IN THE COURT OF APPEAL OF NEW ZEALAND

CA858/2011
[2013] NZCA 420

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

Hearing:	22 July 2013
Court:	O'Regan P, French and Winkelmann JJ
Counsel:	D W Grove for Appellants P J Napier and A K Hyde for Respondent
Judgment:	6 September 2013 at 4 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B Judgment will be entered for the appellants. We seek submissions on the judgment amount as set out in [55] of the Reasons of the Court.

C The respondent must pay to the appellants costs for a standard appeal on a band A basis and usual disbursements.

D Costs in the High Court should be determined in accordance with this judgment. If an award of costs has been made in the High Court, we set it aside so that costs can be redetermined in accordance with this judgment.

REASONS OF THE COURT

(Given by O'Regan P)

[1] The second appellant, Mr Appleton, invested in a property investment scheme promoted by the group of companies associated with Blue Chip New Zealand Limited (Blue Chip). His investment was funded by the first appellants, the trustees of the Appleton Family Trust, raising money from the Bank of New Zealand on the security of the Appleton family home. Blue Chip referred the appellants to the respondent, Tauranga Law (the law practice of Mr Kevin Olivier) for advice. Mr Appleton's investment was lost and the Trust and Mr Appleton, who had guaranteed the obligations of the Trust to the Bank of New Zealand in relation to the funds that the Trust borrowed to invest in the Blue Chip Scheme, suffered loss. They sued Tauranga Law for negligence.

[2] The focus of the High Court judgment and of this judgment was on the position of Mr Appleton. We will refer to him in this judgment but note that the Trust also has an interest in the outcome.

[3] In the High Court, Allan J found that the advice given by Tauranga Law was negligent but that Mr Appleton had not established that this negligent advice had caused his loss.[1] The appellants appeal against that decision. They argue that on the evidence before the High Court, the Judge should have found that the negligent advice was causative of Mr Appleton's loss. Tauranga Law supports the Judge's analysis and, in addition, supports the judgment on the ground that, as Tauranga Law had specifically advised Mr Appleton that he could lose his deposit, and that was what came to pass, it could not be liable to him because it failed to advise of other risks.

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1 *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 12 December 2011 [High Court judgment].

Issues on appeal

[4] The parties filed an agreed list of issues:

(a) Having warned of the risk that came to pass, can Tauranga Law be liable for a failure to advise of other relevant risks?

(b) If so, was Allan J required to assess the appellants' case on the following basis:

(i) What advice should have been given by Tauranga Law to the appellants?

(ii) After determining what advice should have been given to the appellants, was there sufficient evidence to demonstrate the appellants would have proceeded with the transaction irrespective of whether or not such advice was given?

(c) If so, did Allan J effectively assess the case on the above basis (but perhaps with the burden of proof on the appellants not on the respondent)?

[5] Before dealing with those issues, we will first set out the factual background.

Factual background

[6] In 2004, Mr Appleton entered into an agreement to purchase an apartment in Auckland from a company called Rockfort Ltd (Rockfort). Rockfort was a $100 company. It was an affiliate of Blue Chip. Mr Appleton had previously invested in another Blue Chip product, and had been satisfied with the outcome. Mr Appleton signed the sale and purchase agreement with Rockfort without taking legal advice. The transaction did not involve some of the complexities that characterised a number of other Blue Chip cases that have come before the Courts.

[7] The agreement for sale and purchase was signed on 23 April 2004. The agreement provided for the purchase by Mr Appleton of Apartment 506, 18-20 Turner Street, Auckland from Rockfort Ltd for $356,896. The deposit was to be $101,910.[2] Mr Appleton intended that the Trust would be nominated as the purchaser, and provision was made for that in the agreement. It was intended that the apartment, when purchased, would be subject to a lease between Mr Appleton (or the Trust if nominated) and another Blue Chip company, Auckland Residential Tenancies Ltd (ARTL). The obligations of ARTL were to be guaranteed by Porchester Ltd.

[8] The last page of the agreement had, above the title "Purchaser's Solicitor", a stamp with the names of Tauranga Law and Kevin Olivier. At this stage, Mr Appleton had not contacted Tauranga Law or Mr Olivier. He had no previous dealings with Mr Olivier. This stamp had been provided to the Blue Chip Group by Mr Olivier to assist administratively in providing details of the purchaser's solicitor, as Mr Olivier had advised on a number of similar transactions where the intending investor had been referred to him by Blue Chip for advice.

[9] On 25 April 2004, Mr Olivier received an email from Blue Chip notifying him of the agreement for sale and purchase. We were told that the email contained details of Mr Appleton's contact information, brief details of the transaction, and a reference to the fact that this was Mr Appleton's second Blue Chip transaction.

[10] On 28 April 2004, Walters Law, acting for the Blue Chip Group, wrote to Tauranga Law. The letter noted that Tauranga Law acted for Mr Appleton in relation to the transaction, and enclosed the original agreement for sale and purchase, a diagram to illustrate the transaction, a copy of a tax opinion, two invoices for fees payable to Blue Chip and a copy of the deed of lease between Mr Appleton and ARTL. Mr Olivier did not contact Mr Appleton following receipt of the 25 April email or the 28 April letter.

[11] On 24 May 2004, the Bank of New Zealand sent loan documentation instructions directly to Tauranga Law. Mr Olivier decided to contact Mr Appleton

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[2] This was later altered to $90,065.25: see [13] below.

for the first time. After receiving confirmation of his instructions from Mr Appleton by telephone, Mr Olivier wrote to Mr Appleton on 31 May 2004. The contents of this letter are central to this proceeding, and so we set it out in full:

> **RE: Purchase by you from Rockfort Limited of Unit 506, 18-20 Turner Street, Auckland**
>
> **Bank of New Zealand loan to The Appleton Family Trust**
>
> **Trustees: John Appleton and Andrew Paul Clark**
>
> **Guarantor: John Appleton**
>
> We confirm having received from Walters Law instructions to attend to the above transaction on your behalf and take this opportunity of thanking you for the instruction.
>
> We confirm that the agreement of sale was signed by J Appleton without legal advice from ourselves and that you may nominate a LAQC to take title.
>
> **We note that settlement of Unit 506, 18-20 Turner Street, Auckland has provisionally been set down for 31 August 2005 and that you have contracted to pay the deposit of $101,910.00 immediately. In condition 16 the vendor states that 31 August 2005 is an estimated date and that the vendor will <u>not</u> be liable for any delays beyond that date whatsoever.**
>
> The usual deposit for a transaction of this nature is ten per centum (10%) or $35,689.60 and you have contracted to pay a deposit of $101,910.00.
>
> **The major risk in this transaction <u>prior to settlement</u> (31 August 2005 or later if there are delays) is**
>
> - **if the vendor, Rockfort Limited, is liquidated or**
> - **the developer is unable to complete the building and Rockfort Limited is unable to take title.**
>
> **You/the LAQC would be a concurrent creditor and may then lose the entire deposit.**
>
> We note that in terms of clause 14 of the agreement for sale and purchase, the vendor is to pay to you interest for immediate release of the deposit at 8.5% per annum fortnightly in advance.
>
> We note further that you are obtaining funds to pay the deposit from a loan to The Appleton Family Trust by Bank of New Zealand which loan is secured by an existing mortgage over 5 Tolben Place, Howick, Auckland.
>
> We confirm that once the purchase of Unit 506, 18-20 Turner Street, Auckland has been settled (**31 August 2005 or later if there are delays**) Bribanc Property Management Limited, a company within the Auckland Residential Property Trust group will manage the property for you. Auckland Residential Tenancies Limited, a company within the Auckland

Residential Property Trust group, is the Lessee of Unit 506, 18-20 Turner Street, Auckland for four years.

In terms of clause three of the lease the tenant may by notice in writing to the lessor (you) at least three months before the termination date give written notice of the Lessee's wish to renew the lease for a further period of four years, provided the Lessee has complied with all its obligations under the lease. There are **four renewal periods of four years each** and if they are all exercised then the **total lease will be for a period of twenty years**.

In terms of the fourth schedule of the lease the **lessee has a right of first refusal** to purchase the property. The lessee's right of first refusal to purchase the property is **also extended to the further terms of the lease**.

If the lessee does not exercise its right of first refusal you will then be able to sell the property but such **sale will be subject to the lease** which then has a potential total term of 20 years if all the renewals are exercised by the lessee.

The rental from the property being acquired will be utilised to service the loan and mortgage that you/the LAQC obtain to finance the balance of the purchase price in addition to the existing loan by Bank of New Zealand for the deposit and any shortfall at any time will be made up by you.

We confirm our advice that

- you should inspect the property once it has been constructed (**31 August 2005 or later if there are delays**) to confirm that the purchase price represents current market value.

- Auckland Residential Property Trust advise that an exclusive insurance policy which protects you from tenant default and tenant malicious damage will be arranged. Please ensure that you obtain a copy of this policy from Auckland Residential Property Trust. Your managing agent, Bribanc Property Management Limited, will hold the original. **The major risk in this transaction after settlement (31 August 2005 or later if there are delays)** and once the title is registered in the LAQC's name is if the policy is not in place and Auckland Residential Tenancies Limited (the tenant) is liquidated resulting in you personally having to make the mortgage repayments without the benefit of rental income.

We confirm that we have not advised you regarding your decision to invest in the Auckland property market and that you understand that the projected profit from the investment will only materialise if Auckland property prices increase as projected.

After settlement (**31 August 2005 or later if there are delays**) and once we receive the original documentation from Walters Law, the solicitors for the vendor, we will instruct our land agents to register Unit 506, 18-20 Turner Street, Auckland in the LAQC's name and mortgage in favour of the financial institution that you obtain a loan for the balance of the purchase price from in the North Auckland Registry.

After registration we shall provide you with a copy of the Certificate of Title. The original mortgage and a search copy of the title will be forwarded

> to the financial institution that you obtain a loan for the balance of the purchase price from to be retained by them in safe custody.
>
> We shall keep you advised.
>
> Yours faithfully
>
> ***Tauranga Law***
> **Kevin Olivier**
> **Principal**
>
> (emphasis in original.)

[12] Mr Olivier sent this letter along with a letter instructing Mr Appleton to see an Auckland solicitor, Mr Kelly, who would witness his signature to the Bank of New Zealand loan documents. The loan was raised by the Trust, and so it was necessary for the other trustee of the Trust to accompany Mr Appleton when meeting with Mr Kelly to sign the loan documents. Mr Olivier also prepared a resolution for execution by the trustees of the Trust, resolving to obtain a loan from the Bank of New Zealand in order to facilitate the purchase of the apartment. At trial, there was a dispute about when Mr Appleton received these letters, and the Judge found that Mr Appleton had received them before he visited Mr Kelly on 4 June 2004. This is not now disputed.

[13] Following the execution of the loan documents, Mr Kelly returned them to Mr Olivier. The loan was for $92,310, and the amount eventually paid to Blue Chip by way of deposit was $90,065.25, the balance being applied in payment of a bank establishment fee, and various other valuation and solicitors' fees and disbursements. Blue Chip agreed to accept the sum of $90,065.25 as a deposit in lieu of the $101,910 that was stated in the agreement. The deposit was paid by Mr Olivier into the Blue Chip bank account on 11 or 12 June 2004. It is notable that the deposit was not held on trust by a stakeholder as would occur in an orthodox property purchase transaction. It is also notable that it was paid not to Rockfort as vendor but to Blue Chip.

[14] Settlement for purchase of the apartment was to be 31 August 2005. However, there were significant delays. Several years went by and the apartment was never constructed. After Mr Appleton contacted Blue Chip through Mr Olivier in February and April 2007, Blue Chip agreed to refund Mr Appleton's deposit, but

nothing was ever actually paid. Ultimately, the Blue Chip Group collapsed and Rockfort Ltd was liquidated. Mr Appleton lost his deposit.

[15] The appellants' action against Tauranga Law is founded on an alleged breach of its duty of care to provide competent legal advice as to the risks associated with the transaction. They claimed for an amount equal to the amount borrowed to fund the deposit paid to Blue Chip, plus interest paid in relation to that loan as well as general damages of $10,000, interest and costs. Mr Appleton said in evidence that he had received adequate advice he would never have paid the deposit and would have cancelled the agreement. The appellants did not pursue the claim for general damages in this Court.

High Court decision

[16] In the High Court, Allan J found that Mr Olivier had been negligent and failed to provide Mr Appleton with proper advice and had therefore breached his duty of care to Mr Appleton. However, the Judge further held that Mr Olivier's negligence had not caused Mr Appleton's loss. Mr Appleton's claim therefore failed.

[17] Allan J determined that a contract of retainer arose between Mr Olivier and Mr Appleton on 24 May 2004, when Mr Olivier contacted Mr Appleton and Mr Appleton confirmed that he wanted Mr Olivier to act. He did not accept that the retainer began when Mr Olivier received the email of 25 April 2004 from Blue Chip or the letter of 28 April 2004 from Walters Law.[3] However, the Judge noted that this did not prevent Mr Olivier owing a duty of care to Mr Appleton prior to 24 May 2004 because he knew it was likely Mr Appleton would be instructing him and that he would be expected to look after his interests in the meantime.

[18] Allan J heard evidence from Mr Appleton and Mr Olivier. He also heard from Mr Clark, who was a trustee of the Appleton Family Trust, and received an affidavit from Mr KV Miles, who was formerly employed by the Blue Chip Group. He also heard expert evidence from three property lawyers on the topic of what would have constituted competent advice. These expert witnesses were

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3 See [9] and [10] above.

Messrs PH Nolan, RV Eades and IL Haynes, who had all previously given similar expert evidence in a number of Blue Chip cases.

[19] Allan J determined that Mr Olivier's advice was negligent in a number of respects.[4] We will come to the detail of this later.

[20] However, the Judge ultimately found that Mr Appleton's claim could not succeed because he could not show that he would have acted on competent advice if Mr Olivier had offered it. Mr Olivier's negligence had not led to Mr Appleton's loss.

[21] We now turn to the issues listed at [3] above.

Can Tauranga Law be liable when it warned of the risk that came to pass?

[22] Mr Napier argued that the Judge's finding on causation could have been, and should have been, based on a much simpler proposition than that adopted by the Judge. In essence, he said that the letter of 31 May 2004 had advised Mr Appleton that he could lose his deposit. What ultimately transpired was that Mr Appleton did, in fact, lose his deposit. Because Mr Appleton had been advised of the very risk that came to pass, therefore it could not be said that negligent advice on other aspects of the transaction had caused Mr Appleton's loss. Rather, they may have led to a situation in which the possibility of the loss occurring arose, but that was something different from being the cause of loss.

[23] Mr Napier argued that the only risk that was relevant was the one that led to the loss that was suffered, and any failure to advise on other risks that did not come to pass were simply irrelevant.

[24] Mr Napier relied on the decision of this Court in *Sew Hoy & Sons Ltd (in rec & liq) v Coopers & Lybrand*, in which Henry J said:[5]

> The "but for" test is not in my view appropriate. Failure to meet it must of course negate causation, but what must still be established by a plaintiff is that in a commonsense practical way the loss claimed was attributable to the

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4 High Court judgment, above n 1, at [42]–[44] and [52]–[53].

5 *Sew Hoy & Sons Ltd (in rec & liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 403.

> breach of duty, and thus justifies the Court in imposing responsibility on the defendant for the loss.

[25] Mr Napier also relied on the distinction drawn by Tipping J in *Price Waterhouse v Kwan* between causing loss and providing the opportunity for loss to occur.[6]

[26] Mr Napier correctly states the propositions for which these authorities stand, but that does not assist him with his argument. It is simplistic to say that there was no causation in the present case because the risk of the loss of a deposit was highlighted. The Judge found that the advice given by Mr Olivier was deficient in a number of ways. One of these was that the advice provided in connection with the deposit, obscured the fact that Blue Chip could do what it liked with it. Other deficiencies as found by the Judge were also relevant to the nature and magnitude of the risk of loss of the deposit. For example, the fact that Rockfort did not own the land on which the apartment was to be built, and that it was a company of no substance. Because of these flaws in the advice, the mere highlighting of the risk of loss of the deposit did not bring home to Mr Appleton the magnitude of the risk. And the failure to advise on the possibility of cancelling meant Mr Appleton was not made aware of the fact that he had the right to take steps to avoid the risk (we come back to this last point later). In these circumstances, it cannot be said that Mr Appleton was made aware of the very risk that came to fruition.

[27] As Henry J observed in *Sew Hoy & Sons Ltd*, what is required is a commonsense practical assessment of the nature of the advice given in all of the circumstances leading to the loss, to determine whether causation has been established as a matter of fact. We believe that such an assessment is required in this case. We reject Mr Napier's submission and turn to that assessment.

Our approach

[28] We now deal with the second and third issues identified at [4] together. We do not adopt the methodology set out in [4](b) above. Rather, we begin by asking in what respects the letter of 31 May failed to outline to Mr Appleton the nature of the

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6 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].

transaction into which he had entered and the risks which arose from it. We then turn to the question, should the Judge have found that it had been established that Mr Appleton would not have entered into the transaction or would have extracted himself from it if he had been properly advised?

[29] The appellants are exercising a general right of appeal. The parties are entitled to judgment in accordance with the opinion of this Court.[7] Mr Napier submitted that we should exercise caution in assessing the findings of the High Court on causation, as he characterised those findings as ones of credibility. We do not see the issue of causation as turning on findings of credibility. Rather, the Judge's determination on causation was an assessment of fact and degree on which the appellants are entitled to the opinion of this Court.

Failures in advice

Right to cancel

[30] Before we turn to the letter of 31 May 2004, we first deal with the failure by Mr Olivier to advise Mr Appleton at any stage about his right to cancel.

[31] The High Court Judge found that Mr Olivier was negligent not to advise Mr Appleton of the right to cancel.[8] The right to cancel arose under s 225 of the Resource Management Act 1991, and applied for a period of 14 days after the agreement of sale and purchase was signed on 23 April 2004. By the time that period elapsed (on 7 May 2004), Mr Olivier had had the contract between Mr Appleton and Rockfort for over a week.

[32] There was conflicting evidence from the expert witnesses about whether Mr Olivier was under an obligation to contact Mr Appleton on receipt of the communications from Blue Chip on 25 April 2004 and Walters Law on 28 April 2004. The Judge found that Mr Olivier was negligent not to advise Mr Appleton of his right to cancel under the Resource Management Act before 7 May 2004. Even if there was no such obligation, the evidence before the Court from both Mr Olivier

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7 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
8 At [43].

and from Mr Miles was that Mr Appleton would have been able to cancel the contract after the expiry of the 14 day period provided for in s 225 if he had asked to do so. This was apparently because Blue Chip had plenty of potential buyers at the relevant time and took the view that it should not stand in the way of those that wished to withdraw from a transaction already entered into. Mr Olivier said this was something that was well known to him from past experience with Blue Chip, and the Judge accepted that cancellation remained a practical option after the expiry of the 14 day period.

[33] The fact that Rockfort/Blue Chip agreed to alter the amount of the deposit payable under the agreement for sale and purchase from $101,910 to $90,065.25 when the Bank of New Zealand declined to lend Mr Appleton the higher amount supports the proposition that Blue Chip was prepared to be flexible despite clear contractual obligations.

[34] Drawing all this together, Mr Olivier was negligent, either because he failed to advise of the possibility of cancellation when the right existed under s 225 or, alternatively because he failed to advise of that possibility after he actually received instructions from Mr Appleton and, on the Judge's finding, the contract of retainer between Mr Appleton and Mr Olivier had commenced.

[35] Failure to advise on the right of cancellation was also a significant factor in the dismissal of Tauranga Law's application for summary judgment in November 2010.[9]

31 May letter

[36] The Judge found that the letter of 31 May 2004 (the only advice given by Mr Olivier to Mr Appleton) gave no, or insufficient, advice about:[10]

> (a) the fact that Rockfort was not the registered proprietor of the site on which the building in which the apartment was to be located was meant to be built;

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9 *Appleton v Tauranga Law* HC Tauranga CIV-2010-070-385, 3 November 2010 at [37].

10 High Court judgment at [44] and [52]–[53].

(b) Rockfort was a company with a capital of $100 and no apparent independent substance;

(c) the lack of deposit security; while Mr Appleton's attention was drawn to the fact that the deposit was almost three times higher than the conventional 10 per cent, the reference to the "immediate release of the deposit" tended "to obscure the reality that the vendor [sic, in reality Blue Chip] was to be at liberty to utilise the deposit as soon as it was paid";

(d) there were no plans or specifications and virtually no means of identifying what was being purchased from Rockfort; and

(e) Rockfort was not the developer of the property, and there were no provisions in the agreement that would have enabled Mr Appleton to compel Rockfort or the developer to actually undertake the subdivision and development.

[37] These deficiencies in the advice given were not contested in this Court by Mr Napier, although they had been in the High Court. They must be seen, however, in the context of the advice that was given, particularly:

(a) the fact that the deposit was three times greater than normal;

(b) the fact that there was a risk that the deposit would be lost if Rockfort was liquidated or the developer was unable to complete the building and Rockfort was unable to take title;

(c) the fact that the letter included a statement that the writer "noted" that "the vendor is to pay to you interest for immediate release of the deposit".

[38] The deficits in the advice given are, in our view, more serious than the Judge appears to have believed. The reality of the situation was that Rockfort was purporting to enter into a sale of an apartment in circumstances where it had, as far

as Mr Olivier and Mr Appleton knew, no rights to the land on which the apartment was meant to be built, no funds available to it to purchase the land and no right to do so, no funds available to actually develop the land or purchase the apartment building from the developer and no right to do so, and no support of any kind from Blue Chip.

[39] The lack of any real way of describing the apartment meant that the contract was probably void for uncertainty because it did not identify in any meaningful way what the apartment being purchased by Mr Appleton would comprise. There were none of the normal protections for a purchaser off the plans, such as provisions relating to the design and engineering specifications, certification of practical completion, a maintenance period, a termination date in the event that the development did not proceed, and so on. There was no explanation of why the deposit was paid to Blue Chip rather than Rockfort, and no indication of what obligations Blue Chip assumed to Mr Appleton. Blue Chip was said to be Rockfort's agent, but it was unclear whether the credit risk being taken by Mr Appleton was a credit risk on Blue Chip or on Rockfort.

[40] In his evidence in the High Court, Mr Olivier shrugged off all of these deficits by saying that everything depended on Blue Chip performing, and that Blue Chip was a large and reliable company. This seems to us to be inadequate. The purpose of getting legal advice is to ensure that the investor who is attracted by the superficial desirability of an investment is advised on the legal underpinning of the assumed features. The reality in the present case was that Mr Appleton was, in effect, making an unsecured advance to Blue Chip, a party with which he had no contractual relationship at all.

Causation

[41] Given our view that Mr Olivier's failings were much more serious than the Judge found, it is necessary for us to reassess the issue of causation in light of our findings.

[42] Mr Appleton gave evidence that he would not have proceeded with the transaction if he had known that Rockfort Ltd did not own the property and that the

deposit was being released to Blue Chip rather than being held in a solicitor's trust account. However, the Judge found that Mr Appleton had made up his mind to proceed with the transaction before engaging Mr Olivier, and that he was "extremely unlikely to be put off by anything Mr Olivier said or wrote".[11] Allan J's reasons for this finding were:[12]

(a) Mr Appleton had previously invested with Blue Chip and was happy with the state of that investment. He also knew that Blue Chip had a good reputation. He regarded his second investment with Blue Chip as attractive and secure.

(b) Mr Appleton entered into the agreement without seeking legal advice.

(c) Mr Clark, the other family trustee, gave evidence that Mr Appleton was "dead certain he was doing the right thing" and was confident that he had "done all his homework".

(d) In cross-examination, Mr Appleton stated that he had not read in full the sale and purchase agreement that he had signed on 23 April 2004 and he had taken little interest in the letter of 31 May 2004. In response to a question about whether he carefully read the letter of 31 May 2004, Mr Appleton stated "I didn't feel that it was pertinent".

[43] The Judge concluded: "Mr Appleton was determined to proceed with this transaction, come what may, and irrespective of his legal advice".[13]

[44] In his evidence in chief, Mr Appleton said:

> 31. If I had been advised of the significant legal issues and risks arising out of this transaction I would have done all that I could have to get out of the transaction and not pay the deposit and costs. I confirm that I did receive Tauranga Law's letter of 31 May 2004. That was the first occasion that any risks of the transaction were brought to my attention. I did not appreciate however the significance of the risks. I also did not realise that there was an ability to cancel the contract.

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11 High Court judgment, above n 1, at [62].
12 At [57]–[60].
13 At [66].

> 32. I understood that the vendor, Rockfort Limited owned the property. I therefore did not think that there were any significant risks to the transaction. I did not understand that [sic: the] consequences of the deposit being released or that this was unusual. I must have read the letter from Tauranga Law dated 31 May 2004, however this did not raise concerns. I have no idea what a concurrent creditor is. I would have not proceeded if I know [sic: knew] that:
>
> a. The vendor did not own the property;
>
> b. The deposit was being released and therefore I had no security;
>
> c. The release of the deposit was unusual and risky.

[45] In his oral evidence in the High Court, the following exchange took place between Mr Appleton's counsel and Mr Appleton:

> Q. As far as this transaction is concerned, the – there've been a number of criticisms raised about the actual mechanics of it, the legal aspects of it and I just want to put these to you, in a list, and get your response what you would have done if you had been told about these risks. The issues that have identified are this: firstly, the vendor Rockfort Limited was a subsidiary of Blue Chip, but it was a hundred dollar company. Rockfort didn't own the property that you were purchased – purchasing. The deposit was extremely high, the usual deposits about 10% of the purchase price and you were paying about, close to 30% of the purchase price. The deposit was being released in that it was being paid under the contract to Rockfort Limited and Rockfort could do whatever they wanted with it pending settlement. There was no other ability to protect the deposit being paid pending completion of the purchase and you getting title. And the agreement was highly unusual in that you were buying off the plan something to be built, but there was no contractual obligation or specification as to actually what you were being purchased – what you were intending to purchase. And if you were – if it was explained to you that this is highly unusual and very risky, what would your reaction have been?
>
> A. I wouldn't have entered into the agreement in the first place.
>
> Q. And what about if those aspects were pointed out afterwards?
>
> A. Then I would have done my level best to, to get out of the agreement.
>
> Q. Just finally, who did you think was building this apartment?
>
> A. Blue Chip.

[46] Mr Appleton was not cross-examined on those answers, so it amounted to unchallenged evidence. Mr Grove made much of this failure to cross-examine. We

do not think that an obvious oversight by counsel, in circumstances where the cross-examination would have been essentially a ritual putting of the point to Mr Appleton in anticipation of his refusal to accept it, should be elevated to a "king-hit". No unfairness arose through the failure to directly confront Mr Appleton during cross-examination on the answers he gave in the exchange recorded above.[14]

[47] Mr Napier argued that the lengthy question recorded above referred to matters that had, in fact, been covered in the 31 May letter so the answer that Mr Appleton would not have entered into the agreement if advised on those matters did not fairly address the difference between the advice he would have received from a lawyer who was not negligent and the advice he actually received. We accept that there is validity in that point, because the question does refer to matters that were, in fact, covered in the 31 May letter. But we think the question and answer still has evidential weight because it put to Mr Appleton what he would have done if he had been advised of all of the matters mentioned in the question. We do not consider that the fact that he had been advised of some of these means the question and answer do not provide an evidential basis for a finding about what Mr Appleton would have done if he had been advised in a careful and comprehensive way.

[48] Mr Napier made much of the fact that Mr Appleton had said that he did not feel that the letter of advice of 31 May 2004 was "pertinent", a factor which had also weighed heavily with the Judge. However, we think that the submission, and the Judge's conclusion based on it, is unfair to Mr Appleton. What he actually said was that he did not think that the letter was pertinent because he believed that the deposit was held on trust. This brings very much into focus the adequacy of the reference in the letter to the fact that the deposit had been released to Blue Chip.

[49] The Judge found that the reference to the "immediate release of the deposit" tended to obscure the reality that Blue Chip could do what it liked with the deposit as soon as it was paid. Mr Napier said that he was not challenging any of the Judge's findings, but in effect he did challenge that finding and said that the letter actually made the release of the deposit clear. We do not see any basis to differ from the

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[14] *R v Soutar* [2009] NZCA 227 at [27].

Judge's finding that the reference to the release of the deposit obscured the reality that Blue Chip was at liberty to do what it liked with the money.

[50] The fact is that the terms of the letter would not have been particularly pertinent if the deposit had been held on trust as would be normal in a property transaction. Once the Judge made a finding that it was not made clear that the deposit could be used by Blue Chip for any purpose it chose, we do not think it was fair to Mr Appleton to take his reference to the letter not being pertinent as an indication that he would have invested regardless of the nature of the advice given to him.

[51] The Judge also placed considerable weight on Mr Clark's evidence that Mr Appleton was determined to go ahead with the investment, based on his previous good experience with a Blue Chip investment. Again, we do not consider that it is right to conclude from the fact that Mr Appleton was dead set on entering into an orthodox property purchase agreement with Blue Chip that he was also dead set on entering into the unsecured deposit arrangement that he actually entered into in circumstances where he did not realise that that was what he was doing.

[52] It is true, as the Judge found, that Mr Appleton entered into the agreement without taking legal advice. But it is also true that he asked for a copy to be sent to the lawyer who was to advise him about it. The copy was received by Mr Olivier at a time when the option of cancelling was still available. All of this brings squarely into focus the fact that Mr Appleton was not given advice that he could have cancelled the agreement if he was concerned about the terms of it. The failure to advise about the cancellation right was pleaded and the Judge found in Mr Appleton's favour on that point. We see no reason to go behind that finding. The fact that Mr Appleton entered into the agreement without legal advice does not logically support the conclusion that he would not have cancelled it if he had been properly advised as to its nature and had been told that cancellation was an option available to him.

[53] We accept that the High Court Judge concluded that if Mr Olivier had advised Mr Appleton prior to 7 May of his cancellation rights pursuant to s 225 of

the Resource Management Act, Mr Appleton would nevertheless have proceeded. We do not see that as determinative, because of the practical availability of cancellation after 7 May given what Mr Olivier knew about Blue Chip's position on later cancellations. In our view, if the Judge had considered whether Mr Appleton would have cancelled after he had been properly apprised of the precariousness of the contractual position and advised that he had, in effect, made an unsecured deposit with Blue Chip in circumstances where he had no contractual rights against Blue Chip and where the eventual purchase of an apartment was contingent on a number of significant matters over which Rockfort had no contractual control, he would have found that Mr Appleton would not have continued with the transaction.

[54] Our difference of view with the Judge on the nature of Mr Olivier's failures leads us to a different conclusion on the causation issue. Given that we see Mr Olivier's failings as much more significant than the Judge did, we must of necessity reassess the causation issue in light of our different conclusion on the nature of the breach of the duty. Having done that, we conclude that on the evidence before the Court, Mr Appleton established that if he had been fully appraised of the nature of the transaction he was entering into and the legally exposed position which he faced, and if he had been told that he was able to withdraw from the transaction without penalty, he would have done so.

Result

[55] We therefore allow the appeal. We will enter judgment for the appellants for the amount claimed in the notice of appeal plus accrued interest but not including general damages. To avoid any error in the amount we direct counsel to confer and file a joint memorandum within 14 days setting out the amount for which judgment should be entered or, if there is any disagreement, identifying the areas of disagreement so that we can resolve them.

Costs

[56] Costs should follow the event. The respondent must pay to the appellant costs for a standard appeal on a band A basis plus usual disbursements.

Costs in the High Court

[57] Costs in the High Court should be determined in accordance with this judgment. If an award of costs has been made in the High Court, we set it aside so that costs can be redetermined in accordance with this judgment.

Solicitors:
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Keegan Alexander, Auckland for Respondent