and costs of sale) were to be divided as to 95 per cent to BCJVL and five per cent to the investor. That was required despite the investors having paid the deposit and borrowed the remainder of the purchase price. If the joint venture was terminated without the property being sold, the position was less clear. In that event, cl 12.7 provided that ownership of the property was to be transferred to the parties as tenants in common while cl 9.1.2 appeared to assume that on termination, the property would be sold with the net proceeds of sale of the land and buildings being paid to the investor and the net proceeds of sale of the chattels being paid to BCJVL.

[301] The description of the JVA does not fully explain the extent of the contributions made by the investors under the JVAs. The typical contributions are best demonstrated by the "pro forma" statement of account which Blue Chip sent to individual investors. We set out an example:

Re: 8.2/70-74 Albert Street, Auckland Central, Auckland

		Debit	**Credit**
Paid by [Client] to cover deposit as per Sale and Purchase Agreement			$67,050.00
Paid by [Mortgagee] – loan advance for purchase			$379,950.00
To [Vendor] – deposit as per Sale and Purchase Agreement		$67,050.00	
Paid to the Joint Venture			
Brokerage Fee – 2.95% of Purchase Price	$13,777.00		
Working Capital Facility	$43,775.00		
Registered Property Valuation Cost	$400.00		
JV Agreement Fee	$3,500.00		
Chattels & Fit-out Valuation Cost	$350.00		
On A/c of legal fees	$2,700.00		
Contingencies on Legal's	$1,500.00		
Trust Formation Costs	-		
Bare Trustee Incorporation Fee	$350.00		
Furniture Pack	$20,000.00	$86,352.00	

Clients Initial Contribution (Excluding deposit on settlement)		$86,352.00
To Vendor balance to settle property	$379,950.00	
Total Investment cost	$533,352.00	$533,352.00
Balance payable by client		$379,950.00

[302] It is evident from this statement that the payments made by the investor to Blue Chip constituted three main elements:

- The deposit under the relevant SPA (in this case $67,050) which was passed on by Blue Chip to be held in the trust account of the solicitor for the developer.
- The amount borrowed by the investor to complete the purchase (in this case $379,950).
- A further sum (in this case $86,352) paid to the joint venture. This was in addition to the amount required to settle the purchase.

[303] It was submitted on behalf of the investors that the JVAs constituted an offer of both equity securities (in the company to be incorporated) and debt securities. The Judge did not accept the submission that the acquisition of shares in the joint venture company would constitute an equity security. In essence, he found that the underlying substance of the joint venture was the purchase of an interest in land and that the company to be incorporated was no more than a vehicle to hold the land as bare trustee for the joint venture partners.

[304] The appellants submitted that a substance over form approach was not available in determining whether the shares were equity securities. We agree that it was not open to the Judge to overlook the company structure and focus on the purpose of the company as a bare trustee for the respective interests of the joint venturers in the purchase of the apartment and associated chattels. The shares in the company fall squarely within the definition of equity security.

[305] But the more substantial difficulty with the appellants' case, as Mr Neutze submitted, is that there was no offer to the public for subscription in terms of s 33. The JVA provided that the investor was entitled to all the shares in the company to be incorporated and to appoint the directors of the company.[110] The shares were not purchased from Blue Chip or issued by a company that was offering them to the

[110] Clauses 7.1 and 11.6 of the JVA.

public for subscription. They were issued to the investor by a company incorporated by the investor himself or herself.

[306] As to whether the JVAs constituted a debt security, Venning J found, despite some reservations, that the payments made under the JVAs could come within the statutory definition of a debt security. He acknowledged the argument on behalf of the investors that the relevant Blue Chip entity could be seen to be an issuer,[111] because the investor was required to pay substantial sums of money to the Blue Chip entity, quite apart from the deposit on the apartment paid to the vendor/developer. To that extent, the Judge was prepared to accept that the Blue Chip entity could be seen to be, in relation to the JVAs, a person "on whose behalf any money paid in consideration of the allotment … was received".[112]

[307] Mr Campbell supported that conclusion, submitting that the investor's rights to interest payments and procurement fees were in consideration of money that the investor had paid to Blue Chip Joint Ventures Ltd.

[308] Mr Neutze submitted that a debt security would ordinarily involve the payment or loan of money by an investor to the issuer of the security with a right to repayment. He supported that by reference to academic criticism of the *Culverden* decision.[113] Mr Neutze noted that Professor Watts had contended that the phrase "the right to be paid money" should be construed ejusdem generis with the references to deposits and loans and the other forms of security mentioned in the definition of debt security. He submitted that a broad approach to the expression "or otherwise owing by" could expand the scope of the Act well beyond Parliament's true intention. We note too that Farrar states that the right to repayment is an essential element of a debt security.[114]

[309] While we are conscious of the need to ensure that the protective purpose of the Act is not diminished by adopting an inappropriately narrow view of what

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111 As defined in s 2 of the Securities Act.

112 At [268] of the *Greenstone* judgment.

113 Peter Watts "Company Law" [1996] NZ Law Review 275; [1997] NZ Law Review 319; Francis Dawson "Securities Regulation" [2002] NZ Law Review 277 at 281.

114 John Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008) at 1015.

constitutes a debt security, we must also have regard to the risk of adopting an approach which is too broad. That would have the potential for unintended consequences and could create undesirable commercial uncertainty as to the requirements of the Act.

[310] Mr Neutze made a further point on behalf of the developers. He submitted that the Act contemplated multiple security holders of the same type. He supported that submission by reference to the provisions in the Act and Regulations requiring the appointment of a trustee in respect of the security.[115] While we accept that the Act will ordinarily apply to multiple security holders of the same type, it may also apply to an offer to the public of a single security. It would be rather artificial if the Act could not apply in a case such as the present where Blue Chip offered to the public the opportunity to purchase individual units in a multi-unit development under broadly similar terms.

[311] The starting point must be to read the Act as a whole in light of its text and purpose. As already noted, the purpose of the Act is the protection of the investing public against the risk that the issuer of a security may not be able to fulfil the contractual obligations it assumes under the security. The interpretation and application of the Act is to be approached from the investor's viewpoint.[116] The principal means by which the Act achieves its objective is to insist that adequate and accurate information be provided to subscribers through a prospectus or by other means, such that investors may make informed decisions and better appreciate the risks they may be taking. In the case of debt securities, the supervision of a trustee under the terms of a registered trust deed is also required. The Act seeks to enforce the obligations upon the issuers of securities by rendering invalid any allotment of a security offered to the public without a registered prospectus or authorised advertisement and by a range of substantial civil and criminal penalties which may be imposed upon the issuer and, in the case of a company, its directors.

[312] While, as *Culverden* attests, the definitions of security and debt security are widely expressed, we do not consider that Parliament intended the definition of debt

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115 Securities Act, ss 33(2) and 45(2); 5th Schedule to the Securities Regulations 1983, cls 1 and 3.

116 *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 at 629 per Fisher J.

security to embrace commercial transactions which do not involve some element of repayment of money subscribed by investors. *Culverden* may be regarded as an unusual application of the Act but, even there, the element of the transaction found to bring the transaction within the concept of debt security in the Act was essentially a repayment obligation. The occupier had paid for the unit and was entitled to receive the return of the price (with some adjustments) at the end of the occupancy.

[313] There is force in Mr Neutze's point that the expression "any interest or right to be paid money that is … otherwise owing …" should take colour from the other terms included in the definition including the reference to deposits, loans, debentures, debenture stock, bonds, notes, certificates of deposit and convertible notes. Each contains the underlying concept of a payment by a subscriber to an issuer with a right to repayment of the amount contributed, usually with some additional element of interest, profit or other pecuniary advantage. We also consider that the opening words of the definition of debt security are relevant. The expression "otherwise owing" takes colour from the preceding terms "deposited with" and "lent to". We further observe that the Act applies only to offers of securities for "subscription".[117] In relation to a debt security, a subscription will normally involve depositing or lending money in exchange for the issue of a security evidencing the right to be repaid the money with whatever return is promised.

[314] The fact that the investors paid money and also assumed obligations under the JVAs in return for Blue Chip Joint Ventures Ltd assuming responsibility for interest on borrowings and payment of procurement fees does not, of itself, bring the JVAs within the definition of debt securities. We keep in mind that the legislature must have intended some limit on the definition of debt security given the residual nature of the definition of "participatory security".[118]

[315] There are several important respects in which the JVA transactions can be distinguished from *Culverden*. The first point of distinction is that Culverden was both the issuer of the security and the vendor of the units in the retirement village. Here, the relevant Blue Chip entity entered the investment agreements but was not

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[117] Securities Act, s 33(1) and definition of "subscribe" in s 2.

[118] Defined by s 2 as meaning any security other than an equity or debt security, a unit in a unit trust, an interest in a superannuation scheme or a life insurance policy.

the vendor of the apartments. The investors were contracting separately under the SPAs with the developers on the one hand and with Blue Chip on the other in relation to the JVAs. Secondly, although the investors paid significant sums to BCJVL beyond the deposits payable under the SPAs, BCJVL did not assume any obligation to repay those monies. The relevant obligations BCJVL assumed were to meet any shortfall of interest (after allowing for rental received from the lease of the apartments) and the obligation to pay the procurement fees. Thirdly, although the evidence established there was an intention to sell the apartments after a four year period, Blue Chip did not assume any obligation to do so. Finally, in the event of a sale of the apartment, the investors were only entitled to a very minor (five per cent) share in the net proceeds of sale after repayment of borrowing and the costs of sale. Any return from a future sale was very much dependent upon the continuation of a buoyant property market.

[316] We conclude that the JVAs do not constitute debt securities for the purposes of the Act. In the absence of any repayment obligation binding on Blue Chip, the assumption on each side of particular contractual obligations under the JVAs was not sufficient to bring them within the purview of the Act.

The PIP agreements

[317] The terms of the PIP agreements were virtually identical for each development. We have described them in some detail above[119] including terms of the Blue Chip brochures relevant to this investment product. There is no need to repeat this material here.

[318] For present purposes, the essential features of the PIP agreement were:

- The investor granted to a Blue Chip entity the option to accept the deed of nomination and thereby assume the rights and obligations as purchaser under the SPA.
- The Blue Chip entity agreed to pay the option fee to the investor.
- If the option was exercised then the Blue Chip entity was to assume responsibility under the SPA and agreed to reimburse the investor for the deposit.

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[119] At [40]–[48].

- If the option was not exercised by Blue Chip, then the investor was obliged to settle the SPA and the Blue Chip entity agreed to pay the investor's reasonable costs associated with the settlement of the property, including interest on the borrowing.

[319] Mr Campbell submitted that the right to be paid the option fee, and the right to be reimbursed either for the deposit (if the option was exercised) or the reasonable costs of settling (if the option was not exercised), are rights "to be paid money that is, or is to be ... otherwise owing, by any person" in terms of the definition of debt security. A conclusion that these rights amounted to debt securities would, he submitted, be consistent with the purpose of the Act since the Blue Chip entity was promising to pay money to the investor at a future date and the investor was at risk that the payment might not be honoured.

[320] The Judge found that the PIP agreements did not amount to debt securities.[120] Venning J reasoned that the only money paid under the PIP agreement was the deposit. This was not paid to Blue Chip but was paid to or for the benefit of the developer/vendor under the SPAs. The Judge observed that Part 2 of the Act applies only to the allotment of securities by an issuer. Here there was no relevant issuer of debt securities since Blue Chip was not (in terms of the statutory definition) a "person on whose behalf any money paid in consideration of the allotment of the security is received".

[321] The Judge went on to note that the option fee was the only payment that the Blue Chip entity was obliged to pay regardless of whether the option was exercised.[121] The payment of the purchaser's settlement costs was conditional upon the non-exercise of the option while the obligation on the Blue Chip entity to reimburse the amount of the deposit was conditional upon Blue Chip exercising the option. The Judge considered, taking a broad view, that the reference in the definition of debt security to "money that is, or is to be ... otherwise owing by any person" might include conditional payments and that those rights could arguably come within the definition. But he considered these rights could not be categorised as debt securities in the first place.

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120 See, for example, at [278]–[285] of the *Greenstone* judgment.
121 At [285] of the *Greenstone* judgment.

[322] Mr Campbell submitted there were two related errors in the Judge's analysis. First, it was the grant of the option (not the deposit) which was the consideration for the right to be paid the option fee and the right to be reimbursed for the cost of borrowing if the option was not exercised. Secondly, the Judge had overlooked that "money's worth" was included in the definition of money. Mr Campbell submitted that the grant of the option was money's worth and was treated as such by the investor and the Blue Chip entity under the PIP agreements. The parties to those agreements treated the grant of the option as having a money equivalent, namely, the amount of the deposit paid by the investor to the vendor. The option fee was calculated by applying an interest rate to that money equivalent. Effectively, the Blue Chip entity was saved from having to fund the deposit for the period between the time it was paid by the investor and the time when the Blue Chip entity exercised the option.

[323] We are unable to accept the submissions made on behalf of the investors on this point. For the reasons already discussed in relation to the JVAs, we do not consider that the PIP agreements fall within the definition of debt security. The payment of the deposit under the SPA was the only payment made by the investor and this sum was paid to or for the benefit of the developer as vendor under the SPA. No other funds were paid by the investors to any Blue Chip entity.

[324] We accept that the grant of the option in favour of the Blue Chip entity could be regarded as consideration for the promise to pay the option fee to the investor and that it is possible that the grant of the option could be considered to be money's worth as submitted. The investors' argument in this respect is supported by the definition of "subscribe"[122] which includes a purchase or contribution "whether by way of cash *or otherwise*" (emphasis added).

[325] But, consistently with our conclusions in relation to the JVAs, there was no obligation by Blue Chip to repay money or money's worth contributed by the investors. The payment of the option fee was, at best, a return to the investor for the grant of the option. The other obligations Blue Chip assumed depended upon whether the option was exercised by Blue Chip. Its obligation was either to

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[122] Securities Act, s 2.

reimburse the investor with an amount equivalent to the deposit (which had been paid to or for the benefit of the developer/vendor) or to reimburse the investor for the cost of any necessary borrowing to settle the purchase if the option was not exercised. There was no binding obligation by an issuer in terms of the Act to repay to the investor any money or money's worth that may have been provided by the investor. We conclude that the rights identified by Mr Campbell are not such as to fall within the definition of debt security.

[326] For completeness, we should mention an alternative argument raised by Mr Neutze. He submitted that the obligations on the part of Blue Chip were conditional, depending on whether the option was exercised. As such, he submitted that there was no "right to be paid money that is, or is to be ... otherwise owing ..." in terms of the definition of debt security. It is not strictly necessary for us to determine this issue but we consider that the expression "is to be owing" could be construed as including money owing in the occurrence of certain contingencies. We note, for example, that convertible notes are debt securities even though the ability of the issuer or the holder to convert them to shares would mean that the repayment obligation applies only if the conversion option is not exercised.

The PAC agreement

[327] The PAC agreements are relevant only to the Icon development. The essential terms are described above.[123] The investors made the same arguments in relation to the PAC agreements as they did for the PIP agreements. It was submitted that the right to be paid the call option fee, the right to be reimbursed an amount equivalent to the deposit (if either option was exercised) were rights "to be paid money that is, or is to be ... otherwise owing, by any person" in terms of the definition of debt securities.

[328] The Judge found that the PAC agreement was not caught by the provisions of the Act.[124] His reasoning was similar to the approach he adopted for the PIP agreements: the Blue Chip entity which contracted with the investors under the PAC agreements was not an issuer of any security since the deposit was paid to the

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123 At [50]–[53].

124 At [237]–[241] of the *Icon* judgment.

vendor/developer for its benefit and not for the benefit of the relevant Blue Chip entity; and the option fee was payable by the Blue Chip entity under the PAC agreements without any corresponding obligation on the part of the investor to invest monies with the Blue Chip entity.

[329] We agree with the conclusion reached by the Judge for the reasons he gave and for the additional reason that there was no obligation on the part of the relevant Blue Chip entity to repay to the investor any money or money's worth that may have been subscribed by an investor in terms of the Act. The obligation to pay the one-off call option fee was given in consideration of the grant of the option in favour of the Blue Chip entity. As in the case of the PIP agreement, it may be that the grant of the option could be considered to be money's worth as Mr Campbell submitted. But, in the same way as we have concluded for the PIP agreements, there was no obligation on the part of the Blue Chip entity to repay any money subscribed by the investor to the issuer of a security. The obligation to pay the investor an amount equivalent to the deposit when either of the options was exercised did not amount to the repayment of an issuer of funds subscribed to it by an investor.

[330] We conclude that the PAC agreements were not debt securities for the purposes of the Act.

Lease arrangements

[331] It will be recalled that the lease arrangements were offered to investors subject to the terms of a lease under which the rent was to be guaranteed. It was submitted on behalf of the investors that the offer of the rental stream under the leases fell within the definition of debt securities as "a right to be paid money that is, or is to be ... otherwise owing by, any person". Mr Campbell frankly acknowledged that this was a difficult argument which was advanced only if the Blue Chip investment agreements were not found to be debt securities.

[332] The Judge dealt with this issue in the context of mainstream investments which are not directly relevant to the issues before us but, as Mr Campbell pointed out, all the SPAs at issue involve the sale of units subject to a lease. The Judge

found[125] that unlike *Culverden* there was no buy-back obligation on the part of the lessee requiring it to repay money to the investor; the obligation to pay rental arose under the lease itself; the lease was initially between the developer as lessor and the lessee; the right to the rental stream under the lease did not pass by virtue of any contract or offer of security between the investor and the lessee but rather by operation of law.[126]

[333] We agree with the conclusion reached by the Judge substantially for the reasons he gave. The lease was simply part and parcel of the SPA, the purchase price for which was fixed by the terms of the underwrite agreements. The right to the income stream from the lease could not in any sense be regarded as a repayment of funds by the issuer.

Does the exemption under s 5(1)(b) of the Securities Act apply in respect of the Blue Chip investment agreements?

[334] If, contrary to our view, the Blue Chip investment agreements are securities, it is necessary to consider whether they are exempted under s 5(1)(b) of the Securities Act.

The JVAs

[335] The Judge found that, even if the Blue Chip agreements amounted to debt securities, they were exempted by s 5(1)(b) on the basis that they were "in respect of … any estate or interest in land for which a separate certificate of title can be issued …" under the relevant legislation.[127] The argument in the High Court for the investors, repeated in this Court, was that the JVAs could not be characterised as merely ancillary to an ordinary purchase of land. Rather, the rights under the JVAs to interest payments and a procurement fee were central features of the joint venture product. It was submitted that they were the means by which the Blue Chip product was to provide a rate of return on the deposit. None of these terms, it was said, were

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125 See, for example, at [244]–[249] of the *Greenstone* judgment.
126 Property Law Act 2007, s 233.
127 At [269]–[273] of the *Greenstone* judgment.

found in an ordinary purchase of land. Reliance was placed on the conclusion reached by the Privy Council in *Culverden* that:[128]

> The repayment right, far from being ancillary, is a cardinal feature of the transaction. This being so, the repayment right cannot be sheltered behind the s 5(1)(b) exemption as an unexceptional term ancillary to the purchase of an interest in land.

[336] Mr Neutze submitted that the words "in respect of" in s 5(1)(b) were words of the widest import. He cited a number of authorities in support of that submission including the observations of Dickson J delivering the judgment of the Supreme Court of Canada in *Nowegijick v The Queen:*[129]

> The words "in respect of" are in my opinion words of the widest possible scope. They import such means as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[337] It was submitted for the developers that an offer of a security which is in respect of an estate or interest in land is one which refers to or relates to an estate or interest in land, unless the exclusionary provisions of s 5(1)(b)(i) and (ii) apply (which was not suggested here). Mr Neutze further submitted that the case for the investors was built upon a misreading of the *Culverden* case and the exemption.

[338] There can be no doubt that the exemption in s 5(1)(b) applies to the SPAs because, upon their execution, they gave rise to an equitable interest in the land in favour of the investors. The rationale for the exemption in respect of estates or interests in land appears to be that investors purchasing an interest in land have available to them the tangible security of the land and the protections available to them under the ordinary law of contract.[130] The special protections of the Act appear to have been considered unnecessary for those reasons. That conclusion is consistent with the exemptions in s 5(1)(c) and (d) relating to any proprietary right to chattels or an interest in the share capital of a flat or office owning company (as defined in s

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128 At [259]–[260].

129 *Nowegijick v The Queen* [1983] 1 SCR 29.

130 John Farrar (ed) *Company and Securities Law in New Zealand* (Brookers, Wellington, 2008) at 987.

121A(1) of the Land Transfer Act 1952). The suggested rationale is also consistent with the unavailability of the exemption in the case of contributory schemes.[131]

[339] The SPAs involved here were separate contracts between the investors and the developers capable of operating wholly independently from the Blue Chip investment agreements. These facts immediately distinguish the present case from *Culverden*. The Judge concluded:[132]

> The substance of the transaction created by the joint venture agreement is the purchase and ownership of the apartment by the joint venture partners. The repayment of the borrowing costs and the payment of the procurement fee are part of the joint venture agreement, which is directed at the purchase of an interest in land. The obligation to pay the procurement fee arises from payment of the deposit on the land. The obligation to pay interest, which is conditional, only arises when the land is purchased. The features that the plaintiffs characterise as debt securities can properly be said to be ancillary to the purchase of an interest in land, as opposed to ancillary to the agreement for sale and purchase, for example.

[340] We agree in part with the Judge on this point. In essence, the purpose of the JVAs was to enable the joint venturers to engage in the business of owning and renting residential property. The JVAs spelt out the obligations of the joint venturers in relation to their respective contributions and their obligations in relation to the purchase. These included the important issue of responsibility for the costs of borrowing necessary to effect the purchase; defining the respective shares of the joint venturers; and prescribing what was to happen in the event of a sale of the unit or termination of the joint venture.

[341] However, we are unable to agree with the Judge that the obligation on Blue Chip to pay the procurement fee should be treated as merely ancillary to the SPAs, or, to put it another way, that it was an unexceptional feature of an agreement in respect of an estate or interest in land. From the point of view of the investors it was an essential or cardinal feature since they had no expectation of anything but a very minor share of any capital gain and were undoubtedly attracted to the prospect of receiving the procurement fee payable to them on a fortnightly basis to supplement their income. The receipt of the procurement fee was the only material return they

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131 Securities Act, s 5(1)(i) and s 5(1)(c).

132 At [272] of the *Greenstone* judgment; and at [290] of the *TWL* judgment

could expect to receive from the investment and must be regarded as being of the essence of the investment. It was, we think, an unusual feature of the transaction and not one which could be regarded as a normal element of an SPA or a joint venture in respect of an estate or interest in land.

[342] It is not necessary to consider separately the application of the exemption to equity securities, given our earlier finding that no equity securities were offered to the public for subscription. But if such an offer had been made, we do not consider it would be open to the issuer to rely on the exemption under s 5(1)(b) simply because the company in which shares were offered, owned or was to acquire, property for which a separate certificate of title could be issued.

The PIP agreements

[343] As to the exemption under s 5(1)(b), the Judge concluded that the PIP agreements were, in any event, exempt from the provisions of the Act in that they amounted to agreements "in respect of any estate or interest in land ...". [133] The Judge noted that the option in favour of the Blue Chip entity was to purchase an interest in land. [134] The option fee was also in respect of an interest in land since (as the Judge explained) it was paid to obtain an interest in land. As such, the grantee of the option obtained an equitable interest in the land.[135] The Judge also considered that the right to be reimbursed for reasonable settlement costs if the option was not exercised, related to the acquisition by the investor of an interest in land. Finally, the obligation to reimburse the deposit if the option was exercised, was also payable in respect of an estate or interest in land since it was paid in exchange for the transfer by the investors of their interest in the land.

[344] Mr Campbell submitted that, in terms of *Culverden*, the terms of the PIP agreements could not be regarded as ancillary to the purchase of an interest in land and that the exemption under s 5(1)(b) did not apply.

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133 See, for example, [287]–[290] of the *Greenstone* judgment.
134 At [283].
135 Referring to *Mackay v Wilson* (1947) 47 SR (NSW) 315 (NSWSC).

[345] The resolution of this issue is not clear-cut. On one view, it is entirely possible to conclude that the relevant obligations on the part of the Blue Chip entity are in respect of an estate or interest in land. The obligation to pay the option fee is expressly conditional on the investor entering the SPA for the relevant apartment and the fee is payable in return for the grant of an option to acquire an estate or interest in land; the option is itself an interest in land; and the payment of an option fee is not an unusual feature. On the other hand, the payment of the option fee could be regarded as a cardinal and not merely an ancillary feature of the PIP agreement in terms of *Culverden*.

[346] The obligation to pay reasonable settlement costs to the investor if the option is not exercised might also be regarded as falling within the exemption on the footing that it relates directly to the acquisition of an interest in land. However, it could also be regarded as an essential or cardinal feature of the PIP agreement from the investor's viewpoint and, unlike the option fee, is not a usual feature of an option to purchase. Similar considerations apply to the obligation on Blue Chip to pay to the investor an amount equivalent to the deposit if the option was exercised by Blue Chip.

[347] The scope of the exemption under s 5(1)(b) must be determined not only by the language used but also by the purpose of the provision. When the Privy Council in *Culverden* spoke of ordinary purchases of land, it was, we think, referring primarily to normal agreements for sale and purchase of land with no unusual features. In such a case, the exemption would apply. On the other hand, if the agreement for sale and purchase itself, or some related agreement, contained an unusual feature which was not merely ancillary but was an important or cardinal feature of the transaction from the investor's point of view, then the exemption would not apply. This approach would serve to protect the investor against unusual risks not normally associated with an ordinary agreement for sale and purchase of land. *Culverden* was such a case. The buy-back provisions, although associated with an agreement for sale and purchase of land, were an unusual and important part of the overall arrangements.

[348] We see no reason not to apply a similar approach to the options granted by the investors to the relevant Blue Chip entity under the PIP agreements. On this

basis, the obligation to pay the option fee, although an important feature of the transaction, could not be regarded as unusual. We take a different view, however, in relation to the payment of reasonable settlement costs if the option was not exercised and the obligation to reimburse the investor for the deposit paid if the option was exercised. These were both critical and unusual aspects of the PIP agreements.

[349] We conclude that the exemption under s 5(1)(b) applies to the option fee but not to the other identified obligations on the part of the relevant Blue Chip entity.

The PAC agreements

[350] The Judge found the relevant provisions of the PAC agreements were exempt from the effect of Part 2 of the Act by virtue of s 5(1)(b).[136] He held that the put and call option created, at the least, an equitable interest in the land in favour of the relevant Blue Chip entity which clearly fell within s 5(1)(b). The obligation to reimburse an amount equivalent to the deposit was an obligation arising on part of the Blue Chip entity in consequence of the acquisition by the latter of an interest in land following the exercise of the option. (For completeness, we note here that two of the investors who signed PAC agreements did not provide a cash deposit but took the opportunity to satisfy their deposit obligations by way of a bond.)

[351] We conclude for the same reasons we have adopted for the PIP agreements, that the obligation to pay the option fee is exempt under s 5(1)(b) but the obligation to reimburse an amount equal to the deposit is not exempt.

The lease

[352] There could not, we think, be any doubt, that the lease was also exempted under s 5(1)(b) as an estate or interest in land for which a separate certificate of title could be issued. Mr Campbell submitted there was a distinction between the lease itself and the offer of the lease rental stream, but we agree with the conclusion of the Judge that the rental stream under the lease was plainly to be regarded as being "in respect of ... any estate or interest in land in terms of s 5(1)(b)".[137]

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136 At [240] of the *Icon* judgment.
137 See, for example, at [250] of the *Greenstone* judgment.

The consequences of any illegality under the Act; severability and tainting issues

[353] Since we have found that neither the SPAs nor the Blue Chip agreements are in breach of the Act, it is not strictly necessary for us to consider these issues but we do so, against the possibility that our findings in that respect are wrong.

[354] As Mr Campbell submitted, if the SPAs and the relevant Blue Chip agreements are subject to Part 2 of the Act, then any allotment in contravention of s 37(1) is invalid and of no effect by virtue of s 37(4). The "allotment" consists of the entry into the agreements that gave rise to the securities.[138]

[355] As Mr Campbell further submitted, a "demarcation" issue arises if the SPAs do not amount to securities or are exempt from Part 2 of the Act. In that case, if one or more of the relevant Blue Chip agreements is invalidated by s 37(4), the issue arises as to whether the Blue Chip agreement includes the SPAs as related agreements. If the SPAs are interdependent with the Blue Chip agreement (or as it is sometimes put, the SPAs cannot be severed from the relevant Blue Chip agreement), the SPAs "will be void, not because they were themselves allotments but because their validity had been dependent on the validity of the allotments".[139]

[356] Counsel submitted that the term "interdependent" in relation to illegality under the Act (or otherwise) is used more broadly than the sense in which this concept was used to support the interdependence argument we have already discussed. Counsel submitted that, in the present context, it extended to a situation where the two agreements were so closely connected that it was unrealistic to sever one from the other. By way of example, counsel referred to the decision of the Court of Appeal of New South Wales in *Hurst v Vestcorp Ltd.*[140] In that case, an issue arose in the context of a tax scheme for investment in a film production. The investors entered into an investment agreement with the producer of the relevant film and Vestcorp, who promoted the scheme, lent money to the investors to finance their investments. At issue was the enforceability of the loan agreements. The Court held

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138 *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA); *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 (HC) at 626; and *Braemar Lodge (2004) Ltd v Owers* [2010] NZCA 300.

139 Per Fisher J in *DFC Financial Services Ltd v Abel* at 627.

140 *Hurst v Vestcorp Ltd* [1988] 12 NSWLR 394.

that the investment was offered in breach of the relevant securities law so that the investment agreement was illegal and unenforceable. The Court held further that the loan agreement could not be severed from the investment agreement and was also unenforceable.

[357] *Hurst v Vestcorp* was distinguished by Fisher J in *DFC Financial Services v Abel*. A promoter had, in breach of the Act, offered an interest in a bloodstock partnership without a registered prospectus. The promoter also arranged loans for the investors from a third party, DFC. In arranging those loans, the promoter acted as agent for the investors and not for DFC. It was held that the loan agreements were not affected by the illegality of the partnership agreement. With reference to *Hurst*, Fisher J observed:[141]

> There are special reasons for invalidating loans to investors where the loans emanate from promoters. In those circumstances the investment and the loan may or may not be recorded on different pieces of paper but they record essentially one transaction between the same parties.

Fisher J's analysis was adopted on similar facts by this Court in *Abbott v UDC Finance Ltd.*[142]

[358] We do not have any difficulty in reaching the conclusion that the SPAs and their associated lease agreements are clearly independent of the Blue Chip agreements and no question of severability really arises. They were entered into between the investors and the developers who were third parties acting independently from Blue Chip. They were effective in their own terms and were not dependent on the Blue Chip agreements. We rely on our previous findings in relation to the interdependence issue.[143]

Were the SPAs tainted by any illegality in relation to the Blue Chip agreements?

[359] The final argument relied upon by the investors is that, even if the SPAs are regarded as severable from the Blue Chip agreements, the SPAs are subject to the

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141 At 631.
142 *Abbott v UDC Finance Ltd* [1992] NZLR 405.
143 See [255]–[264] above.

common law principle of tainting if, contrary to our findings, the Blue Chip agreements are illegal. The basic principle is set out in *Burrows Finn and Todd*:[144]

> ... A contract may be tainted by illegality if it was designed to assist or promote a different contract which was in breach of a statute.

[360] Two things must be shown. First, the contract must be for the purpose or object of assisting or promoting the illegal transaction. Secondly, it must be shown that the parties to the contract knew of the illegality of the other transaction.[145]

[361] The Judge found that the investors had not established either of the two matters identified to establish tainting in terms of the authorities cited.[146] We can dispose of this issue quite briefly on the facts. First, there is no evidence that the SPAs had as their purpose or object the assistance or promotion of any of the Blue Chip sales agreements. If anything, it was the Blue Chip sales agreements which were designed to assist the completion of the SPAs. Secondly, we have already found that neither Greenstone nor TWL had any actual, constructive or imputed knowledge of the detail of the Blue Chip sales agreements.

[362] The position with Icon is different because we have found that Icon had constructive knowledge through Mr Bryers of the detail of the PAC agreements at issue in that appeal. We think it is reasonable to conclude that Mr Bryers had constructive knowledge that the Blue Chip investment products were not accompanied by a prospectus or authorised advertisement. However, there is no evidence that he knew, or ought to have known, that Blue Chip was thereby breaching the Act. It is, of course, somewhat artificial to be considering this issue when we have already found there was no illegality.

[363] The question arises in the case of Icon whether the knowledge required for tainting purposes is merely knowledge of the facts that constitute the illegality or whether there must be actual or constructive knowledge that the agreement at issue is

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144 At [13.5].

145 *Portland Holdings Ltd v Cameo Motors Ltd* [1996] NZLR 571 (CA) at 578, 581–582 and 583; *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481 (HC) at 676.

146 At [292]–[334] of the *Greenstone* judgment; at [311]-351] of the *TWL* judgment; at [242]–[284] of the *Icon* judgment.

illegal. In *Spector v Ageda,*[147] Megarry J (as he then was) left the issue open. On the facts, the solicitor in question was not only aware of the facts that constituted the illegality but had studied the law of moneylending and Megarry J considered that he knew those facts constituted an illegality if it was necessary to demonstrate such knowledge.[148]

[364] In *Portland v Cameo* McCarthy J was quite clear that knowledge of the illegality, not merely the facts giving rise to that illegality, was required:[149]

> .. But for myself I am not prepared to accept that the appellant must be treated as though it was aware of the illegality surrounding the sale of the car. In actual fact it was not aware. The evidence given by and on behalf of it and the firm of accountants was that, although they knew that the hire purchase agreement was incomplete, they thought that the steps taken to complete it were permissible and that the sale was valid. *Ignorantia juris neminem excusat* no doubt, and it does not lie in the mouth of a party to an illegal contract to claim that he was unaware of the law relating to the illegality to which he is *particeps criminis*: *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; [1960] 1 All ER 177; *J M Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340; [1963] 2 All ER 258. But, as the Privy Council said in the former case, the maxim does not mean that everybody is presumed to know the law. The true proposition means that no man can excuse himself from doing his duty by saying he did not know the law on the matter. Much less, in my view, does [the law] mean that A is necessarily obliged to know that certain things which B has done amount to a breach of a statutory regulation. There is no duty cast on him to be vigilant. In the present case the law required certain action by B and that law was broken by B, not by A; and although A did know of the circumstances which constituted the illegality, I do not think that a person in the position of A must be taken to have known that what B did amounted to a failure to comply with a duty cast on [it] by a regulation, when in truth A did not know that.

[365] North P agreed with McCarthy J and briefly said:[150]

> ... The duty of observing the law rested with the respondent, not with the appellant. The appellant had no way of knowing that the working sheet was not part of the hire purchase agreement. If it had been, all would have been well.

Turner J expressed some reservations about the view expressed by McCarthy J although there was no need for him to go further on the view of the case that he had

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147 *Spector v Agida* [1973] Ch 30.
148 At [45].
149 *Portland v Cameo* at 579.
150 At 583.

accepted.[151] In *Abbott v UDC Finance Ltd* this Court discussed the position of UDC, the lender, in respect of a transaction in breach of the Securities Act by another party:[152]

> .. None of these matters suggests any involvement of UDC other than as a lender. They do not suggest any knowledge on the part of UDC of any breach of the Securities Act. It was submitted that [UDC] should have investigated the proposed borrowers and ensured that the requirements of the Securities Act were complied with in respect of the allotment of interests to them. No basis was suggested for imposing such an obligation, nor was any pleaded. ...

[366] In *Equiticorp v The Crown*, Smellie J did not need to address the issue directly because, on the facts of the case, the Crown, by its solicitors, knew that the use of Equiticorp funds raised potential problems under s 62 of the Companies Act 1955.

[367] We are of the view that the reasoning of McCarthy J in *Portland* is sound and that for the purposes of tainting, it is necessary to demonstrate that the party to the allegedly tainted transaction had actual or constructive knowledge, not only of the facts said to give rise to the illegality in the associated transaction, but also that those facts meant that the transaction was illegal. There is no evidence that Mr Bryers knew of any illegality in the Blue Chip agreements nor any evidence from which it could properly be inferred that he ought to have been aware of any illegality.

[368] We conclude that if there was any illegality through breach of the Act in relation to the Blue Chip agreements, the SPAs were not tainted by that illegality. It might be argued in some circumstances that a regular participant in financial markets such as Mr Bryers ought to have been aware of potential illegality and was at least put on inquiry in that respect. But it needs to be kept in mind that if, contrary to our view, there was illegality, it was not obvious that was so. Indeed, the circumstances in which the illegality is said to arise might be considered unusual or even obscure.

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151 At 582.
152 At 415.

Summary

[369] We conclude in summary that:

- The three new causes of action based on promissory estoppel, implied term and interdependent agreements which the investors seek to introduce by amendment of their statements of claim have no proper foundation in fact or in law. In addition, an amendment at this late stage would cause serious prejudice to the developers since factual issues relating to the proposed new causes of action were not explored at trial.

- The Blue Chip agreements are not securities within the meaning of the Securities Act 1978.

- If the Blue Chip agreements are securities within the meaning of the Securities Act, the obligation on Blue Chip to pay the procurement fee under joint venture agreements is not exempted by s 5(1)(b) of the Act.

- The obligation to pay an option fee under the PIP and PAC agreements is subject to the exemption but the obligation to pay reasonable settlement costs and to reimburse an amount equivalent to the deposits paid are not exempted.

- The SPAs between the developers and the investors are independent contracts and are not tainted by any illegality in relation to the Blue Chip agreements since the SPAs were not entered into for the purpose of assisting or promoting any illegal transactions and because the developers did not have any knowledge of any illegality in respect of those transactions.

Result

[370] The formal outcome of these appeals is:

(a) The application by the appellants to amend the pleadings in each case is dismissed.

(b) The appeals relating to the five appellants named at [19] of this judgment are dismissed.

(c) Counsel for the remaining appellants are to confer with counsel for the other parties and inform the Court by memorandum within one month from the date of this judgment how the appeals by the other appellants are proposed to be dealt with.

(d) Costs are reserved. Counsel are to confer and file a memorandum within the same period on that subject.

Solicitors:

Ellis Law, Auckland for Appellants
Brookfields, Auckland for Greenstone Barclay Trustees Ltd
CMS Legal, Auckland for Turn and Wave Ltd
Carter & Partners, Auckland for Icon Central Ltd

APPENDIX

The Barclay development

Mr and Mrs Lester

[1] Mr and Mrs Lester are a couple in their 40's with a combined income of about $52,000. They own their own home at Albany worth between $520,000 and $570,000. Prior to their investment, they had an existing mortgage of just over $120,000.

[2] They were introduced to Blue Chip after receiving a call from a telemarketer in early 2006. They were visited by a Blue Chip sales agent, Mr Ty Jones (who was not called to give evidence). Mr Jones emphasised Blue Chip's strength and financial stability by reference to prominent members of the Board of Directors. He told Mr and Mrs Lester that "nothing was 100 per cent safe, but in saying that, you might as well say Blue Chip is". When asked whether Blue Chip would "go under", Mr Jones responded by saying that would not happen. Blue Chip would honour its commitments.

[3] They were offered the opportunity to purchase a unit in the Barclay development on a joint venture basis. Mr Jones explained that Blue Chip would use the equity in their home to purchase an apartment. They would receive a fortnightly procurement fee from Blue Chip. The apartment would be sold within four years when they would be repaid all the money they provided and would receive a small share of any capital gain. If the apartment was not sold within four years, Blue Chip would "roll over" their agreement for another two years on the same basis. Blue Chip would then sell the apartment after six years or roll it over for another two years if it did not sell. Mr Jones emphasised to them that, in his experience, this had never happened previously. If all else failed, Mr and Mrs Lester would have an apartment to sell themselves. However, they should not think about this because "it would not happen".

[4] Mr Jones recommended they obtain legal advice from a lawyer, a Mr Mathias, who informed them that the documents which they had been given to

sign were in order. Mr Lester said Mr Mathias did not give them any explanation of the documents.

[5] The unit they agreed to purchase was priced at $575,000. A deposit of $86,250 was required. A mortgage of $267,000 was raised on the Lesters' home through a financier arranged by Blue Chip. The amount borrowed enabled repayment of the existing mortgage; payment of the deposit to Brookfields (Greenstone's lawyers); a further sum of $22,245 to Blue Chip for brokerage fees and other expenses; legal costs; and $52,360 to Blue Chip for "working capital" which was to be used to pay the procurement fees to the Lesters.

[6] It was not pleaded nor given in evidence that the Lesters were told they would not have to settle the purchase or that they would only have to settle if the Blue Chip companies fulfilled their contractual obligations.

[7] When Blue Chip collapsed, the joint venture had not proceeded beyond arranging the initial finance. No loans had been procured by Blue Chip to enable the Lesters to settle the transaction and their procurement fees ceased. The evidence was that their financial circumstances, unsurprisingly, were severely strained.

[8] The Judge concluded the Lesters were aware of the risks but proceeded after the reassurances from Mr Jones about the financial capacity of Blue Chip.[153] The Judge also found that the Lesters were aware that, in entering the SPA and joint venture agreement, they were undertaking a commitment to fund the purchase of the apartment.[154] They knew the purchase was to be funded through borrowing on the existing equity in their home and the apartment being purchased. They were aware of the risks involved but proceeded with the investment.

[9] There was no pleaded representation along the lines now proposed to support a promissory estoppel argument. On the evidence and the Judge's findings, that argument could not succeed. In entering the SPAs, the Lesters recognised there was a risk Blue Chip would not meet their obligations. They proceeded because they

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153 At [341] of the *Greenstone* judgment.
154 At [347] of the *Greenstone* judgment.

were satisfied, on the basis of the assurances received from Mr Jones, about the financial stability of Blue Chip and after receiving legal advice.

[10] There was no cross-examination as to the ability of the Lesters to settle without Blue Chip.

Ms Janes

[11] Ms Janes is a woman in her 50's with two teenage children. Prior to her investment with Blue Chip, she was earning $23,000 per annum. She owned a home valued at approximately $600,000 with an existing mortgage of just over $200,000. She was also introduced to Blue Chip through a telemarketer. The Blue Chip representative in her case was Mr Jones. She received similar assurances to those given to the Lesters about the standing and financial stability of Blue Chip. She made some inquiries of her own including speaking with an accountant.

[12] In deciding to enter a joint venture with Blue Chip, a critical factor for her was that her home would be refinanced at the same time. She signed an SPA for a unit in the Barclay development in May 2006. The purchase price was $557,000. As part of the transaction, she borrowed about $395,000, part of which was to repay her existing mortgage. The balance of $180,000 went into the joint venture. She understood she would receive a fortnightly procurement fee of $549. The investment would run for four years after which Blue Chip would sell the apartment and she would then be repaid the amount of her investment and a small portion of any capital gain.

[13] Before investing, Ms Janes asked what would happen if the apartment did not sell within four years. She received similar assurances to those given by Mr Jones to the Lesters. She was satisfied from the assurances given that Blue Chip was safe and would not let her down. Although she was advised that the lawyer, Mr Mathias, was available to give advice, she did not receive any advice from him before signing the SPA.

[14] All went well until September 2007 when there were defaults in paying the procurement fees. Ms Janes is now in a position where she is unable to service the

mortgage commitments. She has stopped paying the interest on the Blue Chip portion of the borrowings. At the time of the hearing in the High Court she had rented out her home and was trying to sell it.

[15] There was no evidence or pleading that Ms Janes would not be required to settle or that she would only have to do so if Blue Chip performed its obligations. Given the documents she had signed, including the SPA, and the financial analysis Ms Janes received prior to the documents being signed, she must be taken to have been aware she was entering an SPA with a commitment to purchase. Her own evidence shows she was aware there was a risk to her if Blue Chip failed or if the apartment could not be sold at the end of the four year period. Her case is similar to that of the Lesters. She appreciated the risk but proceeded on the assurances given by Mr Jones and on the basis of her own inquiries expecting that Blue Chip would be able to meet its obligations.

[16] There being no evidence to support the proposed promissory estoppel argument, any claim on that basis could not succeed.

[17] There was no cross-examination on the basis of Ms Janes' ability to complete the purchase without Blue Chip's assistance.

Mr and Mrs Hickman

[18] Mr and Mrs Hickman signed SPAs for three apartments in the Barclay development in December 2006 at a total purchase price of just over $1.2 million. Deposits of $120,000 were required. We discuss their case more fully below in relation to the Bianco development in which the Hickmans entered SPAs for a further eight apartments. In all, they agreed to buy some 18 apartments. In respect of the apartments in the Barclay and Bianco developments, the Hickmans signed associated PIP agreements.

[19] We do not repeat here the detail we set out below.[155] Suffice to say that for the reasons given in respect of the Hickmans' investment in the Bianco development, the promissory estoppel argument could not succeed.

Mrs Dick

[20] Mrs Dick and her late husband owned their home which was subject to a mortgage of approximately $80,000. In addition they had a beach property but few other assets.

[21] In 2006 they attended an investment seminar organised by Blue Chip and were later approached by a Blue Chip sales agent, Mr Michael Davis. Later that year they signed an SPA to purchase a unit in the Barclay development for a total, including furniture, of $610,000. After signing the SPA, they also entered a joint venture agreement and other associated documents.

[22] Unlike most of the other investors, Mrs Dick readily accepted that she and her late husband understood that they were signing an SPA which committed them to purchase the apartment. She understood that, in return, they would receive a fortnightly payment of $420 over a four year period after which the property would be sold and they would recover their investment. They also understood that the equity in their home would be used to raise funds for the purchase. All costs of borrowing and otherwise would be met by Blue Chip.

[23] Mr and Mrs Dick were anxious to ensure that their home was safe. Mr Davis gave them assurances in that respect and they also made their own inquiries. They consulted their own solicitor, a Mr McDell. The Judge accepted Mr McDell's evidence (supported by a file note) that he had grave reservations about the Dicks entering the transaction. He warned them about the risk of a downturn in the property market and the possible collapse of Blue Chip. He told Mr and Mrs Dick that, if Blue Chip could not meet the mortgage payments or pay the fortnightly payments to them, their home would be at risk. Despite that advice, Mr and Mrs Dick signed an unconditional SPA without further reference to Mr McDell.

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155 At [98]–[106].

[24] There was no evidence or pleading that Mr and Mrs Dick were advised they would not be required to settle or that they would only be required to do so if Blue Chip performed its obligations. Clearly, Mr and Mrs Dick understood they would have to settle the purchase but they expected Blue Chip would honour its promises and meet its obligations. They understood that a total of $280,000 would be borrowed initially against their property which was then valued at approximately $600,000. $80,000 of the mortgage advance would be applied to repay their existing mortgage and the balance of $200,000 would be used to pay the deposit on the purchase of the apartment and other costs and expenses payable to Blue Chip.

[25] Mrs Dick understood the title to the apartment would be in their name and that if Blue Chip did not sell the apartment after four years then the joint venture would be rolled over. Ultimately, they would be able to sell the apartment themselves if Blue Chip did not do so.

[26] Against these findings, there is no prospect that the promissory estoppel argument could succeed in their case.

Ms Andrews

[27] Ms Andrews was introduced to Blue Chip through her partner, a Mr Knaggs, who was a Blue Chip salesman. Ms Andrews owned her own home valued at $450,000 subject to a mortgage of $125,000. She was not earning at the time.

[28] In January 2007, she entered two SPAs for apartments in the Barclay development for approximately $900,000 and PIP agreements. The deposit of $95,000 was raised by refinancing her existing mortgage. She was familiar with SPAs and knew what they entailed. She was persuaded to make the Blue Chip investments as a result of assurances from Mr Knaggs about Blue Chip's substance.

[29] She said Mr Knaggs told her that if Blue Chip had not sold the apartment within two years, Blue Chip would pay any costs until the apartment was sold. There was no prospect of Blue Chip going into liquidation because it was worth $80 million.

[30] Ms Andrews also made inquiries about Blue Chip from others, although she did not obtain legal advice before signing the SPAs.

[31] Ms Andrews maintained that Mr Knaggs had told her that if anything went wrong with Blue Chip, the developer would step in and take over Blue Chip's responsibilities under the SPAs. She continued to maintain this was what she had been told despite the absence of any such obligation in the relevant documentation. Mr Knaggs gave evidence but accepted in cross-examination that he could not recall having made this statement to Ms Andrews.

[32] The Judge rejected Ms Andrews' evidence about the developer "stepping in".[156] He also rejected the evidence of Ms Andrews and Mr Knaggs to the effect that the SPAs were altered after they were signed.

[33] After Ms Andrews entered the agreements, she received fortnightly payments of approximately $680 per month (after payment of the mortgage commitments) until November 2007 when payments stopped.

[34] There was no evidence or pleaded representation that Ms Andrews would not have to settle other than the representation, rejected by the Judge, that the developer would step in if Blue Chip did not meet its obligations. The promissory estoppel argument could not succeed since there is no evidence to support it.

[35] Ms Andrews' evidence was that she was struggling to meet the mortgage payments and, at the time of the hearing in the High Court, had been made redundant from her employment. There was no cross-examination about her ability to settle the purchases herself.

Mrs Whyte

[36] In January 2007 Mrs Whyte entered three SPAs and three PIP agreements. Two of these related to apartments in the Bianco and one in the Barclay development. We discuss her case below in relation to the Bianco development.[157]

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156 At [378] of the *Greenstone* judgment.
157 At [159]–[166] below.

We conclude below that Mrs Whyte's case is possibly the closest to establishing an evidential basis for the proposed promissory estoppel argument but the Judge found that she knew there was some risk she would have to settle if Blue Chip did not take over the agreements as she was led to believe by her nephew, Mr Devoy, who was a Blue Chip representative.

[37] We note below that the Judge found there were questions of reliance given Mrs Whyte's acknowledgement that there was a risk she would be required to settle.

[38] A further principal difficulty with the promissory estoppel argument is that the alleged promise that Blue Chip would take over the purchase is in direct conflict with the terms of the PIP agreement which specifically contemplates the possibility that Blue Chip will not settle. In that case, Blue Chip undertook to meet the investor's costs of completing the settlement. This difficulty applies to all the investors who entered PIP agreements.

Mrs Crockett

[39] Mrs Crockett and her late husband made two investments with Blue Chip. They signed an SPA for an apartment in the Barclay development on 25 February 2007 and, on the same day, completed a PIP agreement and other related documentation. They also signed an SPA for an apartment in the Chatham development which was later transferred to the Stadium development. This second development is not relevant for present purposes.

[40] According to financial details provided to Blue Chip at the time, Mr and Mrs Crockett had a farm property in two titles owned through their family trust for a total of about $1 million and subject to a Westpac mortgage of $153,000. In addition, they had investment property owned through a company with a net equity of approximately $300,000. At that time, they had a combined income of $86,000. Mr Crockett has since passed away. Mrs Crockett is 60 years of age and is a qualified nurse.

[41] A deposit of $109,000 in total was paid for the two apartments with mortgage finance arranged by Blue Chip.

[42] The Blue Chip sales adviser was a Mr Payne who was a long-term family friend, trusted by Mr and Mrs Crockett. He told them that a Blue Chip investment could help them take advantage of the unused equity in their home to earn a return of 16 per cent per annum on monies borrowed at nine per cent per annum. They understood this was effectively to be a loan. They would be funded to pay a deposit on a unit and Blue Chip would purchase the unit and repay the deposit on or before completion of the unit. Blue Chip would "definitely step in to purchase the property" at the same price they had agreed to pay before they were called upon to settle. They were advised this would occur no more than 15 to 16 months after they invested.

[43] When Blue Chip exercised its option to purchase the property, it would repay the money borrowed for the deposit and the investment would end. Mrs Crockett's evidence was that Mr Payne told them Blue Chip was "a big company which had a perfect record of taking up the option to purchase and had never failed to go through with it". She said they relied on this information when deciding to invest and did not consider it necessary to obtain legal advice before signing the agreements.

[44] The pleaded representations were that Blue Chip would buy back the property and that the Crocketts would not have to settle.

[45] The following passage from Mrs Crockett's cross-examination demonstrates the basis for her belief that they would not have to buy the properties:

> Q And you knew … this was … an Agreement for Sale and Purchase when you signed it that would be fair enough wouldn't it?
>
> A Signed it on the understanding that we never had to buy the properties.
>
> Q Based on the expectation that Owen [Mr Payne] had created that Blue Chip would exercise the option based on that?
>
> A Yes and they were a reputable company, I mean we just thought Blue Chip was going strongly.

[46] The Judge did not make any finding as to Mrs Crockett's appreciation of the risk. However, this passage demonstrates that her expectation that they would not have to settle was dependent upon Blue Chip's ongoing viability.

[47] As in the other cases, the Judge found that any representation made by Mr Payne was in his capacity as an agent for Blue Chip and not for the developer.

[48] There was no cross-examination about the ability of Mrs Crockett to settle the transactions but this is a case where available resources may have been sufficient to enable her to do so although clearly she would have to sell some of her property.

[49] This case comes closer to establishing an evidential basis for a promissory estoppel argument than most of the others. But on balance we are not persuaded that the proposed promissory estoppel argument could succeed given our conclusion that Mrs Crockett appreciated that they would only be relieved of responsibility if Blue Chip ultimately exercised the option to purchase and had the capacity to complete the SPAs. She expected they would not have to settle because she believed Blue Chip had the capacity to do so. She must be taken to have been aware that she would be obliged to settle under the SPA if Blue Chip did not perform.

Mr van Beek

[50] Mr van Beek was first introduced to Blue Chip in late 2003. The Blue Chip sales representative was a Ms Plessius. They discussed a mainstream Blue Chip investment in an Auckland apartment. Ms Plessius explained that Mr van Beek would be purchasing an apartment but Blue Chip would, in four years time or earlier, purchase the apartment from him for at least as much as he had paid for it. In the meantime the property would be rented with the rental being guaranteed by Blue Chip. He would receive a monthly return without having to bear any of the costs. He understood he would have to mortgage his home which then had a net equity of about $280,000. He was then receiving a salary of $70,000 per annum.

[51] Ms Plessius stressed how strong Blue Chip was and that it was financially sound. Mr van Beek contacted a number of investors in Blue Chip who told him they had not encountered any problems with the company. In 2003 and again in 2005 he purchased two apartments and received the payments he anticipated.

[52] In January 2007 Mr van Beek advised Blue Chip he wished to cancel one of these investments because there had been a long delay in completing the building of

the apartments. He was advised by Blue Chip staff that he could only cancel the agreement if he entered into two further SPAs and associated PIP agreements. Although reluctant to do so, he agreed rather than lose his deposit on the prior agreement.

[53] Mr van Beek signed two further SPAs and two PIP agreements. One was for an apartment in the Chatham development at a price of $578,000 and the other was for a unit in the Barclay development for $421,000. Deposits of $57,800 and $40,300 respectively were paid in respect of these agreements. Mr van Beek was concerned that he appeared to be agreeing to buy two apartments worth almost $1 million having cancelled the previous agreement to buy an apartment for only $320,000. When he raised this concern, he was told by one of the Blue Chip staff, a Mrs Rewita, that it did not matter because he would never be expected to actually pay for the apartments.

[54] Mr van Beek says he assumed the SPAs for the Barclay and Chatham apartments had rental guarantees similar to the other agreements he had earlier signed and that, if he had to settle, Blue Chip would lease back the apartments from him. After a period of either four or eight years, Blue Chip would repurchase the apartments from him. Blue Chip would then resell the apartments to other clients and he would receive the capital gain. He further understood that the guaranteed leases from Blue Chip would cover the amount of this loan repayments and that he would receive a 16 per cent option fee on his deposit money until settlement of the SPAs was complete. He said he was led to believe by Mrs Rewita there was no risk involved on his part. He believed Blue Chip would deliver on what they had promised.

[55] In cross-examination, Mr van Beek accepted that he knew he was signing an SPA and what that entailed. He admitted he could not recall the exact words Mrs Rewita used when referring to the settlement issue.

[56] There was no pleaded representation that he was told he would never have to settle. Rather, the representation pleaded was that Blue Chip would buy back the property. The Judge found that Mr van Beek's expectation that he would never

actually have to pay for the apartments was contrary to the express terms of the SPA and was inadmissible.[158] To the extent that Mr van Beek had assumed the Barclay SPA was similar to the other agreements he had signed earlier, he was acting under a misapprehension. But, the Judge found that this did not amount to a representation, let alone one binding on Blue Chip. The Judge also noted that Mr van Beek had accepted he could not really remember what Mrs Rewita had said to him when explaining the agreements.[159]

[57] The difficulty here is that there was never any pleading remotely similar to the promise now relied upon for the proposed promissory estoppel pleading. Had there been, the Judge may have made a definite finding on the point. Clearly, the Judge did not consider much weight should be attached to Mr van Beek's evidence about what Mrs Rewita said to him on the settlement issue. As we read Mr van Beek's evidence as a whole, his understanding was that Blue Chip would be buying the apartment back from him as he had understood would occur with the earlier investments he had made. In these circumstances, there is insufficient evidence to support the amended pleading in relation to promissory estoppel.

[58] Mr van Beek asserted that he did not have the capacity to settle the SPAs and was not cross-examined on that point.

Mr and Mrs Johnson

[59] The Johnsons were visited by a Blue Chip agent, a Mr Vusoniwailala, in the latter part of 2006. After making inquiries, they signed an SPA to purchase an apartment in the Barclay development with accompanying furnishings for a total of $593,000. They also entered into a joint venture agreement and associated documents.

[60] Earlier, they had entered a mainstream investment with Blue Chip which had functioned satisfactorily. At that time, they received assurances from the Blue Chip adviser as to Blue Chip's substance, they took advice from a lawyer recommended

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158 At [405] of the *Greenstone* judgment.
159 At [404] of the *Greenstone* judgment.

by Blue Chip, and they made inquiries of their own. They were particularly impressed with the prominent members of Blue Chip's Board of Directors.

[61] The Johnsons decided in September 2006 to proceed with the Barclay investment on their Blue Chip adviser's recommendation. By this time, the Johnsons were not particularly concerned about the security of the investment as they regarded Blue Chip as a sound company and their mainstream investment had proceeded satisfactorily in all respects. They understood they would be required to raise a deposit of $168,000 against the equity in their home and, when the apartment was completed, they would have to contribute a further $110,000. In the meantime, Blue Chip would be paying them a fortnightly procurement fee of just over $400. After a period of four years, Blue Chip would buy back the apartment from them.

[62] Mrs Johnson's evidence (given on behalf of herself and her husband) was that it was not until difficulties arose over payment of the procurement fees in late 2007 or early 2008 that she discovered that she and her husband were expected to contribute the balance of the purchase price. She said she understood it was a joint venture and no-one had informed them that they would have to meet the entire purchase price.

[63] At one point, Mrs Johnson said in her evidence that the Blue Chip adviser had told them that they did not need to worry about the apartment for which they had signed up because they were "not actually buying the property". She said that the agent told them they would never have to have a shortfall to manage. There was no pleaded representation to that effect and Mrs Johnson accepted in cross-examination that the documentation she and her husband had signed made it clear that they were purchasing the apartment.

[64] The pleaded representation, which was consistent with Mrs Johnson's other evidence, was that Blue Chip would buy back the property after a four year period if the capital growth on the apartment increased by a minimum of 30 per cent. The Judge found that, in context, this representation seemed to relate to the mainstream

agreement rather than the joint venture. He also noted that, in any event, it was expressed to be conditional.[160]

[65] There was no pleaded representation that they would not be required to settle or that they would only be required to do so if Blue Chip performed its obligations. Read as a whole, the tenor of Mrs Johnson's evidence is that they understood they were buying the property but it would be bought back from them by Blue Chip at the end of the four year period. The evidence could not support the promissory estoppel pleading.

[66] The Judge also found that given the Johnsons had received legal advice before entering the transaction, it would be fair and reasonable to apply cl 27 of the SPA to the representations made.[161]

[67] Mrs Johnson asserted in her evidence that they could not afford to buy the apartment and she was not cross-examined on that issue.

Mr and Mrs Bogardus

[68] In 2006, Mr and Mrs Bogardus signed SPAs and joint venture agreements in relation to the purchase of two apartments in the Barclay development for $588,000 and $390,000 respectively. At the time, they had a joint income of $41,000 and assets in the form of real estate worth over $1 million. As a result of a slip affecting one of these properties, the total value of their assets is likely to be lower than it was at the time of their investments.

[69] They already had two investments with Blue Chip which they had found to be broadly successful. A Blue Chip sales representative, a Mr Stephens, recommended that they should move on to another Blue Chip investment in order to increase their cashflow. Mr Stephens explained to them how the joint venture product worked. They understood they would have to raise a mortgage of $284,000 on their home which would be used as a deposit on the two apartments. Blue Chip would meet the cost of servicing the mortgage and they would receive $1,250

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160 At [415] of the *Greenstone* judgment.
161 At [416] of the *Greenstone* judgment.

fortnightly from the time they entered the transactions. At the end of four years, Blue Chip would buy the apartments, settle the mortgage and take the capital gain.

[70] Mr Stephens told them there was "absolutely no risk" in the transactions since their deposits would remain in a solicitor's trust account for the entire four years. At the end of the four years, Blue Chip would "purchase the apartments back from us". By doing so, Mr Stephens said Blue Chip would realise the capital gain on the transaction.

[71] The Judge found they were influenced to proceed by the successful outcome from their earlier investment with Blue Chip which they said had "worked out exactly the way … Blue Chip had told us that it would".[162] Mr Mathias acted on behalf of Mr and Mrs Bogardus in connection with the transaction but they did not seek his advice prior to signing the documents.

[72] Blue Chip stopped making payments to them on the Barclay investment in September 2007. They have since been struggling to meet the interest commitments. The evidence of Mr Bogardus was that they could not meet the amounts required to settle the purchases. He was not cross-examined on this point.

[73] In cross-examination, Mr Bogardus accepted that they knew they were signing SPAs and a joint venture agreement but the gist of his evidence was that they did not understand that they would have to meet the balance of the purchase price if Blue Chip failed to perform in terms of the joint venture agreement. He said he believed Blue Chip was carrying the risk in that respect.

[74] There was no pleaded representation that Mr and Mrs Bogardus would not have to settle the purchases or would only have to do so if Blue Chip performed their obligations. The only pleaded representation for present purposes was that Blue Chip would buy back the property after a four year period. The Judge found that any such representation was about what Blue Chip would do in the future in terms of the joint venture agreement.[163] It did not relate to the SPA or the obligations of Mr and

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[162] At [424] of the *Greenstone* judgment.
[163] At [423] and [424] of the *Greenstone* judgment.

Mrs Bogardus under that agreement. Nor was it within the scope of any authority from Greenstone.

[75] The Judge also found there was an issue as to reliance concluding that Mr Bogardus was prepared to take the risk associated with the joint venture because the previous investment had been successful.

[76] On the basis of the documents signed, Mr and Mrs Bogardus must be taken to have been aware of their obligations under the SPAs. There is no evidence to support the alleged promises to support the promissory estoppel argument.

Mr Crawford-Greene

[77] Mr Crawford-Greene is retired and in his 60's. In the United States he ran a major and highly successful business. He has also worked as a stockbroker. He retired to New Zealand with assets in trust in excess of $800,000.

[78] Through a Blue Chip adviser, Mr Baldwin, he signed two SPAs in September 2006 to purchase apartments in the Barclay development. He also signed joint venture agreements and other documents.

[79] Prior to the time he made the investments, he satisfied himself that Blue Chip was financially sound. He did so by attending Blue Chip seminars, discussions with satisfied Blue Chip investors and by making his own extensive inquiries on the internet.

[80] Mr Crawford-Greene accepted in cross-examination that he knew he was signing SPAs and that there would be borrowings on his property. He was taken through a series of documents which he had received prior to the investments which made it abundantly clear that the total costs of the transactions were $529,000 and $533,000 respectively. These documents also made it clear that these amounts were all to be provided by him as the "client" and that substantial borrowings would be required.

[81] Mr Crawford-Greene had signed the SPAs while he was in the United States. Soon afterwards, he received a comprehensive letter from his lawyers outlining exactly what was involved in the transactions and a lengthy email setting out the risks. The most important of these was that Blue Chip could go broke in which case the vendors would expect him to settle the purchases. Mr Crawford-Greene's response was:

> I guess I have to hope Bluechip does not go bottoms up.

[82] His lawyer responded that at least he would be a party to the purchase of a real apartment in Auckland.

[83] At the time of this exchange of emails, it seems that the deposit under the SPAs had not been paid. The joint venture documents were not signed until a later date.

[84] There was no pleaded representation or evidence that Mr Crawford-Greene would not be obliged to settle or only if Blue Chip performed its obligations. The only relevant pleaded representation was that Blue Chip would buy back the property after a four year period. As the Judge noted, Mr Crawford-Greene did not give evidence to support this representation.[164] The proposed promissory estoppel cause of action could not succeed in the absence of evidence to support it.

[85] The Judge considered it would be appropriate to apply cl 27 of the SPA in view of the fact that Mr Crawford-Greene was an experienced businessman and had received legal advice.

[86] Mr Crawford-Greene said he was not in a position to proceed with purchasing the apartments and was not cross-examined on that point.

Mr Stewart

[87] Mr Stewart invested in three PIP agreements. One of these related to the Barclay development and another to the Bianco development. A third related to a

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[164] At [430] of the *TWL* judgment.

development in Eden Crescent known as the Verve. This was later transferred to a purchase in the Icon development.

[88] Mr Stewart's case is discussed in detail in relation to the Bianco development. We conclude below that the promissory estoppel argument is not available to Mr Stewart for reasons discussed.

[89] There is no material difference in relation to Mr Stewart's investment in the Barclay and we reach the same conclusion.

The Bianco Development

Mrs Hunt and Mr Dwight

[90] Mrs Hunt and Mr Dwight are a retired couple. In 2006 they owned a lifestyle block worth just over $1 million. They had an investment portfolio producing income of $36,000 annually and three apartments which were not producing any additional income. They met a Blue chip salesman, a Mr Neilson. Attracted by the prospect of earning some additional income of $1,000 per month, they decided to invest some $221,000 in the Blue Chip PIP product. They were told that over the two year period of the investment, they would show a return of 16 per cent interest. They borrowed $221,000 from the Bank of New Zealand on the security of their lifestyle block.

[91] Their legal adviser was a Mr David Daniel. Although the Judge found that they did not obtain legal advice from him until after the relevant documents were signed in February 2007, it was conceded by Mr Dwight in cross-examination that they must have seen him prior to the time the documents were executed.

[92] Mrs Hunt (with whose evidence Mr Dwight agreed) said that Mr Neilson told them:

(a) The investment was sound because Blue Chip had never failed to buy back an investment or a property.

(b) Even if Blue Chip for some obscure reason did not buy back, they would cover all the relevant costs.

[93] Mrs Hunt and Mr Dwight signed agreements for sale and purchase in respect of four apartments in the Bianco development for a total of $2.9 million. Mrs Hunt's evidence that she did not understand she was buying property cannot stand in the light of the documents she signed and written advice from Mr Daniel (after the date of the transaction) describing the nature of the transaction and the option to purchase which Blue Chip held in this form of investment.

[94] There is no evidence of any express representation by Mr Neilson that they would never have to settle the purchase if Blue Chip did not perform although it is reasonable to infer from the evidence that they understood the risk of Blue Chip not buying the property back (ie exercising the option) was low. Even if that did not happen, they understood Blue Chip would meet the costs involved.

[95] The statement of claim pleaded "they would never have to complete a purchase". The Judge found that both Mrs Hunt and Mr Dwight understood in general terms they were agreeing to buy properties but also understood that Blue Chip would buy the properties back from them.[165] He found that the representation that they would never have to settle was inadmissible.

[96] We consider that the Judge's findings are generous in the case of these plaintiffs. On Mrs Hunt's own evidence, she understood there was a risk that Blue Chip would not buy the property back even if that was low. She understood that, in that event, Blue Chip would cover the costs. There was no cross-examination about the ability of Mrs Hunt and Mr Dwight to settle without Blue Chip and neither Mr Neilson nor Mr Daniel were called to give evidence. The evidence does not support the promises proposed in the amended pleading.

[97] Mrs Hunt's evidence was that Mr Daniel had real reservations about the transaction and questioned them about the prudence of borrowing money to put into the investment. Notwithstanding that advice, they proceeded with the transaction.

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[165] At [397] of the *TWL* judgment.

In these circumstances, there must be real doubt about reliance on the pleaded representations.

Mr and Mrs Hickman

[98] Mr and Mrs Hickman are one couple who are clearly differentiated from the others. They are said to be the largest investors in the Blue Chip products. In total, they agreed to buy 18 apartments and paid close to $1 million in deposits. Eight of the apartments they agreed to purchase were in the Bianco development. They also agreed to buy apartments in the Barclay and Icon developments (as discussed above) and seven more in a development in Pitt Street. The Barclay and Bianco investments all proceeded with associated PIP agreements..

[99] Mr Hickman had been a partner in a sharebroking firm in the United Kingdom. He and his family emigrated to New Zealand in 2006. For immigration purposes, they were required to invest $1 million in New Zealand. Mr Hickman was clearly impressed by the apparent substance of Blue Chip which he investigated and estimated was worth about $250 million. He was impressed to the extent that he decided to buy shares in the company.

[100] Mr Hickman was introduced to a Blue Chip agent, a Mr Kereama. His evidence was that Mr Kereama told him Blue Chip could sell the apartments on to other investors if they were not completed within two years, and that whatever happened Blue Chip guaranteed to buy them back so that he would not have to settle or worry about the matter further. He decided to proceed, stating in the finance application that they had net assets in excess of $4 million and that his income for the previous year had been $300,000. Mr Kereama was not called to give evidence.

[101] The Judge found:[166]

> … I am satisfied that Mr Hickman was well aware when he signed the agreements for sale and purchase that he was agreeing to purchase the apartments. He had a number of brochures relating to the PIP product available to him. The brochures expressly confirmed that the investor had to be in a position to settle the properties if required. No doubt he expected that Blue Chip would purchase the apartments back from him. That does

[166] At [359] of the *TWL* judgment.

> not, however, alter the fact that he was aware he was assuming an obligation to purchase the apartments when he and his wife entered the agreements for sale and purchase on 20 December.
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> Mr Hickman proceeded with the transaction because he was impressed by the apparent wealth and performance of Blue Chip, its association with the New Zealand Golf Open, its listing on the Stock Exchange and the involvement of Macquarie Bank.

[102] There was a pleaded representation that Blue Chip agreed to buy back any apartments in which any funds were invested so that "at no stage would the Hickmans be required to actually settle the purchase of any apartment." The Judge found that there was a representation to the effect that "whatever happened Blue Chip guaranteed to buy them back". However, it was outside the scope of any agency granted by TWL to the sales agent. The Judge also found that the representation was directly contrary to the express terms of the agreement for sale and purchase and was inadmissible.

[103] There was also a further pleaded representation that "the worst that could happen was that Blue Chip would buy the properties back at the same price and return the deposits together with interest". The Judge found that this was a representation as to Blue Chip's future intention.[167] It had nothing to do with TWL's position or the obligation of the Hickmans to TWL under the SPA. The Judge specifically found that the evidence did not establish that, as at December 2006, when these agreements were signed, Blue Chip did not intend to exercise the option under the PIP agreements nor that it was not financially able to do so.

[104] Finally, the Judge found that in the case of Mr and Mrs Hickman it would be fair and reasonable for the entire agreement in the SPA to apply to defeat any claim for misrepresentation.[168]

[105] We consider the Judge's findings above[169] would preclude reliance on the promise specified in the amended pleading proposed. In essence, the Judge found that despite being told Blue Chip would buy the properties back from him, he knew there was a risk he would have to settle. That does not amount to a promise that Mr

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167 At [362] of the *TWL* judgment.
168 At [365] of the *TWL* judgment.
169 At [101].

Hickman would not have to settle or would only have to settle if Blue Chip fulfilled its obligations. He proceeded in reliance on his own assessment of Blue Chip's financial strength and took the risk he would not be called upon to settle himself.

[106] Mr Hickman said in evidence that he could not have afforded to buy the properties at the total purchase price which was around $10 million. He was not cross-examined on that point.

Mr and Mrs Britton

[107] Mr and Mrs Britton bought two units in the Bianco development under PIP agreements. Mrs Britton was introduced through a work colleague to Mr Meadows, the Tauranga financial adviser for Blue Chip.

[108] Mr and Mrs Britton had a debt-free home at the time but little income. While Mrs Britton was keen to invest to maintain an income stream, Mr Britton was displaying marked reluctance to enter the transactions.

[109] Nevertheless, the Brittons decided to go ahead with the investment on 17 January 2007 and signed two SPAs. Mr Meadows assured them that the deposits under those agreements would be placed into the trust account of the developer's solicitor until such time as Blue Chip bought the apartments back from them on or before the date for completion.

[110] Shortly after signing the SPAs but before they had signed the PIP agreements, Mr and Mrs Britton took legal advice from a Mr Hyatt, a solicitor practising in Tauranga. There was a discussion about raising finance by a mortgage on their home through the Auckland Savings Bank and Mr Annan was asked to proceed to make the necessary arrangements.

[111] In the meantime, Mr Britton's opposition to the investments was becoming stronger and this led to serious difficulties in his relationship with Mrs Britton. They met again with Mr Annan. There was a conflict of evidence as to what occurred at the meeting. The Judge preferred the evidence of Mr Annan, based on a file note he made shortly after the meeting. This recorded, amongst other things, that Mr and

Mrs Britton were concerned about whether Blue Chip would exercise its option under the PIP agreements to purchase the property. He advised Mr and Mrs Britton that Blue Chip might not exercise the option and, in that event, they would be forced to go ahead and complete the purchase themselves. They accepted this and asked Mr Annan to confirm with Mr Meadows so they had a clear understanding.

[112] Mr Annan did follow the matter up with Mr Meadows as instructed and the advice he had given to Mr and Mrs Britton was confirmed. As the Judge observed, the risk was, in any event, apparent on the face of the PIP agreements.

[113] The Judge concluded that, despite the legal advice they received, Mr and Mrs Britton decided to proceed with the PIP investments, most probably because Mrs Britton wished to do so.[170] They knew they were committing to the purchase of the two apartments if Blue Chip did not exercise the option.

[114] It was pleaded that Mr Meadows had represented to Mr and Mrs Britton that they would not be obliged to complete "repurchase" of the properties because Blue Chip would do so. The Judge found, correctly in our view, that if this was an actionable misrepresentation, it was not relied upon by Mr and Mrs Britton.

[115] We are satisfied on the evidence and the findings of the Judge that a promissory estoppel claim could not succeed.

Mrs Bruerton

[116] Mrs Bruerton is a 70 year old widow with limited resources. She was introduced to a Blue Chip sales representative, a Mr Meys. After obtaining legal advice, she decided to proceed with the PIP product and signed the necessary documents including an SPA for an apartment. It was pleaded that she would not be required to complete settlement of the property. The Judge found that Mrs Bruerton had been advised by her solicitor before entering the contract that Blue Chip Premium Income Ltd would exercise the option to complete the purchase of the

[170] At [374] of the *TWL* judgment.

property but there was no guarantee it would do so.[171] If the company did not exercise the option, Mrs Bruerton would be required to settle the purchase.

[117] A record of Mrs Bruerton's evidence was not produced as part of the case on appeal. Even if it had been pleaded, Mrs Bruerton's evidence could not support a promise that she would not be required to settle or would only have to do so if Blue Chip fulfilled its obligations. Clearly, there are also reliance issues since she was advised Blue Chip might not fulfil its obligations by exercising the option.

Mr and Mrs Busch

[118] Mr and Mrs Busch are a couple in their 60s with a combined gross income of about $90,000 per annum. They owned a home through a family trust valued at approximately $700,000. They had savings of approximately $100,000, most of which they invested in Blue Chip. $59,000 was invested in a mainstream investment and $34,000 in the PIP product.

[119] Mrs Busch asserted in cross-examination that the Blue Chip representative (Mr Mike Davis) told her that they would never have to settle because Blue Chip would. Mrs Busch also asserted that they could not have afforded to buy the property themselves and this was not challenged in cross-examination.

[120] There was no pleading to the effect that they would not be required to settle. The Judge found that, by reference to the product brochure and other information, Mrs Busch understood she would be signing an SPA but that she and her husband did not take sufficient notice of the documentation and advice provided to them.[172] This made it clear they were committing to the purchase of the property if Blue Chip did not exercise the option. The decision to proceed had been made only after advice from a lawyer and an accountant. Although both of these were alleged not to be independent, they were not employed by Blue Chip and there was no finding by the Judge that they were not independent.

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171 At [381] of the *TWL* judgment.
172 At [387] of the *TWL* judgment.

[121] There was no pleading that Mr and Mrs Busch would only have to settle if Blue Chip fulfilled its obligations. On the Judge's findings, the promissory estoppel could not have succeeded.

Mr Houkamau

[122] Mr Houkamau is a retired gentleman who purchased one unit and invested $59,000 in the PIP investment product. He was introduced to Blue Chip through a Ms Hayes who was a life insurance adviser. Ms Hayes was not a Blue Chip licensee but accepted she had received training to sell the Blue Chip product and was entitled to commission on any such sales.

[123] Both Mr Houkamau and Ms Hayes gave evidence. The Judge was not satisfied that Mr Houkamau's recollection of events was reliable and preferred the evidence of Ms Hayes. The Judge found that Mr Houkamau knew that he was entering an SPA as part of the PIP agreement. The Judge also found that Mr Houkamau knew that if Blue Chip did not exercise the option, he would have to purchase the apartment.[173] On the basis of what Ms Hayes told him, he did not believe he would have to settle. The Judge noted that Ms Hayes accepted in cross-examination that she was "pretty confident" when she sold the PIP agreement that Blue Chip would take over the obligation under the agreement.

[124] It was pleaded that Mr Houkamau (or his family trust) would not actually be purchasing the property because Blue Chip would take it over or on-sell it to other Blue Chip investors.

[125] The Judge found that the representation by Ms Hayes was not so much that the trust would not actually be purchasing any property but rather that Blue Chip would exercise the option within two years.[174] The Judge regarded that as a statement of Blue Chip's future intention that Ms Hayes believed to be true at the time she made it. The representation was made on behalf of Blue Chip not on behalf of TWL or within the scope of the task authorised by TWL.

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[173] At [410] of the *TWL* judgment.
[174] At [411] of the *TWL* judgment.

[126] There was no pleading or evidence to the effect that Mr Houkamau would not have to settle or would only have to do so if Blue Chip fulfilled its obligations. On the Judge's findings of fact, such a plea could not have succeeded. There was no cross-examination about Mr Houkamau's ability to settle in the event that Blue Chip could not do so.

Mr Hutchinson

[127] Mr Hutchinson is a retired gentleman of 75 years of age. He owned freehold property worth about $350,000 and had a further $80,000 in cash and shares. His income was about $26,000 per annum in addition to government superannuation.

[128] He invested in a Blue Chip joint venture through the Blue Chip agent Mr Davis. In December 2006, he signed an SPA for an apartment in the Bianco development for $547,000. A deposit of $79,200 was paid and additional borrowing of $161,000 secured against his existing property.

[129] A financial analysis provided to him showed that, upon completion of the purchase, a further $369,000 would have to be borrowed. The joint venture agreement itself was not signed until February 2007.

[130] Mr Hutchinson's understanding of the investment was that he would receive rental from Blue Chip and that at the end of four years, Blue Chip would sell the property and pay back the deposit, possibly with some capital gain.

[131] The Judge found that Mr Hutchinson appreciated that he was signing an SPA and, by reason of his qualifications and experience as a licensed real estate agent, he would have understood the nature of the documentation despite his evidence that he did not fully understand it. He took legal advice from Mr Mathias on the day the SPA was signed. Mr Hutchinson's evidence was that he understood that Blue Chip was sound and was most unlikely to default on its obligations.

[132] It was pleaded that, at the end of the joint venture, Mr Hutchinson would be relieved of any further obligation because Blue Chip would purchase the property or on-sell it to a Blue Chip investor. The Judge found that this was a statement of Blue

Chip's future intention and was a representation made on behalf of Blue Chip, not TWL.

[133] It was also pleaded as a representation that there would be no obligation on Mr Hutchinson to actually complete settlement of the property. The Judge found this was contrary to the documentation executed by Mr Hutchinson and was not admissible. There was no pleaded representation or evidence to the effect that Mr Hutchinson would only be called upon to settle if Blue Chip met its obligations. Even if it had been, the Judge's findings would have meant it could not succeed since Mr Hutchinson was aware that he had signed an SPA that obliged him to proceed with the purchase. There was no cross-examination about his ability to settle if Blue Chip defaulted.

Mr and Mrs Jacobsen

[134] Mr and Mrs Jacobsen are aged 53 and 63 years respectively. They owned a home in Nelson worth approximately $550,000, subject to a mortgage of $55,000. Between them they earned in the vicinity of $50,000 per annum. They were introduced to a Mr Baldwin, an investment advisor promoting Blue Chip in the Nelson region. They made two investments with Blue Chip. The first was a mainstream investment which they entered into along with their son. This resulted in their purchase of a property in South Auckland which they still owned at the time of trial. Their evidence was that the rent did not quite cover the mortgage but otherwise this investment was reasonably satisfactory.

[135] The second investment was in a PIP product. They dealt mainly with Mr Brownie from Blue Chip in respect of this transaction. They independently borrowed $63,000 from Westpac for the deposit and signed the PIP agreement around March 2007.

[136] Mrs Jacobsen's evidence was that they understood they would receive a monthly fee from Blue Chip, and the investment would last a year or so. Before the property they were purchasing was finished, Blue Chip would take it over and there was no prospect they would have to settle the transaction. They thought that the

$63,000 they had invested was a loan to Blue Chip which would be used to assist Blue Chip in building the apartment.

[137] Mrs Jacobsen accepted she had seen Blue Chip documentation which, if she had read it properly, would have informed her there was a risk that Blue Chip would not buy back the property from them. She also acknowledged receiving a financial analysis which specifically warned that "the client may be required to settle on the investment property and therefore must show the capacity to do so".

[138] The sample analysis provided by Blue Chip stated:

> You should not proceed with an investment unless you are completely comfortable with the risks and costs involved. These are discussed in the Premium Income Product explanation document that your adviser has provided to you. We recommend that you take independent professional advice prior to entering into the Sale and Purchase Agreement, as this represents a legally binding contract on you including situations where Blue Chip does not exercise its Option.

[139] The Premium Income Product proposal document is slightly more equivocal. It says at one point that:

> These deals are structured so that the Investment Property will settle in approx, 2 years. Blue Chip will effectively take over client's position to settle the property and repay the deposit amount(s) prior to the Investment Property settlement date – therefore the client does not settle on the property.

[140] However, in bold type at the foot of the document it is stated that:

> The client may be required to settle on the Investment Property and therefore must show the capacity to do so.

[141] Throughout, Mr and Mrs Jacobsen received legal advice from a lawyer (a Mr Stocker) who had represented them in the past. Both Mr and Mrs Jacobsen acknowledged in cross-examination that they knew they were entering an SPA of an apartment but they believed and understood they would never have to buy it.

[142] The Judge found that Mr Brownie had advised the Jacobsens generally how the PIP worked.[175] They should have understood that there was a risk to them that

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[175] At [434] of the *TWL* judgment.

they would be obliged to settle but went ahead on the basis they fully expected Blue Chip to purchase the property so they would not have to settle.

[143] Two relevant representations were pleaded:

(a) They would only have to put in one deposit.

(b) They would not be required to purchase the property because Blue Chip would complete the purchase for them.

[144] As to the first, the Judge found that if it was suggested that the Jacobsens would not have to settle, the representation was inadmissible as contrary to the documentation.[176] As to the second, the Judge found that this was a statement of Blue Chip's future intention and, in any event, was made about and on behalf of Blue Chip and not TWL.

[145] There was no pleading or evidence of a promise that the Jacobsens would only have to settle if Blue Chip performed its obligations. Essentially, this is another case where the investors proceeded with knowledge of the risks but considered them to be low or non-existent because they believed or were advised that Blue Chip would perform. There are also issues here about reliance given that they obtained advice from an independent solicitor. We do not consider a promissory estoppel argument could succeed in their case.

Mr Leach and Ms Holder

[146] Mr Leach and Ms Holder are a retired couple. In January 2007 they owned a freehold property worth approximately $500,000 and had some investment funds of around $100,000. Through a Blue Chip agent, a Mr Hand, they invested $128,000 in three PIP schemes which involved the purchase of three apartments in the Bianco development worth $1.28 million. Although Mr Hand recommended that they obtain independent legal advice, they did not do so until after they had signed the relevant documents.

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[176] At [435] of the *TWL* judgment.

[147] They told the court they understood Blue Chip would be using their money to buy three properties which Blue Chip would then on-sell. They did not think they were buying apartments. The Judge found that Mr Leach and Ms Holder were not credible witnesses.[177] They knew they were committing to SPAs. As to the pleaded representation that at the expiration of the investment period (up to 24 months) Blue Chip would take over responsibility for completing the settlement and would return their cash and investment with any outstanding interest, the Judge found that if this representation was made it was a statement of future intention and was made on behalf of Blue Chip not TWL.

[148] There was no pleading or evidence that they would not have to settle or only if Blue Chip fulfilled its obligations. These investors were found to have appreciated they were agreeing to purchase real estate which carried a commitment to settle.

[149] These investors said that they could not afford to purchase the properties from their own resources and were not cross-examined on that issue.

Mr Stewart

[150] Mr Stewart is a 60 year old businessman who invested a little over $150,000 in three PIP agreements between December 2006 and March 2007. He signed separate SPAs in respect of the Barclay and Bianco developments, and a third in respect of a development at St Martins Lane in Eden Crescent, known as the Verve. This was later transferred to a purchase in the Icon development in October 2007.

[151] Mr Stewart obtained investment advice from Ms Vanessa Hayes to whom we have already referred in relation to Mr Houkamau. Ms Hayes recommended a Blue Chip investment. Mr Stewart attended a presentation by a Mr Lynch and Mr McIntosh who were respectively a Blue Chip licensee and operations manager.

[152] The thrust of Mr Stewart's evidence was that he was looking for a two-year investment and had no intention of purchasing property through Blue Chip. He was told by the Blue Chip representatives that he would not have to worry about buying

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[177] At [441] of the *TWL* judgment.

an apartment because Blue Chip would either purchase the property or find a purchaser.

[153] Ms Hayes was called by the developer to give evidence. She said Mr Lynch had said at the presentation she and Mr Stewart attended that the purpose of the PIP agreement was to provide Blue Chip with a stock of apartments which it could sell at a later stage to mainstream investors. Mr Lynch had said there was a risk Blue Chip would be unable to find a mainstream investor before Mr Stewart had to settle under the agreement. However, Mr Lynch had also said that Blue Chip would make particular efforts to find a purchaser and that the risk that they would not do so was low.

[154] Ms Hayes' evidence was that she was "pretty confident" that Blue Chip would take over the obligations under the PIP agreement. She was aware from Mr Stewart's financial circumstances that he would not be able to arrange the finance to purchase them himself.

[155] Although the Judge noted that Mr Stewart had sought to downplay his knowledge of the obligation under the SPAs and the PIP agreements, he accepted the evidence of Ms Hayes as being more reliable than that of Mr Stewart.[178] The Judge was satisfied that Mr Stewart knew and understood the nature of the obligations he was entering into. In particular, although his focus was on the interest rates being offered (which ranged between 12 and 16 per cent at the time) he was aware that he was signing an SPA which committed him to purchase the property if Blue Chip did not do so. He was prepared, the Judge found, to run that risk because he had been told it was a low risk. The Judge was satisfied that the risks had been explained by Mr Lynch and that, before proceeding with the SPA for the Bianco apartment, Mr Stewart had received a final analysis sheet which recorded:

> You should not proceed with an investment unless you are completely comfortable with the risks and costs involved.

[156] A feature of Mr Stewart's case is that Mr McIntosh sent an email to Ms Hayes on 10 January 2007 in relation to Mr Stewart's investment which stated:

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178 At [420] of the *TWL* judgment.

> It doesn't really matter what property he is given as he will *most likely* never have to settle on it.
>
> (Emphasis added.)

[157] It was pleaded that at the conclusion of the two year period, Blue Chip would purchase the property or find a purchaser and that Mr Stewart would not be obliged to complete the purchase. In accordance with his earlier findings, the Judge found that this representation was not made in the terms alleged.[179] He specifically found that Mr Stewart was never told he would not be obliged to complete the purchase. Rather, he was told there was a risk (albeit a low risk) that he might be required to settle.

[158] There was no pleaded representation that Mr Stewart would not be obliged to complete the settlement or only if Blue Chip performed its obligations. On the evidence, the promissory estoppel argument is not available to Mr Stewart.

Mrs Whyte

[159] In January 2007, Mrs Whyte invested a little over $100,000 in three PIP agreements. She signed three separate SPAs at that time. Two of these related to apartments in the Bianco and one in the Barclay development. She did so on the recommendation of her nephew, a Mr Devoy, who was also a Blue Chip representative.

[160] At the time Mrs Whyte was a retired person having an unencumbered home valued at approximately $350,000 and invested funds of approximately $500,000.

[161] Mrs Whyte said her understanding was that the transaction essentially involved short-term loans to Blue Chip for which she would receive an interest return over a period of 12–18 months. She was assured by Mr Devoy that Blue Chip would take over the purchase of these three properties before she was required to settle. She needed to know this because she was not in a position to settle from her own resources.

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[179] At [422] of the *TWL* judgment.

[162] Mrs Whyte did not take legal advice before signing the SPAs because, she said, she trusted her nephew and she felt she sufficiently understood the arrangements. She relied on the assurances from Mr Devoy that Blue Chip would step in and take over the purchase of the properties before settlement. She said Mr Devoy told her Blue Chip was a credible company listed on the New Zealand Stock Exchange.

[163] For his part, Mr Devoy generally accepted Mrs Whyte's evidence. He stated he believed he explained to her she might have to settle the SPAs if anything went wrong. However, he also recalled being very confident that would not occur. In answer to questions from the Judge, Mr Devoy said he understood the difference between an obligation to purchase and an intention to do so. The Judge found that Mr Devoy understood at the time that Blue Chip was obliged to take over the SPAs before settlement. Mr Devoy accepted that this understanding, in hindsight, was a serious error on his part and that it contradicted the sales documents which Blue Chip issued.

[164] The Judge found that there was no evidence of a specific representation to the effect pleaded, namely that Blue Chip would ultimately take over and purchase the property and return the deposit. He found that Mrs Whyte knew there was a risk that she would be required to settle.[180] Mrs Whyte conceded as much in cross-examination. The Judge considered reliance was in issue.

[165] It was also pleaded that under no circumstances would Mrs Whyte have to complete the purchases and that she was essentially just lending the deposit monies to Blue Chip in exchange for regular interest payments. The Judge found that Mrs Whyte did not give evidence of that specific representation.[181] Rather her evidence was that she was told Blue Chip would take over the obligation to purchase the property and she would not be obliged to do so. That was in accordance with Mr Devoy's understanding at the time.

[166] There was no pleading that Mrs Whyte would only be obliged to complete the SPAs if Blue Chip performed. On the evidence, the true position is that

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[180] At [449] of the *TWL* judgment.
[181] At [449] of the *TWL* judgment.

Mrs Whyte understood she was signing SPAs of property but did so on the basis of assurances from her nephew that there was little risk that Blue Chip would not take over the SPAs before settlement was due. The Judge's finding that she knew there was some risk she would have to settle if Blue Chip did not take over the agreements precludes a finding there was an unequivocal promise that Blue Chip would settle the purchase. It was dependent on Blue Chip's financial capacity.

The Icon Development

Mr and Mrs McFarlane

[167] The appellants selected Mr and Mrs McFarlane to illustrate their case in respect of the Icon development.

[168] Mr and Mrs McFarlane are a retired couple. They were introduced to Blue Chip through their daughter who was employed by Blue Chip. In September 2007 they entered into an SPA to purchase an apartment in the Icon development and an associated PAC agreement. At the time they owned a debt-free home worth approximately $400,000 but had few other assets. At the time of the hearing in the High Court, Mr McFarlane was earning $38,000 per annum. The couple had no other income except superannuation.

[169] They were not required to put up any cash for a deposit but entered into a deposit bond agreement. They understood that they would immediately receive in return from Blue Chip a fee of $7,500.

[170] The Judge accepted that their daughter represented to them (after checking specifically with Mr Flowerday and Mr Bell) that they would never be called upon to settle the SPA because Blue Chip would exercise its purchase option under the PAC agreement.[182] However, the Judge also found that Mr McFarlane understood he was entering an SPA which committed him to purchase the property. In doing so, the Judge found that Mr McFarlane essentially accepted what his daughter told him.

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[182] At [324] of the *Icon* judgment.

The representation was made on behalf of Blue Chip and not on behalf of, or within the authority of, any task Icon had given to BFB.

[171] The Judge also noted that, like other representations to the same effect, it was contrary to Icon's interests under the SPA. Finally, the Judge considered that there was an arguable case that the McFarlanes had affirmed the SPA after they sought legal advice about cancellation.

[172] The cross-examination of Mr McFarlane is instructive:

> Q Now you'd have understood at the time that the ability for Amelia to perform a put option or to be able to exercise the call option, would depend on it still being around in the future, do you understand that?
>
> A Well yes, yes.
>
> Q Yes so you'd have understood that if for some reason it wasn't perhaps if it went into liquidation or suffered some other problem that you might be left with the apartment to buy, so you understand that?
>
> A Well we did but this is why we made the enquiries with our daughter Elizabeth about the security of Blue Chip.
>
> Q So you satisfied yourself that, in your view, Amelia Limited would be around for appropriate enough time to enable them to take you out of this agreement?
>
> A Well we were told by Elizabeth that Amelia was 100% owned by Blue Chip and that was so as good as Blue Chip was going to be.
>
> Q And you thought Blue Chip would be good?
>
> A At that time we did yes.

[173] This passage makes it very plain that Mr McFarlane understood that the statement made to him that he would not be required to settle was dependent upon the Blue Chip company Amelia having the resources to complete the settlement itself. The representation which the McFarlane's relied upon was that Blue Chip would have the ability to complete the purchase in due course, thereby relieving them of the obligation to settle the purchase themselves. The evidence does not support a promise in the terms pleaded for the promissory estoppel argument.

Mr Collingwood and Ms Scanlen

[174] In October 2006, Mr Collingwood and Ms Scanlen signed three SPAs. Two of these related to apartments in the Verve development and, about 12 months later, were transferred to the Icon development. They also executed PAC agreements relative to these investments. Using the equity of approximately $300,000 in their home, they borrowed $150,000 from Westpac, their existing mortgagee. These funds were advanced under a Westpac Lo-Doc scheme. The joint income of Mr Collingwood and Ms Scanlen was of the order of $32,500.

[175] The investors were introduced to a Mr Watson who was a Blue Chip sales adviser. They were told by Mr Watson that they could earn eight per cent interest over and above the interest costs on the $150,000 mortgage. They were assured their deposits would be held in a solicitor's trust account. Mr Watson also told them that although they would be signing SPAs for the apartments, they would never have to settle because Blue Chip would exercise an option to purchase at which point they would receive a further sum of $9,000. Blue Chip would meet all relevant costs and they would expect to receive fees of approximately $2,010 per month. Although they understood they would be contacted by a solicitor recommended by Blue Chip, that did not happen before they signed the documents.

[176] At the time of the hearing in the High Court, all of Ms Scanlen's income was being applied to pay off the interest on the Westpac borrowings. They were in a very difficult financial position and could not afford to meet the total of approximately $1.5 million needed to settle the purchases of the three apartments.

[177] There was a pleaded representation that the investors would not have to settle the purchase of the apartments and that the investment would be for a short term. The Judge found that the suggestion they would not have to settle was contrary to the terms of the SPA and inadmissible.[183] He also found that the representation that the investment was short-term must be directed to Blue Chip's obligations to re-purchase or to buy them out. He found that this representation was not actionable against Icon.

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[183] At [289] of the *Icon* judgment.

[178] Mr Collingwood's evidence about what he was told was not challenged in cross-examination but he was questioned about what he thought would happen if Blue Chip did not settle the apartments. He said this had not crossed his mind but he had made inquiries and had discovered Blue Chip had been going for about seven years and had been successful. He agreed that the possibility that Blue Chip would not settle had not crossed his mind because he still expected Blue Chip to "be around".

[179] This is another case in which the investors knew they were signing SPAs but expected that they would never have to settle because Blue Chip would take up the option and settle effectively on their behalf. Mr Collingwood acknowledged, however, that this was dependent upon Blue Chip continuing to have the resources to enable this to occur. The promissory estoppel argument could not succeed.

Mr and Mrs Ashby

[180] In December 2006, Mr and Mrs Ashby signed two SPAs in relation to units in the Verve (Eden Crescent) development and an associated PIP agreement. The SPAs were later transferred by agreement to the Icon development. Deposits totalling just over $100,000 were paid. At the time, Mr and Mrs Ashby had substantial assets. These comprised a home worth between $400,000 and $600,000 and investments of approximately $200,000. Mr Ashby was the trustee of a trust with capital assets of approximately $5 million. Although retired, Mr and Mrs Ashby received about $120,000 per year from developments in which Mr Ashby had an interest.

[181] They were introduced to Blue Chip through a Mr Hand. Mr Ashby's undisputed evidence was that he believed he was signing binding SPAs. When he raised this with Mr Hand, he was assured this was not the case. Mr Hand told him that he and his wife would sign other documentation to the effect that the deposit would be placed in a solicitor's trust account and Blue Chip would exercise an option to purchase the units themselves in order to take advantage of anticipated capital gain.

[182] Mr Ashby's evidence was that Mr Hand stated their only involvement would be to supply deposit monies. In exchange, they would receive a very good interest return until Blue Chip exercised their options. Although Mr Ashby inquired several times, he said he was assured on each occasion by Mr Hand that they would not be required to settle.

[183] The Judge held that Mr Ashby understood the documents he was signing and the effect of an option.[184] To the extent there was a representation that Blue Chip would exercise its option to purchase, the Judge found this was a statement of future intention.

[184] As to the pleaded representation that the Ashbys would not be required to complete the purchase, the Judge found that the evidence to that effect was inadmissible as being contrary to the conditions of the SPA.

[185] In his evidence-in-chief, Mr Ashby referred to advice from Mr Hand about Blue Chip's substantiality, his own awareness of Blue Chip's profile as a sponsor of sports events, and the fact that various high profile directors were on the Blue Chip Board. Although Mr Ashby was not cross-examined specifically on this point, it is reasonable to infer from his evidence and his experience in property development that Mr Ashby must have been aware that he and his wife would not be relieved from responsibility unless Blue Chip had the resources to complete the settlement themselves. We consider the promissory estoppel argument could not succeed on these facts.

[186] Mr Ashby did not give any evidence to the effect that he was unable to complete the purchases from his own resources or those of his family trust. The total purchase price for the two units was a little over $1 million.

Mr and Mrs Bagley

[187] In 2006, Mr and Mrs Bagley entered three SPAs, two of which were in the Verve development and were later transferred to the Icon development. The total purchase price for these two apartments was $997,000. The third was for an

[184] At [296] of the *Icon* judgment.

apartment in Pitt Street with which we are not concerned. Initially, the Bagleys signed two PIP agreements but, at the time of the transfer to the Icon development, they signed PAC agreements. In order to pay the deposits, $150,000 was raised on the security of a property owned by their children in which the Bagleys had an equitable interest.

[188] The Bagleys became aware of Blue Chip through their children. They were introduced to the Blue Chip sales representative, Ty Jones. Although Mr and Mrs Bagley were retired, Mrs Bagley had considerable experience as a real estate agent. She was aware they were signing SPAs but Mr Jones assured them they would never have to settle the agreements because, under the PIP agreements, Blue Chip would buy them. Mrs Bagley said that because of their "secondary position", they did not even think to ask how long the investment period would be. They understood they would receive approximately $400 per month in relation to the two PIP agreements. The impression was that Blue Chip was a company of good standing and they were aware that a number of people whose views they respected had invested with Blue Chip. They were influenced by the enthusiasm of their children.

[189] Later in her evidence, Mrs Bagley said Mr Jones had told them that Blue Chip would "guarantee" to "buy the apartments back". In October 2007 they were contacted again by Mr Jones who persuaded them to cancel the agreements in respect of the Verve development and purchase apartments in the Icon development instead. They were attracted by the promise that they would receive a payment of $9,000 if they agreed to do so.

[190] They decided to proceed and signed the necessary documents. They did not receive the $9,000 promised. Their family have since sold the property on which the deposit was raised and they have effectively lost any equity they had in that property. If they had to purchase the three apartments they agreed to buy, they would have to find a total of $1.5 million less the deposits paid.

[191] The Judge accepted that Mr Jones had made a representation to the effect that Blue Chip would re-purchase the property so the Bagleys would not be obliged to

complete the purchase and that the investments would be for a short term because Blue Chip would exercise its option to purchase.[185] As in the other cases, the Judge found that the representations were made on behalf of Blue Chip, not Icon. He noted the position was complicated by the fact that the Verve agreements were essentially cancelled and Mr and Mrs Bagley signed up for the two further apartments in Icon. Mrs Bagley did not give evidence of any specific representations about the Icon purchase.

[192] In cross-examination, Mrs Bagley accepted that she understood that she and her husband were the primary purchasers under the SPAs. She explained that at the time the SPAs for the Verve development were signed, they were just plans. When asked who they would be sold to, she stated:

> Well, according to Blue Chip, they had buyers lined up who would buy apartments, their own real estate agents would on-sell them before we had to settle.

[193] She went on to say that she did not think about what would happen if Blue Chip did not settle. The subject had not been mentioned. She accepted that when Mr Jones referred to Blue Chip "guaranteeing" they would buy the apartments back, she relied on his word and did not see any written document to that effect.

[194] Mrs Bagley's evidence is effectively a statement about Blue Chip's future intentions. She and her husband expected that they would never have to settle but they understood that this would depend on Blue Chip taking over the SPAs so as to relieve them from responsibility. They must have understood that this could only occur if Blue Chip remained viable. Importantly, the "transfer" from the Verve development to Icon involved the cancellation of the Verve agreements and the execution of fresh agreements for the Icon development. There was no evidence of any promise or representation to the effect now proposed at the time the new agreements were signed. We conclude that the evidence does not support the promissory estoppel argument.

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[185] At [303] of the *Icon* judgment.

[195] It should be noted that no documents have been placed before us relating to any sales material shown to Mr and Mrs Bagley prior to their entering the SPAs. Nor was there any cross-examination about the content of any such material.

[196] There was no cross-examination about the ability of Mr and Mrs Bagley to settle the transactions without Blue Chip.

Mr and Mrs Cosgrove

[197] In mid-2007, Mr and Mrs Cosgrove were approached by a Blue Chip representative, a Mr Melville. After some persistent salesmanship by Mr Melville, they agreed to invest in three apartments in a development promoted by Blue Chip known as The Stadium. The total purchase price for the three apartments was just over $1 million. The Cosgroves had successfully run a small business and had assets worth just short of $1 million. However, their income was modest. The investments were under the Blue Chip PIP scheme.

[198] Mr and Mrs Cosgrove understood that the ten per cent deposit payable in respect of the three apartments would be held in a solicitor's trust account and that they would receive monthly payments of option fees over a period of approximately 18 months. Mr Cosgrove's evidence was that Mr Melville told them they would never actually have to settle the purchase of the three apartments because, once the building work was completed, Blue Chip would on-sell the apartments to another type of investor. He also explained that Blue Chip would make their money from the capital gain when the apartments were on-sold.

[199] When they entered these agreements, Mr Cosgrove said he relied on what he had been told Mr Melville and the relevant sales material. Amongst other things, he relied on Mr Melville's advice that Blue Chip was "a very secure company" and there was very little risk in the investment.

[200] In September 2007, Mr Melville contacted the Cosgroves again and they were persuaded to sign up for two more apartments, this time in the Icon development for a total cost of nearly $1.1 million. The Cosgroves provided cash of $107,000 for the ten percent deposits required. They also signed two PIP

agreements in relation to the Icon development. Mr Cosgrove said they signed for the Icon development with no questions asked as they believed they were familiar with the PIP investment product and were excited about receiving the monthly payments for the option fees.

[201] It was pleaded that Mr Melville represented to the Cosgroves that Blue Chip would exercise its option to purchase before they were called upon to settle and that the investments would be for a short-term. The Judge found that Mr Melville might well have said that Blue Chip would exercise the option but Mr Cosgrove was well aware that if it did not exercise the option, he and his wife would be left with the commitment to purchase.[186] Mr Cosgrove was concerned about the risks and taxed Mr Melville a number of times about "what would happen if Blue Chip went bust?". He was repeatedly assured that this was not going to happen, although he acknowledged that he realised there was at least a small risk that this might occur. The Judge also found Mr Cosgrove was aware from the documentation that if Blue Chip did not exercise the option and was not able to settle, he and his wife would be left with the obligation to settle. Notwithstanding that information, they had decided to proceed.

[202] On these facts, a plea of promissory estoppel could not succeed.

Mr and Mrs Dragicevich

[203] Mr and Mrs Dragicevich are a retired couple. Before investing with Blue Chip they had a home valued at $300,000 which was debt-free. In addition, they had a little over $200,000 invested. Their combined annual income was $18,500. Friends who had invested with Blue Chip assured them that they were satisfied with their investment. They contacted a Blue Chip representative, a Mr Templeton. After receiving his advice, they signed an SPA in September 2007 for the purchase of one apartment in the Icon development for $619,000. They also signed a PIP agreement and other relevant documentation. A deposit bond was entered into with New Zealand Home Bonds Ltd for the deposit required of $61,900. Although legal advice was recommended, they did not take any.

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[186] At [307] of the *Icon* judgment.

[204] In her evidence–in-chief (given on behalf of both plaintiffs) Mrs Dragicevich said there was either no risk or very low risk involved in the investment. Mr Templeton told them they would never have to settle the purchase price because, before the apartment was finished, Blue Chip would "step in and exercise an option to purchase". At that point, they were told all their money would be refunded. It was anticipated this would occur within about 18 months. They expected to receive option fees of $305 per month.

[205] Less than three weeks later, they received a letter from Blue Chip advising that Blue Chip had elected to exercise the option to accept the Deed of Nomination in respect of their investments. They were advised that although Blue Chip was no longer obliged to pay any option fees to them, Blue Chip would pay four per cent on their invested money and a further four per cent on settlement of the property. Mrs Dragicevich said they had no ability to settle the purchase agreement.

[206] In relation to the pleaded representation that Blue Chip would exercise its option to purchase before Mr and Mrs Dragicevich were called upon to settle under the SPA and the pleaded representation that they would not be required to complete the purchase of the apartments, the Judge found that Mr Templeton did advise them that Blue Chip would exercise the option.[187] But he also found that Mrs Dragicevich knew that if Blue Chip did not exercise the option, they would have to complete the purchase themselves.

[207] In her evidence–in-chief, Mrs Dragicevich accepted they were advised the risk was low and she acknowledged she had read the agreements. They did not expect to have to settle because they thought Blue Chip would exercise the option.

[208] We are satisfied that the promissory estoppel argument could not succeed on the evidence in respect of these investors. They knew there was a residual risk that they might have to settle even if they did not expect to have to do so.

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[187] At [313] of the *Icon* judgment.

Mr and Mrs Herrick

[209] Mr and Mrs Herrick are a retired couple in their late 70's. They own their family home through a family trust. They also have a company which owns a block of flats having an approximate net value of $800,000. Prior to their investments with Blue Chip, they had a combined income of about $1500 per week. In December 2006 they signed up for eight apartments – five in the Barclay and three in the Verve development. The total purchase price was approximately $3.9 million. They also signed associated PIP documents and paid deposits on funds borrowed from the National Bank.

[210] In October 2007, their Blue Chip representative, Mr Stephens, advised the Herricks that the Verve development was not proceeding. Mr Herrick said that he and his wife were anxious to cancel the Verve development and signed relevant documents which they believed would achieve this. He said they did not realise they were signing SPAs for apartments in the Icon development at the same time, although he acknowledged Mr Stephens had suggested they "go into" something in Upper Symonds Street (where the Icon development was situated). Mr Herrick said later in his evidence that he was not sure this was quite correct. At the time they signed SPAs for apartments in the Icon development, the Herricks also signed associated PAC agreements and other documents.

[211] Mr Herrick was adamant he was told by Mr Stephens they would never actually be buying the apartments because they would be purchased by Blue Chip. His evidence in that respect related to the initial investments in December 2006. Mr Herrick did not give evidence of any such representations being made at the time when the Icon SPAs were signed. We are only concerned with the Icon SPAs because Mr Herrick has come to an arrangement with Greenstone in respect of the Greenstone SPAs.

[212] As to the pleaded representation that the investments would be for a short term on or before which Blue Chip would exercise the option to purchase and repay the deposits, the Judge found that Mr Herrick understood they would be using the equity in their property to finance the required deposit and that Blue Chip would

purchase the apartments from them "later down the track".[188] Mr and Mrs Herrick knew about property ownership and what was involved.

[213] There was a further pleaded representation in a slightly different form that Blue Chip would exercise its option to purchase the units under the PAC agreements before the Herricks were called upon to settle and they would not be required to complete the purchase. The Judge found that Mr Herrick did not give direct evidence on the issue. Nor did he give evidence to support the pleaded representation that the PAC agreements were substantially the same as the previous PIP agreements for the Verve. Rather, his evidence was that he and his wife had signed the agreement without realising what they were signing.

[214] There was no pleaded representation and no evidence that the Herricks were told they would only have to settle if Blue Chip performed its obligations. On the evidence, promissory estoppel is not available.

Mr and Mrs Moore

[215] Mr Moore is retired. Mrs Moore works part-time. They own their own home which they stated to be worth around $450,000. They were introduced to Blue Chip through Mr Hand and decided to proceed with two PIP investments. On Mr Hand's recommendation, they obtained legal advice. In December 2006, they entered two SPAs in the Verve development for a total price of just over $1 million. They borrowed $104,000 from the Loan and Building Society (now the Canterbury Building Society) for the deposits. Mr Hand told them that the investment would be over a period of 18 to 24 months. They would receive a 16 per cent return that would cover the cost of mortgaging their home for the deposit and would provide them with extra income which they expected would amount to just under $1400 per month in option fees.

[216] Mr Moore said Mr Hand told them they would never be required to actually settle on the properties because Blue Chip would exercise an option to purchase prior to settlement date. When Mrs Moore questioned Mr Hand about the structure of the Blue Chip Group, Mr Hand referred to the reputable high profile people on the

[188] At [318] of the *Icon* judgment.

Board. Mrs Moore asked what would happen if Blue Chip "went bust". Mr Hand responded that Blue Chip had made a net profit in excess of $6 million over the last two financial years, had the financial backing of Macquarie Bank in Australia and was also guaranteed by Lloyds of London.

[217] Mr Moore also said that Mr Hand told him it was "highly unlikely that Blue Chip would founder in any way". He also referred to the surging demand for Auckland inner-city apartments. Mr Hand explained that it was in Blue Chip's interest to complete the purchase itself to realise the anticipated capital gain on the apartment.

[218] Mr Moore went on to say that Mr Hand told them that even if Blue Chip did not exercise the option to purchase within two years, Blue Chip would still pay their extra costs including interest rates and insurance until the apartment was on-sold. He produced an email from Blue Chip to Mr Hand dated 28 November 2006 which confirmed that Blue Chip would cover all their costs if settlement was required. The email went on to state that, even then, they (Blue Chip) would still be trying to on-sell.

[219] In October 2007, Mr Hand informed Mr and Mrs Moore that the Verve development was not proceeding. He encouraged them to sign a new agreement for two units in the Icon development instead. On 10 October 2007 they signed the relevant SPAs and PIP agreements for the Icon development. On 24 November 2007, they received letters advising that Blue Chip would exercise the options to purchase both apartments.

[220] Mr Moore stated that they did not have any way of raising the funds necessary to purchase the apartments and they were not cross-examined on that issue.

[221] In relation to the pleaded representation that the Moores would not be called upon to complete the purchase of the apartments and that Blue Chip would exercise its option to purchase the apartments before settlement, the Judge accepted that a

representation to that effect was made.[189] The Judge found that the representation was made on behalf of Blue Chip, not the vendor (who at the time was Verve) and certainly not on behalf of Icon which was not involved at that stage.

[222] The Judge also found that the Moores understood there was a risk that Blue Chip might not settle and that they would be required to complete the purchase. They understood the nature of the transaction, at least to the extent that they had signed up to purchase an apartment. They received legal advice before proceeding. The Judge also placed some importance (rightly in our view) on the email from Blue Chip to Mr Hand of 28 November 2006.

[223] In cross-examination, Mr Moore was taken through the various documents he had signed including promotional brochures for the PIP product. He acknowledged that the PIP brochure contained a statement to the effect that Blue Chip had every intention of buying back the property as it was a major benefit for them to do so. He also recognised the possibility that Blue Chip would not exercise the option and that investors had to have the means to settle. Despite that, he accepted Mr Hand's assurances that it was highly unlikely Blue Chip would not perform.

[224] On the basis of the evidence and the Judge's findings, the plea of promissory estoppel could not succeed. On Mr Moore's own evidence, he was aware of the risk, however slight, that Blue Chip would not perform. That is evident from the written material he received prior to purchase in the form of the promotional brochure and the email of 28 November. There was no evidence of any further representation about the settlement issue at the time the Verve agreements were cancelled and the Icon agreements were entered into. As the Judge recognised, it would not be possible to sheet home to Icon the earlier representations made in respect of the Verve investments which involved a different developer.

Mr Stewart

[225] We have discussed Mr Stewart's case already in relation to his investments in the Barclay and Bianco developments.[190] It will be recalled that one of

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189 At [329] of the *Icon* judgment.
190 Above at [87] ff.

Mr Stewart's investments through Blue Chip was in respect of the Verve development. This was later transferred to the Icon development.

[226] The Judge's findings in respect of the other investments apply equally to the Icon investment.[191] The Judge found that Mr Stewart was never told that he would not be obliged to complete the purchase. Mr Stewart was told and understood that he was signing and committing himself to purchase an apartment. There was an expectation that Blue Chip would exercise its option and he would be repaid within a period of two years. Mr Stewart was aware there was a risk that this might not happen, even though there was a low risk.

[227] The Judge also found that the pleaded representations in regard to settlement were those made at the time of Mr Stewart's initial investment in the Verve development.[192] As such, they could not have been made on behalf of Icon even if agency were established.

[228] The proposed promissory estoppel argument could not succeed in Mr Stewart's case.

Mr and Mrs Webber

[229] Mr and Mrs Webber owned their own home and a beach property. Together they had net assets of approximately $1 million prior to investing with Blue Chip. They were introduced to Blue Chip through a Mr Baldwin.

[230] In April 2006 they initially invested in two apartments in developments unrelated to this appeal. One was by way of joint venture and the other a mainstream investment. They had the benefit of advice from a lawyer and an accountant before doing so.

[231] In December 2006 and January 2007 they signed three SPAs with associated PIP agreements and other relevant documentation. Two related to the Verve development and were subsequently transferred to Icon. The third was in a

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191 At [342] of the *Icon* judgment.
192 At [345] of the *Icon* judgment.

development known as the Chatham. In order to pay the deposits, the Webber's raised $141,000 on their property.

[232] Mrs Webber said Mr Baldwin had told them they would earn 16 per cent interest less their mortgage payments until the properties were complete. This could generate another $10,000 of income per year. The amounts borrowed for the deposits would be held in trust and returned to them when the building was complete. This would be a short-term investment, maybe a year.

[233] Mrs Webber said that Mr Baldwin told them on several occasions that there was no way they would ever have to settle as Blue Chip would do so. If Blue Chip did not settle straight away for some reason, Blue Chip would cover all the costs of interest and legal fees until such time as they did settle.

[234] Between June and October 2007, Blue Chip elected to exercise the option to accept the Deed of Nomination. They signed documents in October 2007 transferring the two Verve agreements to the Icon development. They did not receive any additional advice at that time from Mr Baldwin or from a lawyer. Although some payments were received from Blue Chip, they ceased altogether in November 2007. At the time of the hearing in the High Court, they were struggling to pay the mortgages in relation to the two earlier agreements as well as the mortgage arranged for the subsequent PIP deals.

[235] Mrs Webber said it was impossible to make ends meet on their income of about $30,000 per annum. To settle the three PIP deals they would have to provide approximately $1.5 million.

[236] The Judge noted that Mrs Webber had produced notes written by Mr Baldwin to the effect that the client did not settle on the investment property but must show the capacity to do so.[193] He also referred to Mr Baldwin's own evidence that there was no guarantee they would have to settle but it was a highly unlikely event.

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[193] At [351] of the *Icon* judgment.

[237] In his evidence, Mr Baldwin agreed there was no guarantee that Blue Chip would exercise the option and settle the purchase. When referred to the sales brochure in relation to PIP agreements, Mr Baldwin accepted that it covered the risks associated with Blue Chip failing to settle. In that case, it would not cost the investors anything because Blue Chip would cover the associated costs. Effectively, the investors were buying the property on behalf of Blue Chip because Blue Chip would buy it back nearer to settlement.

[238] When asked to explain references in the brochure to the investors having the capacity to settle, Mr Baldwin said he explained to investors such as the Webbers that they would need to have the capacity to borrow on their properties an additional twenty per cent above the ten per cent deposit already paid. This would provide a total of thirty per cent of the purchase price and the balance of seventy per cent would be funded by borrowing. Because investors might not have the ability to meet the costs of borrowing, Blue Chip agreed to cover those costs should the investor be required to settle.

[239] While Mr Baldwin acknowledged these were theoretical possibilities, he remained confident at the time of Blue Chip's capacity to settle based on his experience with other investors who had been satisfied with Blue Chip's performance. No doubt Mr Baldwin's confidence was conveyed to the Webbers.

[240] In relation to the pleaded representation that Blue Chip would take over the obligation to purchase the units and that they would not be required to settle, the Judge concluded:[194]

> I accept, having heard Mrs Webber and Mr Baldwin give evidence that Mr Baldwin would have told the Webbers that Blue Chip would exercise the option prior to settlement as that is how he understood Blue Chip made its money and the way it had operated in the past. He fully expected that to continue. Mr and Mrs Webber went ahead on the basis that they did not expect to have to settle, although they understood that they may be required to do so because that was what the documentation provided for.
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> Mrs Webber confirmed in cross-examination that when she pressed Mr Baldwin about it he said:

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[194] At [354] of the *Icon* judgment.

> > In the worst scenario if you had to [settle] Blue Chip would cover all the expenses and the mortgage payments but that won't happen anyway because you won't have to settle.
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> The Webbers were aware there was a risk they would have to settle but relied on it being a remote risk. They had the benefit of legal advice.

[241] On the basis of the evidence and the Judge's findings, the proposed promissory estoppel argument could not succeed.

[242] There was an attempt to cross-examine Mrs Webber with regard to their capacity to settle but the issue was not seriously pursued.

Ms Aitkenhead

[243] Ms Aitkenhead was a named appellant in the Icon appeal but we were informed that her case has been settled.