IN THE SUPREME COURT OF NEW ZEALAND SC 52/2010

BETWEEN **GE CUSTODIANS**
Appellant

AND **BRUCE LEONARD BARTLE**
DOROTHY JUDITH BARTLE
First Respondents

AND **BARTLE PROPERTIES LIMITED**
Second Respondent

AND **JONATHAN MATHIAS**
Third Respondent

Hearing:	20-21 October 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	J A Farmer QC, B J Upton and M V Robinson for the Appellants J G Miles QC, P J Dale and D W Grove for the Respondents

---

CIVIL APPEAL

MR FARMER QC:

If the Court pleases, I appear with my learned friends Mr Upton and Mr Robinson for the plaintiff.

ELIAS CJ:

Thank you, Mr Farmer, Mr Upton, Mr Robinson.

MR DALE:

As the Court pleases, Mr Dale and Mr Grove for the respondents. Mr Miles will be with us.

ELIAS CJ:

I understand he will be coming later. Thank you, Mr Dale and Mr Grove. Yes Mr Farmer.

MR FARMER QC:

Yes, if the Court pleases, there is a value judgement in this case to be made that assumes major importance in the ultimate outcome, and, indeed, is really determinative of it. In particular, to use the words that have been used in Australian cases, whether the transaction could be said to GE's knowledge to be "morally repugnant". The issue, then, we would submit, comes down to the degree to which the Act is intended to protect from themselves people who borrow money to invest in the hope of achieving some superior gain. Justice Randerson, who is, of course, the trial Judge, citing extracts from the Court of Appeal in *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735, which, of course, was a case that came to this Court and the Court of Appeal, ironically including two of the Judges in the present case, the President and Justice Arnold, said that the law does not intervene on the grounds of unconscionability where the borrowers are at full capacity, the loan is on normal commercial terms, and any relative weakness in bargaining power, or lack of complete understanding, can be addressed by the receipt of independent legal advice. If Your Honours please, I'll give you the references. I'm not sure that you need to go to it, but paragraph 286 of His Honour's judgment sets out fairly lengthy extracts from the Court of Appeal's judgment in *Gustav*, which does include a reference to the redressing of any imbalance in bargaining power or in lack of understanding by the borrower receiving what was called full independent advice. And at 310, after analysing the matter further, His Honour concluded in the terms that I've just stated, namely, that the law doesn't intervene where those factors are satisfied: full capacity, a loan on normal commercial terms, and any relative weakness or lack of understanding, complete understanding, being able to be addressed. The way it was put by His Honour was "can be addressed by the receipt of independent legal advice". And in that last respect, His Honour also relied on New Zealand and English authority to the effect that the lender is entitled to assume that the borrower's lawyer will properly explain the transaction and the risks associated

with it, and you'll find a clear statement of that at paragraph 293 of His Honour's judgment.

At 293, His Honour referred to authorities, in particular – and they're in the casebook – a judgment which you'll find at tab 11 of the appellant's bundle, which is volume 1, a case *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 (HC). I might just take you quickly to it, if I could. It's a judgment of Your Honour Justice Tipping in the High Court in Timaru. The case was a solicitor acting for two parties and, in particular, the issue to which I'm referring is dealt with at page 126 of the judgment. Page 211 of the bundle. Beginning at around line 47, at the foot of the page, where Your Honour said, "It was suggested the purchasers were in a position of special disadvantage. They were at full agent capacity. They had no personal disabilities of any kind. The only possible basis upon which it could be claimed they were under a disadvantage is that their solicitor did not fully explain the guarantee to them. That, however, is a matter of complaint between the purchasers and their solicitor. The fact that their solicitor happened to be the same person as was acting for the Nominee Company does not, in my judgement, even approach the proposition that the Nominee Company or the individual lenders were acting unconscionably. There is, in short, nothing in this case which can fairly be said to affect the conscience of the Nominee Company or the lenders. If the purchasers have a complaint, that complaint relates to the conduct of Mr Clark in his capacity as their own solicitor".

When properly analysed, this case has some similarity in principle with the facts of *O'Conner v Hart* [1985] 1 NZLR 159 (PC). I won't read on, but you'll recall that *O'Conner v Hart* is, of course, a Privy Council judgment. The same point was taken, the same approach was taken, to the question of legal advice and the importance of that, and in particular, the effect of that on, as it was put, on the conscience of the lender.

Now, the other case referred to at paragraph 293 of Justice Randerson's judgment is the English Court of Appeal, and that's the *Bank of Baroda v Rayarel* [1995] 2 FLR 376 (CA) and you'll find that in the next tab in the same volume of the bundle. There, once again, the finding was that the other party, the lender, was entitled to assume where legal advice was being given to the borrower that proper advice was being given, and I'll just give you the references. In particular, in the judgment of Lord Justice Hearst, at the bottom of page 384, beginning at letter H, the bank was aware

that there was a solicitor involved for the borrowers, and therefore were entitled to assume that they were being properly advised, both as to the risk that was being run, and, in that particular case where there was more than one borrower, as to whether one of them ought to get separate legal advice from the others.

TIPPING J:

Mr Farmer, that must be subject, I would have thought, to whether the party concerned was or was not under some duty of inquiry as to whether the appearances were actually the case.

MR FARMER QC:

Well, it's certainly subject to a situation where if, for some reason or another, the bank or the lender has reason to think that there was not proper advice being given. Then there would be a duty, perhaps, to inquire further.

TIPPING J:

Or, I would suggest, has sufficient knowledge to put them on inquiry.

MR FARMER QC:

Well, that's –

TIPPING J:

Maybe it's much the same thing.

MR FARMER QC:

Much the same thing. I would certainly, with respect, take issue with the proposition that there was a general duty of inquiry.

TIPPING J:

Oh, yes.

MR FARMER QC:

Where it is known there is a solicitor acting. There must be something more to trigger –

TIPPING J:

I would be provisionally inclined to agree with that, yes.

MR FARMER QC:

Yes, thank you. I won't read the other extracts, but Lord Justice Hoffmann, at page 386, letters D and E and through, really, to the end of what is a fairly short judgment. So that's the approach that Justice Randerson took, and that's the approach that, with respect, we adopt in this appeal.

ELIAS CJ:

Is that the approach you adopt with respect to section 120 of the Credit Contracts Act? I know there's that relatively early judgment of Justice Vautier's saying that it's the same as the old equitable jurisdiction. I will want you, in due course, to persuade me that that is necessarily right.

MR FARMER QC:

Oh, I'm not going to argue for that.

ELIAS CJ:

You're not?

MR FARMER QC:

No. There's certainly other statements made, particularly in the Australian cases, where they have a variety of unconscionability statute provisions, both state and Commonwealth, where, for example, the Contracts Review Act 1980 in New South Wales, and at the Commonwealth level the Trade Practices Act section 51AC, and there's another provision there as well, in all of those, in relation to all of those provisions, which are different from ours but broadly speaking have a similar object and purpose, it's been said that the scope is perhaps broader than the old equitable principles –

ELIAS CJ:

Yes.

MR FARMER QC:

– but nevertheless that's not to say that the old equitable principles aren't highly relevant still and important in considering and applying the statutory provision.

ELIAS CJ:

Yes they may well be but you're not treating them as equivalent?

MR FARMER QC:

I'm not treating them as being in pari materia. I'm not treating them as being identical.

ELIAS CJ:

Yes.

MR FARMER QC:

What I'm saying is that, and I think we did this in our submissions, you can certainly trace the concept of unconscionability from equity through our Money Lenders Act and into the Credit Contracts Act and you do see, if you do that, a broadening of the scope but –

ELIAS CJ:

Well it's a remedial statute which gives the Court wide discretion as to re-ordering matters between parties, whereas the consequence of unconscionability or undue influence is avoidance of the transaction in toto unless you go perhaps the Coleman and Myers route which is another sort of wrinkle, but I just wanted to flag, and you don't need to take any more time on it, that I would not want to be thought to, and this is probably not against you, it may be something that Mr Dale will want to address, that the – I don't, for myself, I'm not persuaded that they are equivalent and that there isn't a broader purpose to the statute.

MR FARMER QC:

Well certainly as Your Honour just said in relation, particularly to relief, in the remedy and what Your Honour called the re-ordering but in terms of the jurisdictional threshold issue, is this transaction unconscionable, I would accept, as I've said, that there is a broader approach that is taken under the statutory provision but there are limits to how much further one can take that over and above the original equitable jurisdiction which, after all, did have the same fundamental concern that the statutory provision has, namely that people should not be held to transactions that are unconscionable and that where a, in this case a financier, conscience can properly be attached, then it will be.

ELIAS CJ:

Exactly.

MR FARMER QC:

I mean there are other perhaps nuances that can be made, the equitable jurisdiction perhaps, there's a greater emphasis on victimisation of the other, of the weaker party which you don't see –

TIPPING J:

And standards of commercial practice, reasonable standards, not necessarily the equivalent of an unconscionable bargain.

ELIAS CJ:

Yes.

MR FARMER QC:

No, that's true, that's true.

TIPPING J:

That's I think is the key dimension in the section.

MR FARMER QC:

Yes. All of that I would readily accept but at the end of the day we say that certainly this is not a case where, for the reasons given by Justice Randerson, where the transaction can be said to be unconscionable, in the –

ELIAS CJ:

But you don't have to say, is really what's being put to you, you don't have to say that it's unconscionable.

TIPPING J:

It has to be oppressive and oppressive covers matters beyond unconscionable.

MR FARMER QC:

It does, it does. In the sense of harsh, oppressive and, as Your Honour said, contrary to –

ELIAS CJ:

Reasonable standards.

MR FARMER QC:

– reasonable standard of commercial practice.

TIPPING J:

Do you agree, Mr Farmer, that one way, there maybe others, but one way of looking at these cases is to ask whether the transaction is oppressive per se in the sense of without yet factoring in the knowledge of the financier and then if it's not oppressive per se, as I'm putting it, that's the end of the matter. If it is oppressive per se, in the sense of looking back on it objectively, then the question arises as to what the financier knew or ought to have known.

MR FARMER QC:

Yes I'm very content with that approach, Your Honour. Now by contrast to Justice Randerson the Court of Appeal, I should perhaps indicate, and I should have indicated, the way I'm going to structure these submissions is to make these introductory remarks and try and contrast the approaches of Justice Randerson, the approach of the Court of Appeal, and then I do want to spend some time on the facts, not with a view to challenging them, the factual rulings, but because obviously all of these cases are very fact specific and so I do want to spend some time with the facts and take you to some of the evidence and then following that I propose to make some general – or specific submissions arising out of that. So it's a three stage structure.

Now turning to the Court of Appeal. The Court of Appeal in the present case gave to the Act what Justice Hammond described at paragraph 49 of his judgment as a "paternalistic" approach, that was the wording he used, posing as the relevant issue in that paragraph, "Do those who borrow money understand what is going on in the transaction and what they are getting into." So it's do they understand and do they understand the risks of the transaction. Now the Court in considering whether the borrower understood the transaction and the risks associated with it then held that if the borrower's lawyer failed in his duty to explain these aspects adequately, the lender would remain liable if objectively speaking the transaction was oppressive or unconscionable and if the lender had failed to make its own inquiries of the

borrower's circumstances. So Your Honour Justice Tipping that's really where I'm agreeing with you I think.

TIPPING J:

Yes, yes.

MR FARMER QC:

If the transaction is, objectively speaking, oppressive or unconscionable then we have the question, well what's the lawyer's position in that, the borrower's lawyer. Justice Randerson is saying the lender is entitled to assume the borrower's lawyer is doing his job. The Court of Appeal is saying that if the borrower and the borrower's lawyer in fact didn't do his job adequately and if the transaction is, objectively speaking, unconscionable, then the lender, if it has failed to make its own inquiries, as to the borrower's circumstances, will be caught by the Act. That was their approach. And in that respect of course the Court of Appeal placed a great deal of emphasis on the borrower's particular circumstances. Their age, their limited income and so forth and I'll come back to deal with that.

BLANCHARD J:

Mr Farmer, can I toss into the mix the possible need for a lender to assess whether the lawyer who's acting for the borrower is genuinely independent or whether the lawyer may be conflicted in some way?

MR FARMER QC:

Well I think that perhaps is a specific application of what we dealt with a little earlier. That I would say to that, that the lender is entitled to assume, unless he has knowledge otherwise, that the particular solicitor is independent, is not conflicted in some way, that's in fact exactly the situation that, in the English Court of Appeal case that I referred to, that the bank is entitled to assume that issues of conflict, for example, in that case are being properly dealt with by the borrower's and guarantor's lawyers. There were three defendants – three borrowers and guarantors in that case – so what the Court said was, unless this somehow comes to the knowledge of the bank, that the lawyer was not addressing the conflict issue correctly, then the bank is entitled to assume that there is no conflict.

BLANCHARD J:

When you get to the facts will you be coming back to this point?

MR FARMER QC:

I can do. The lawyer was introduced via a Blue Chip salesman, not by anyone even remotely connected with my client.

BLANCHARD J:

I understand that but what struck me when I looked at the papers was that there was some evidence as to the volume of transactions where there had been references to the same lawyer, and I wondered about GE's appreciation of that fact which would in itself, if they did appreciate that fact, perhaps put them on inquiry about whether there might be a conflict, where a sole practitioner was getting so many references.

MR FARMER QC:

Well, there's simply –

BLANCHARD J:

That's something for you to come back to at an appropriate time.

MR FARMER QC:

Well, all I can say about that is that there's nothing that would suggest that GE had been alerted to that fact, or had any particular knowledge of that fact.

BLANCHARD J:

They would have seen the lawyer's name coming up over and over again, wouldn't they? They sent the instructions to the lawyer.

MR FARMER QC:

Well, there are a huge, huge number of these transactions. Mr Mathias was not the only lawyer advising borrowers.

BLANCHARD J:

Well, there's some evidence from the GE chief executive about that, isn't there?

MR FARMER QC:

No. I'm sorry, who are you referring to?

BLANCHARD J:

I can't remember his name. Mr Grant.

MR FARMER QC:

I don't think he was the chief executive.

BLANCHARD J:

Well, maybe not, but he was the senior man in this part of the organisation.

MR FARMER QC:

I don't recall, as I wasn't, of course, in the trial, but I don't recall – I don't think my learned friends recall – any such –

McGRATH J:

Bycroft, perhaps?

BLANCHARD J:

No, no, it's Mr Grant I'm referring to, I think.

TIPPING J:

The same man who said if he'd known it all earlier, he wouldn't have gone into it.

MR FARMER QC:

Yes, I'm going to deal with that.

TIPPING J:

You're going to deal with that, I'm sure.

BLANCHARD J:

There was a document which was referred to in the evidence. This is at volume 4 page 879 and 880. There's a document which I don't think we've got to which that witness – and I'm pretty sure that was the man I've mentioned – was being referred, where, after the event – and I appreciate it is after the event – there were lists compiled of the transactions and of the lawyers. And on page 880, it appeared that there might have been something in the order of 40 or more transactions involving Mr Mathias, which is a very unusual feature.

MR FARMER QC:

Well, I think, with respect, Your Honour is quite correct. It is after the event, and what is put to him by my learned friend at 880 line 8, "I suggest if you looked at your other 403 files, you'd find the same pattern. My point is, Mr Grant, if your company had had any decent management structures in place, the coincidence of these loan application circumstances would have become apparent". And that wasn't accepted by Mr Grant. I mean, this is all retrospective and with the benefit of hindsight, and all the rest of it. But it certainly wasn't accepted by him.

BLANCHARD J:

Well, it may be that GE simply hadn't appreciated the number of references, and that that, in itself, wouldn't therefore, in itself, put it on inquiry. But it did strike me as a very unusual feature.

MR FARMER QC:

Well, I mean, the point is made by my learned friends in their submissions that Mr Mathias was not truly independent. He was a tame Blue Chip lawyer, was the way they put it in their submissions. That may be true, but my submission is that GE was entitled to assume that whoever the lawyer was that he was independent and would act properly, et cetera. That's my point. And it's all, you know, one can certainly do this analysis subsequently and put it to a witness in cross-examination, but with respect, it didn't lead anywhere. It certainly didn't lead to any finding.

TIPPING J:

Well, it's not just what they actually knew. I would have thought at least arguably it's what they ought to have known. If they are in possession of information, even if they don't put two and two together, the Court might say, well, they should have put two and two together.

MR FARMER QC:

Well, that, with respect, is a very harsh judgment in terms of –

TIPPING J:

Well, I'm not making the judgment. I'm just putting it for debate.

McGRATH J:

It really comes down to whether the legal test is one of what your constructive knowledge was, and whether you had constructive notice. I think what this exchange between you and members of the Bench is throwing up is, is the issue aware in what circumstances were actually known, or whether sufficient circumstances were known to put a reasonably person on inquiry, and that, it seems to me, is really a legal issue, in the end, as to what the appropriate test is.

MR FARMER QC:

Yes, yes.

TIPPING J:

I don't think we should give too much currency to the proposition that the more lacking in nice you are, the better you are in this context.

MR FARMER QC:

Well, I'm not sure that I would accept that my client was acting –

TIPPING J:

No, I'm not making a judgment about this case. I'm talking about the law, Mr Farmer. The law has to be determined before we get to the facts, if you like. We have to decide what the law is, and then apply that law to the relevant facts.

MR FARMER QC:

Well, I really want to focus here on the facts, and I'm saying that the facts –

TIPPING J:

I'm sure you are. But we've got to get some help from counsel, to the extent they can, on what the law is, or should be.

MR FARMER QC:

Well, what I've accepted as a legal proposition is that if there are facts known to the lender that the independence, or the competence, of the lawyer may be in serious question, then it may well be that the lender is not entitled, as a matter of law, to rely on the general principle that I've expounded, and that Justice Randerson accepted, and that Your Honour accepted in earlier authorities, that the lender is entitled to assume that people, lawyers, do their job competently and properly. But I would

certainly submit that this material here that His Honour Justice Blanchard has referred me to does not get anywhere near that threshold of finding that GE were on notice, as it were.

BLANCHARD J:

Well, that may be right, and I'm not sure that much was made of it at trial or subsequently. I'm just saying that I personally thought that that was a very curious circumstance.

MR FARMER QC:

Indeed, but I don't have to necessarily challenge my learned friend's suggestion that Blue Chip were manipulating the system by using a tame lawyer who they believe rightly or wrongly did not do his job competently. But we are several degrees remote, we would submit, from that position of Blue Chip and what it was doing in terms of recommending to borrowers who their lawyer might be.

TIPPING J:

Do you accept, Mr –

MR FARMER QC:

There's no suggestion, for example, that knowledge that Blue Chip had is attributable to us.

TIPPING J:

That's all right. I repent.

ELIAS CJ:

Just on the legal framework for a moment, the role of an independent lawyer emerges very much from the unconscionable transaction and undue influence cases, and that is because they all arise out of relationships, and therefore independent legal advice breaks that. Do you –

MR FARMER QC:

Sorry, can I just pause you there. There is quite an important distinction in that respect between undue influence cases and unconscionability cases, because in undue influence cases – and this is referred to in one of the authorities – the emphasis is on conflicts, and as Your Honour correctly says, the lawyer, the

presence of the lawyer if there's no conflict will break the undue influence link. Unconscionability is where there are no issues of undue influence, there's simply two parties entering into a commercial transactions and the Courts have been much readier to apply the assumption that I've referred to, that legal advice, once it's known legal advice has been given, that it will be given competently and independently whereas in the undue influence cases, particularly where you get –

ELIAS CJ:

Yes, there's the need to establish independence because –

MR FARMER QC:

Exactly.

ELIAS CJ:

– it's that fact that is so critical.

MR FARMER QC:

That's my point.

ELIAS CJ:

I'm just a little worried about reasoning in a sloppy way between these categories which is why I'm exploring it with you. I just wondered whether in the case of a transaction not on its face oppressive –

MR FARMER QC:

Yes.

ELIAS CJ:

– and in which there's no relationship between the parties other than an arm's length commercial relationship, one would insist on independent legal advice in all cases, although it would be prudent, except where the lender is on notice of vulnerability.

MR FARMER QC:

Well yes I mean in a commercial transaction there is no legal requirement that both parties be legally represented.

ELIAS CJ:

No.

MR FARMER QC:

It's just that if they are –

ELIAS CJ:

They're protected.

MR FARMER QC:

Then they're protected and the lender, the stronger party, usually assumed to be the stronger party, is entitled to assume that any balance, any bargaining position and any knowledge of risk will be redressed by the other parties' lawyer.

ELIAS CJ:

Yes. I suppose my point is that the independent legal advice is an aspect of considering whether the transaction is oppressive but it's not as critical as in some of the cases in equity.

MR FARMER QC:

Well it's certainly not as critical, I agree, as in the undue influence cases but I think one, I think, with respect, agree with His Honour Justice Tipping that one starts really by looking at the transaction objectively speaking and says is it oppressive and we will be submitting that this one was not oppressive for reasons I'll go into. But if it was oppressive then you'd turn to the question of legal advice.

ELIAS CJ:

Yes, thank you.

MR FARMER QC:

Now perhaps if I can just move on from there. I, as always, welcome these discussions but I'm conscious of the fact that we've got, I've only got a day if that and have some material to get through but having said that please, it's not intended to be a discouragement to further discussion –

ELIAS CJ:

Well I think the point is that the Court has to be concerned about implications of any determination it makes, so we're interested in the penumbra, which is what we've been exploring with you.

MR FARMER QC:

Okay. Well I think there are a few issues we can get rid of fairly quickly. The first is there was nothing in the terms of the present loan transactions that were exceptional. Interest rates were at market, I can give you the figure, the first loan 8.73% in 2006. This is all pre-recession days. And the two loans in 2007, 9.66% and 9.86%. So what the Court of Appeal focused on therefore was not that but the question of whether the Bartles could repay the loan given their ages and the fact that their own personal income was modest, it was restricted to their pensions. Now in considering that question, and we say this is really an issue of major importance in this case, in considering that question the Court, with what we say, with respect, a huge benefit of hindsight, brushed aside the fact that the Bartles had a contractual source of income available to them from Blue Chip from which the loan repayments were to be met. Blue Chip paid the loan repayments into the Bartles' account, from which the Bartles then paid GE, and in fact those repayments, interest payments, were met for the first 18 months under the first loan which was made to them. Instead the Court assessed the prudence of the loan through the lens of the economic recession that followed, which led to the collapse of the property market and with it Blue Chip, after which that source of income dried up, and we would say that in effect what the Court of Appeal did was contrary to what this Court said in *Gustav v Macfield*, which I will come back to, that unconscionability must be looked at as at the time the contract is entered into. So certainly at the time the contract is entered into risk is something that has to be considered but, with the greatest of respect, we would submit that the Court of Appeal has used hindsight to look at the events that later occurred and where that source of income, which was contractual –

TIPPING J:

So the key point is how strong that source of income would have appeared at the material time?

MR FARMER QC:

Yes, yes. Yes, that's right.

TIPPING J:

Not how strong it ultimately became.

MR FARMER QC:

With respect, yes Your Honour, and I'll come back to that. So what followed –

ELIAS CJ:

Sorry, you're saying at the time the contract was entered into, not the draw down?

MR FARMER QC:

No, the contract was entered into. The draw down –

ELIAS CJ:

Draw downs is it?

MR FARMER QC:

Draw downs, yes, there were three stages. The first contract of loan was, in effect, when the apartment was being built. Monies which were used applied for that purpose. The second and third contracts – the only reason there were two more contracts rather than one is because a third contract was a company, by a company that the Bartles formed which they personally guaranteed, so it all hooked back into them. Now what follows from that, we would submit, is the question of whether the Act is intended to prevent people from investing in the property market and speculating that the existing strength in the market will continue, and I'll say something about that in a moment. Now what is implicit in that question is whether the risk of an adverse change in market conditions that may lead to a loss rather than an expected profit renders the transaction oppressive and unconscionable and what is further implicit in that question is whether it is the lender who must make that assessment, notwithstanding that its own interests are reasonably protected, as they were in this case by virtue of the loan to value ratio of 70%, or whether the lender is entitled to leave the assessment of risk to the borrower and his lawyer, in other words does the lender have to consider not only its own position but also the position of the borrower and if so to what extent and in what circumstances.

Now there seem to be perhaps five issues in this case. Agency, attribution of knowledge where there is no agency or only partial agency, what's called the outsourcing issue and the financier's responsibilities under the Act where there has

been an outsourcing of some other functions that might otherwise have been done directly by the financier, the borrower's legal advice, which we've talked about already to some extent, and then finally the fifth one, asset lending, the term "asset lending" as oppression, when does asset lending, which the Courts have said per se is not unconscionable but when does it become unconscionable, in what circumstances, and all of those five issues, we would submit, tend to become inter-related at some point or other. But I think it's quite useful to just list them in that way.

So turning if I could to the facts. They're dealt with at some length in our written submissions, and I won't take you to those, paragraphs 7 to 33, and there is also a very detailed chronology of course that we filed as well. But in considering the facts we would submit that it's important to note the formation of the relationships between the various parties and the timing of when they occurred and how they occurred, so that you start really with the Bartles and Blue Chip and the story started when in fact Mr and Mrs Bartle saw a Blue Chip advertisement in the New Zealand Herald and responded to it. They knew, their evidence was that they knew of Blue Chip. Blue Chip was, had apparently been, a sponsor of the New Zealand Golf championship and it was a sponsor of the local rugby team so it was a name known to them as being an apparently very substantial listed company.

So that first contact, which was with Mr Davis, who was the Blue Chip salesman, was on the 29th of May 2006. And he left them after a meeting, left them with one of their brochures, and I'd like you to look at that. If you take volume 6 of the case on appeal, I think all the evidence I want to show you is in volume 6 at page 1235. So if you just perhaps keep it there, if you would. You'll find that initially, that the emphasis on the very first page is what's called "financial planning using smart residential property solutions" and the emphasis is on not only residential property but specifically in the Auckland residential property market. I won't take you right through it, I don't need to. It's a lot of photographs of people riding bicycles on beaches, and that sort of thing.

If you go to page 1247, you'll see what's called the "Blue Chip solution" and the market. "Blue Chip harnesses the power of New Zealand's most consistently performing residential property market, Auckland, to deliver investors all the benefits of property investment without the hassles of being a landlord". Of course, you may recall reference to the fact that the Bartles had been landlords before. They had bought investment properties, and hadn't enjoyed the experience of dealing with

tenants. And so here, one of the things that Blue Chip was offering was the fact that they took full responsibility for tenanting the investment apartment. So, "Auckland, why it's a great investment. It's dominated the New Zealand property investment market landscape and out-performed New Zealand's other main cities". That graph is interesting, because it does show – you'll see the top line is Auckland, and then Wellington, Christchurch, the New Zealand total. And just looking, you'll see particularly a very steep property price rise, of course, in the last few years, and I worked out as best I could that for two years up until the end of 2005, the median, or average, residential house price rise in Auckland had gone, in those two years, from $375,000 up to $600,000. So a massive leap, but part of a continuing trend. And that's what was being marketed.

If you go over the page, 1248, the key factors driving growth in Auckland, and so forth, and the importance of the rental demand for property, and et cetera. Now, that occurred – that was left with them at the end of May 2006, and a few weeks later, on the 23rd of June, Mr and Mrs Bartle signed a finance application by EML. EML was a company that was managed by a Mr Mark Bycroft . Now, you'll find that document in the same volume at page 1270. EML, being Executive Mortgages Limited, so it's really a broker, and there you see the Bartles have filled out various details, including, on the second page, their pension income, their assets, including the house at $420,000, and then going over a couple more pages to 1273, EML states at the top of the page that it's "collecting the applicant or borrower's information in this application so that it can determine your eligibility for the finance you are seeking" – this is the page that the Bartles signed at the bottom of the page – "and any services relating to your property financing". There is authority given to EML to do certain things, and then going down about four paragraphs, "EML will, on your behalf, use your information to apply to lenders for the finance you require". So it is clearly assuming the role of a broker. "The lenders EML deal with are usually" – and then there's a whole heap of them, beginning with ANZ Bank, ASB, ANZ, et cetera, going right through, and you'll find in that list Tasman Mortgages Limited, which is TML, and GE is in there somewhere, too, I think. Must be. Oh yes, there it is. It's called TEA Custodians Pacific, and that later become GE Custodians.

So there is the list of lenders who EML said they dealt with, and they were collecting an application for finance form from Mr and Mrs Bartle without any indication at that time who would ultimately become the lender, if anyone. Now, following that, within a week or two, on the 6th of July, Blue Chip sent to Mr and Mrs Bartle what was called a

sample analysis, explaining the nature of the investment, and the detail of it, and you'll find that on the following page, 1274. "Blue Chip Solution" is the heading. "We propose you enter into an investment with Blue Chip that will provide you with the security of ownership of residential property and the forecast additional income set out below". So one of the features of what was being proposed, that not only would Blue Chip manage the property purchase and the rental of it, and make the mortgage payments, but it would also provide a source of income called additional income, and there is a sample given. It's not the actual figures in this case, but you'll see that there was what was called an initial contribution, which was payable immediately. That's where the apartments were, in effect, being purchased off the plan. Plus an additional amount, which was in the nature of fees and, in fact, in effect, did provide the source of, as it was found, the payments back to them. Total investment would be that amount. The property purchase price would be that amount. And then the income fees over the income receipts that they would receive over a four year period are set out, and then you'll see just below that, "Your fortnightly receipt from Blue Chip. This is the payment you will receive from Blue Chip every second week from the date you pay your contribution" – so it's payable right from the beginning – "until the date the property is sold. In addition to this payment, Blue Chip will meet the interest on any associated borrowing. Payment is made to you as income without a deduction of tax". And then at the foot of the page, "In addition to the return to your contribution" – this is on the property being re-sold – "you are also entitled to a small portion" – which was 10% - "of the net gain when the property is sold". Now, there was the scheme as it was explained, and it was, in essence, how the investment proposal operated.

TIPPING J:

Was it inherent in this that you got 10% of any net gain, but if there was a loss, they had to cover that, but they didn't choose to actually make that express?

MR FARMER QC:

Yes, that's right. The joint venture agreement which the parties then entered into provided that returns of the loans were, for the first four years, I think, interest-only.

TIPPING J:

You needn't go into the detail, unless you think it's important.

MR FARMER QC:

Well, it's relevant. How important, I'm not sure. So interest-only payments for the first four, maybe it was five years. I can't recall. And thereafter interest and principal repayments until the property was sold, and Justice Hammond actually got this wrong, with respect. He thought that once the payments went up to interest and principal, that at that stage the Bartles would have to meet the difference, but, in fact, when we look at the joint venture agreement, you'll see that's not the case. Blue Chip undertook to make those payments. But to address Your Honour's point, when the property was sold, and the selling of it was entirely – the timing of it was entirely of the Bartles' choosing, as we'll see in the documents, but when it was sold, yes, if there was a shortfall, then that would be –

TIPPING J:

To the Bartles' account?

MR FARMER QC:

To the Bartles' account. So just to take up that point I've just made, the Bartles – sorry, before I come to that. So that was the explanation given to them in July. The Bartles went away to think about it, and they came back again in September and said yes, we've thought about this and we want to proceed. Then they were given a further explanation, still in the same volume at 1299, the letter of 27 September, "Welcome to the next stage in the Blue Chip investment process". At that stage, Blue Chip said that they'd selected the property which would form the basis of the investment, and they enclosed a number of documents, including the agreement for sale and purchase, a deed of lease, property management agreement, and invoices for the initial contribution. You'll see under the heading "Transaction" it says, "The transaction has been designed to provide you with a secure, passive income stream, with the risk and responsibility of interest payments transferred to Blue Sky Holdings Limited". There's reference to a joint venture, which was going to be the structure for this, and at the top of the next page, "Essentially, the joint venture will receive the rental income on the property and pay all ownership costs. To the extent that the working capital collected in your initial contribution by the joint venture is insufficient to meet these, Blue Sky will make a contribution to the joint venture". So the working capital was that initial borrowing plus what were called, generally, but perhaps not entirely accurately, fees, and out of that, Blue Chip, through this company Blue Sky, accepted the responsibility of managing the property, dealing with repairs and

maintenance and the like, dealing with any shortfall on rent that might occur, et cetera.

TIPPING J:

Was that the $80,000-odd figure?

MR FARMER QC:

Yes.

TIPPING J:

So in effect, the Bartles were putting up in advance the first year's outgoings?

MR FARMER QC:

Yes. I'm not here to defend Blue Chip.

TIPPING J:

Yes. I just wanted to make sure I was following you.

MR FARMER QC:

So still on page 1300, Blue Sky Holdings would be the manager. And then the next paragraph, "The transaction continues until either you choose to wind it up, or the property is sold". And you'll see if you look at the joint venture agreement that the structure of it was that the Bartles had 75% of the units that were issued under the joint venture, and a special resolution of 75% was required to wind up the venture or sell the property. So they had total legal control over the timing of that. So on termination of the JV, the property is sold. The sale proceeds are applied, first to discharge the balance loan secured against the property, then to return the amount of your initial contribution. Any surplus is then split.

BLANCHARD J:

Is there any significance in 75%, other than voting?

MR FARMER QC:

No.

BLANCHARD J:

It doesn't relate to property in any way?

MR FARMER QC:

No. Then further down that page, initial contribution. That's payable, which includes the deposit on the property, payable immediately. And then looking at the final paragraph on that page, "If you are funding the deposit using borrowed money, you need to ensure that any outstanding conditions of funding imposed by your lender are quickly satisfied. Although these are set on a case-by-case basis, they often include requirements such as a valuation on your home. Evidence of insurance or proof of income, our investment advisor will assist you in satisfying any conditions". Over the page, "Settlement. Once the investment property is ready to settle, you'll need to visit your solicitor to sign the mortgage documents", and then over on the next page, 1302, "Risks. Every investment has its risks. You should make sure you are fully aware of the risks and are satisfied with the investment before signing the agreement for sale and purchase". It sets out the risks, and then the next paragraph, "Should you have any residual concerns, we encourage you to seek independent advice before entering into the agreement for sale and purchase real estate". I think in cross-examination Mr Bartle accepted that he read that particular part of the letter. Indeed, it's a feature of his position, that he seemed to be quite a careful man. He did read things. He did think about them. He did query things. But in any event, there is a reference to a suggestion that he should seek, they should seek independent advice before signing the agreement for sale and purchase, which, in fact, they didn't. Mr Mathias came on the scene shortly afterwards.

Now, I won't take you to the joint venture agreement, which does, though, have its provisions which confirm what I've said, that they had control over the timing of bringing the venture to an end, or selling the property. You'll find – I'll give you the references, just for the record, in volume 7. It begins at page 1460, and the relevant clauses on the winding up are clause 8.5.7, which is the special resolution, and the definition of that is 1.1. You need to look also at 9.1.1(a) to understand the whole thing. So at the moment we're in September 2006. The agreement for sale and purchase was signed around that time. The point to make, though, is that up until the 10th of October 2006, all the contact that the Bartles had was with Blue Chip, and at the end of September with Mr Mathias, when he arrived on the scene, when they engaged him.

TIPPING J:

So EML was a Blue Chip-owned entity, was it?

MR FARMER QC:

No. It was not owned by Blue Chip, but it clearly had –

TIPPING J:

But they had some contact with EML?

MR FARMER QC:

Yes.

TIPPING J:

You said all the contact was with – it made me think that EML was a subsidiary.

MR FARMER QC:

I was really wanting to say that there was no contact with TML or GE. So the first contact with TML was on the 10th of October 2006, which was when they received from TML – I'll show it to you in a moment – approval in principle of a loan, which was stated to be with GE, with TML as a mortgage servicer, and before we go to that, I'll give you the date of the signing of agreement for sale and purchase; the 29th of September. You'll find that – I won't take you to it – at volume 6 page 1295. What is worth looking at, though, at that time, and I'm trying to stay in chronological order, here – at that time, at the end of September, Mr Bartle wrote to, or emailed, his brother, and again, in volume 6, if you go to 1408, this does, perhaps, indicate that he did – this is not a case where he just willingly signed everything put in front of him, not knowing what he was signing; he obviously thought a lot about this – so this is to his brother Neville Bartle, and his brother's wife. "Dear Neville and Joyce. When we were in Auckland, I spoke to you about our intention to buy a property in Auckland. Today we signed up with Blue Chip, and for your information only, these are the conditions. We're explaining this to you, as we feel if it's suitable to you, then why not use it. The property is in Symonds Street, is our unit from the date of settlement, which is very soon. The fortnightly taxable amount of $451 will be deposited into our account. We expect to pay tax on this, as arranged by the accountant with Blue Chip. There are neither administration costs nor any bills to pay. The trust will be formed. After four years the unit will be sold when there are no real estate fees to pay" – and that was a matter that he'd actually inquired from Blue Chip about as to whether there'd be real estate fees payable by them as opposed to payable by Blue Chip "we're then free to do it all again if we wish. Blue Chip also arranges the

accountant. Each two years 451 by 26 is 1126 multiplied by four years is 46,000 before tax of course is a very good return and then we also receive an undisclosed sum after the four years as well. Had we taken the Sentinel option we would have surrendered a given figure from which the family would have had to forfeit during that time. That is the interest charges would have been adding up".

So what he's looking at is the Sentinel product which is I think is called a reverse equity product there. You basically borrow the money, this is for retired people especially, they borrow the money, go on their overseas trips, buy motor cars or whatever else they want to do with it, and they don't pay it back, the interest just keeps accumulating and eating up the equity. So he looked at, the evidence was he looked at that and then he looked at the Blue Chip product and he worked out that he thought that the Blue Chip product was superior because he would, it wouldn't be eating up his equity in the way the Sentinel one would.

So going back to that, "We have considered this opportunity many times over, examining every aspect, and have found no defect. I was on jury service this week. When I was on the last day had an opportunity to speak with a ceiling cleaning customer of mine. She is in the process of giving up work and her husband is 67 like me. Carol told me they had been in Blue Chip over one year now and true to their word have deposited the right amount of money each fortnight. Carol and her husband are really thrilled and expect to have a further property very soon. Judy and I have told you this with the understanding the information will be for your benefit," et cetera.

TIPPING J:

If the proposition that it was a very good return, the little paragraph right in the middle, was presumably the return he was getting, he was looking at that on the basis of what he himself had put in rather than what he'd borrowed, is that right? Because it wasn't – this puzzled me. I've seen this document before and it may not have any bearing at all, Mr Farmer, but that just puzzles me. How he could have – I presume they put some of their own money in did they or was it wholly borrowed?

MR FARMER QC:

No it's wholly borrowed.

TIPPING J:

So in a sense they were getting – they would see it as getting $451 a fortnight gratuitously because –

MR FARMER QC:

Well –

TIPPING J:

– Blue Chip were paying all their interest costs –

MR FARMER QC:

That's right.

TIPPING J:

Yes. That's the rationale?

MR FARMER QC:

Yes, they were seeing it, what they were doing was putting up the security, their home, and giving security over the investment property –

TIPPING J:

Yes.

MR FARMER QC:

Getting back a guaranteed, from Blue Chip, a guaranteed income stream –

TIPPING J:

Yes, and not having to pay any of the outgoings?

MR FARMER QC:

Not having to pay any of the outgoings. Now the, one can see the issues that should have perhaps occurred to them – first of all that they would have to, when the property was sold you would have to expect that the capital gain over four years or five years, or whatever time it was, would have first of all covered that $80,000 because they were borrowing more than the –

TIPPING J:

More than it was worth.

MR FARMER QC:

And then, hopefully but not necessarily, led on to some capital gain over that which they would get 10% of. So that's, you know, that was how the thing worked and –

BLANCHARD J:

And Blue Chip, presumably, took no responsibility for paying that shortfall?

MR FARMER QC:

If – when the property was sold? No that's right, that's right. So, you know, and of course the assumption that – behind all of this, or underneath all of this, was that the property market would stay strong, because if it didn't, if over four years there was a drop in the property price, then of course there would be a shortfall they would have to meet. Now that was the selling point and that's why I showed you the brochure. That that's what the – they were shown facts about the increase in property prices, the strength of Auckland, the strength of the rental market in Auckland et cetera, and that was the basis on which they proceeded. Now –

BLANCHARD J:

Were they specifically warned somewhere in the documents about the problem of having to meet the shortfall if the property didn't go up in value?

MR FARMER QC:

No. But that's what their lawyer should have done.

ANDERSON J:

And asked where was Blue Chip getting the money from to do this?

MR FARMER QC:

Well, I mean there's the sort of second level of risk as to whether Blue Chip, a major listed company, was itself strong enough to meet all contingencies and I'll come back to that, but we would certainly submit that the – that yes the lawyer should have said, well by the way, this is all dependent on Blue Chip remaining viable and if the people, if the borrower said, well thanks for that and, you know, we like this Blue Chip company, we know that it sponsors golf tournaments and football teams and the rest

of it, that's fine, but the criticism that was made of Mr Mathias was he didn't point that out to them.

ANDERSON J:

But what he presumably couldn't know is that the real value of the unit was 15% less than they were paying because that was kicked back.

MR FARMER QC:

Oh Mr Mathias, well Mr Mathias could have, he should have, he would have known that.

McGRATH J:

Well it's really –

MR FARMER QC:

Oh sorry, you're referring to the valuation?

ANDERSON J:

Yes. If this is an immediate 15% kick back to Blue Chip –

MR FARMER QC:

No he may not have known that.

ANDERSON J:

No, the actual value must be –

MR FARMER QC:

But that's a registered valuer, and again, can GE be held responsible for that?

ANDERSON J:

Oh no, no. I understand that point.

MR FARMER QC:

So –

TIPPING J:

Well to ask the lender, subject to further argument, to ask a lender to do due diligence on Blue Chip, which is effectively what you'd have to do in order to get behind it all, might be thought to be quite an extreme step.

MR FARMER QC:

It would indeed, with respect, and that's what we certainly submit. So at the end of September and I, they've signed the agreement of sale and purchase. Then Mr Mathias comes along. Now immediately prior to them signing the agreement there's the letter to the – sorry there's the, I've shown you the letter to the, the email to the brother. There was also, at the same time, at 1295 in volume 6, there was an email from Mr Bartle to Mr Davis setting out what he understood he was getting into. So in that, I won't go right through it, but you'll see in the second paragraph, "The email you sent to us has provided some details that explain the concept to us. What we're able to do is offer our home as collateral for the purchase of a unit close to Queen Street in Auckland. We understand the mortgage will be taken over on our property almost immediately. This provides finance for Blue Chip to build the unit which in four years should be up and rentable. At this point it would be sold back to Blue Chip." So that was what he understood. "Your figures indicate each fortnightly figure of that amount would be deposited into our bank account. Figure is a tax paid amount." Now in fact the figure was I think 410 but they had to pay tax out of it. That became clarified. "At the end of four years this contract ceases. The property would be bought back from us". Well that, for reasons I've given, wasn't quite right. They had the – they could have, if they wished to change the timing of that, but that was what they understood, it would be four years. And just on that, while I think of it, the – because I think Justice Hammond in particular made comment on the fact that this is a 25 year loan, interest-only for the first five years. But in fact it may have been a 25 year, it was a 25 year loan but the reality is that the parties intended to sell within four years so that any suggestion which seemed to appeal to His Honour that somehow these people were going to be well into their 90s and still paying off the mortgage just doesn't, with respect, match the reality of what was happening here.

BLANCHARD J:

It was presumably a fairly standard right of early repayment?

MR FARMER QC:

Yes, yes and I don't believe there were any break fees or anything of that kind. So going down a couple more paragraphs, "We are quite happy to go ahead with this concept but we have some concerns as described below." And those concerns, which I won't take you through, but they're all to do with Mrs Bartle having her medical allowances that might be affected by the extra income that would be coming in and so on. And then at the foot of that, "I hope the above explains our concerns. Your reply is awaited for our comment". So, again, I think one shouldn't, perhaps, have the impression - that this is not one of those cases where, as I say, people just sign something that's put under their nose to sign and without any thought. In other words, to put it another way, it's been put in some of the cases that it's not a case of special disadvantage, either what's now called constitutional disadvantage or situational disadvantage.

That kind of analysis is in the case I will take you to now that my learned friend relies very, very heavily on in his written submissions. A case called *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67. Perhaps if you'd just find the respondent's bundle of authorities, tab 4. I won't deal with the facts of that case at this point, beyond saying that it was a case of an immigrant into Australia who had been conned by a conman - who later went to jail - to borrow money on his home to give to the conman to invest, and there are other particular features, including lack of legal advice, the altering of loan documents and the like that we say are not here. But just on the legal concept of disadvantage, if you go in the judgment to paragraph 194, there's reference to other authorities here. The distinction between constitutional and situational disadvantage is dealt with very succinctly, and very well, if I may say so. So 194, "In recent years, disadvantage has been described as falling into two categories, constitutional and situational. The constitutional disadvantage is a *Blomley v Ryan* (1956) 99 CLR 362 or *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447–type disadvantage, and stems from an inherent infirmity, weakness, or deficiency, for example, sickness, drunkenness, or illiteracy". And for a long time, *Amadio* was, as Your Honours will know, the leading authority on this in Australia. It was a case of illiteracy, as I recall. "A situational disadvantage, on the other hand, arises out of the business or financial weakness of the disadvantaged party. It arises out of the interception of the legal and commercial circumstances in which the parties find themselves".

Then there's a reference to the Australian High Court in *Australian Competition and Consumer Commission v Berbatis Holdings Pty Ltd* [2003] HCA 18, where His Honour the Chief Justice referred to situational disadvantage in a passage that I won't read to you, but it's to the same effect. That distinction having been drawn, on the next page, two paragraphs down, "The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience, or lack of education". – that's the *Amadio* reference – "or it may be situational, deriving from particular features of a relationship between actors in the transaction, such as the emotional dependence of one on the other".

TIPPING J:

That's getting close to merging undue influence with unconscionable bargain. That's what I've always been a bit anxious about, but I don't suppose it's going to matter in this case.

ELIAS CJ:

They've always been fairly close.

TIPPING J:

Yes, but they've been quite discrete.

MR FARMER QC:

But with that distinction, Your Honour, that we talked about earlier, if I may say so. Going down the page to the letter F, one thing is clear and is illustrated by the decision in *ACCC v Samton Holdings Pty Ltd* [2000] FCA 1725 itself, "A person is not in a position of relevant disadvantage constitutional, situational, or otherwise simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between persons of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages or neglect their own interests". And that then follows a reference to another case involving the ACCC, *ACCC v Allphones Retail Pty Ltd* [2008] FCA 1664, which was concerned with section 51AC of the Trade Practices Act, which is the unconscionable provision I referred to earlier. Again, I won't read what follows, but there are a number of propositions which you'll see at the top of the next page that were put. This deals with the point Your Honour the Chief Justice raised with me before. "The meaning of unconscionable for the purposes of section 51AC is not limited to the meaning of the word according to the established principles of common law and equity".

TIPPING J:

Where are you reading from now?

MR FARMER QC:

That's the top of page 40. Then the reference to the dictionary meaning of "unconscionable" and halfway through paragraph b, "When used in that section, the expression requires the actions of the alleged contravener show no regard for conscience, and irreconcilable with what is right or reasonable. Inevitably, the expression purports a pejorative moral judgement". And later, in the same case, His Honour Justice Forrest, in the Supreme Court of Victoria, used the term "moral repugnancy". And then you'll see in paragraph c, "Normally, some moral fault or moral responsibility would be involved. This would not ordinarily be present if the critical actions are merely negligent. There would ordinarily need to be a deliberate, in the sense of intentional, act, or at least a reckless act". And so that distinction between negligence and what's here called deliberate or intentional or reckless acts, and perhaps, Your Honour Justice Blanchard, that may be helpful to the discussion that we had earlier as to the failure, if it was a failure, of GE to put together, to add up the number of times Mr Mathias had been involved in these transactions.

And then finally in the same judgment, before we leave it, at paragraph 209, there's quite a useful list of factors relating to the facts of this case. "No one factor is decisive in determining whether the contact of VHLA" – which is, in effect, the equivalent, but with some differences, of TML in the present case –

TIPPING J:

Where do we find set out the statutory provision that was in issue here, Mr Farmer?

MR FARMER QC:

I have seen it, but I didn't highlight it, so I won't be able to quickly find it.

TIPPING J:

Don't worry, then. We'll find it.

MR FARMER QC:

You do have a proliferation of unconscionability statutory provisions, because we start with the Commonwealth and the various states, and they all have their own way

of dealing with the problem. I'll get you that reference. So 209, no one factor, and on the first factor that on the facts of that case was highlighted, that the VHLA knew that there were irregularities in income declaration in the loan application. What had application happened, very briefly, was that they'd put in an income of two different figures, $69,000, I think, and another figure just a bit less than that. The problem was, if you earned, in Australia – apparently if you're self-employed and you earn more than $50,000, you have to have what they call an ABN number, which is not a GST number, but it's something like it. And so they said, oh, that's a problem if he doesn't have an ABN number, so they deliberately put his income as $49,000 to explain the lack of an ABN number. So the Judge wasn't at all impressed by that, and he went on, also, to point as another example, a very important example, the fact that Mr Schmidt had no income, or no other source by which he could pay the mortgage payments other than out of capital that he had in a bank account which he needed to use to repay the mortgage. The only asset he had which secured the loan was his home. So my learned friends, as I say, have made a lot of this case in their submissions, but I wanted to draw your attention particularly to the statements of principle, and as to the facts to say that there are quite different facts.

TIPPING J:

Well, 211 probably gets as close to a succinct encapsulation of this case where Mr Schmidt was said to be putty in the hands of Maddox, which is quite a vivid way of putting what one is often looking for.

MR FARMER QC:

That's right. He was properly described as a conman who manipulated him something terrible. And also he didn't have legal advice.

ANDERSON J:

He was a man with limited education and only a rudimentary knowledge of the English language.

MR FARMER QC:

Yes, that's right. So he wasn't, perhaps – it wasn't a case, perhaps, of constitutional disadvantage but it was not too far away from it.

ANDERSON J:

It was both, really, wasn't it? It was constitutional and situational.

MR FARMER QC:

A bit of each, yes. So that distinction between moral fault and moral responsibility and negligence, we point that out. Now, going back to the facts, then. Here we do have a situation where, of course, what was said and what was found was that Mrs Bartle didn't fully understand that the mortgage over their home secured not only the first loan, but it secured, also, the other two loans. It was found as a fact, and we don't, of course, seek to challenge that fact. But we do point out that, in fact, they did sign formal loan applications subsequently for both the second and the third tranches. They did sign the loan agreements for those loans. They did sign the mortgage that covered those loans, and you'll recall the evidence was that as Mr Mathias was leaving them, when he got them to sign the mortgage and the loan agreement, they said to him, "What happens if – does this cover our home, and what happens if Blue Chip goes broke", or something to that effect, if the investment goes bad. And Mr Mathias said, oh, well, the mortgage over your home covers the lot. They said they didn't understand that, and the Judge has found that. There was an issue raised about, well, there is still some time, there was a number of days that went by before the loans were drawn down, and the Judge, in effect, said, well, that was obviously, to them, all too late. So we accept the proposition that they didn't have that full understanding. There was cross-examination on it. I'll give you the reference but I won't take you to it. Volume 2 of the case on appeal, page 357, lines 17 to 19. So on the findings of the Court, of Justice Randerson, they did have –

ELIAS CJ:

Which paragraph are you referring to in Justice Randerson?

MR FARMER QC:

It was referring to cross-examination.

ELIAS CJ:

Yes, but which paragraph are you referring to for the finding of fact?

MR FARMER QC:

Oh, I'm sorry – I'll come back to it. So on the findings of the Court, and on the evidence I've shown you, they certainly had some understanding of the scope of the transaction, and of the risk associated with it, but it was an imperfect understanding, but we say one which, at the time, GE certainly wasn't aware of. It didn't have an

inkling at all that Mr and Mrs Bartle didn't have a full understanding of the transaction, or weren't being properly advised, and our case is that GE was entitled to assume that they did have an adequate understanding of what they were committing to when they signed the various loan applications, loan agreements, and mortgages, and that their lawyer would have ensured that they did have that understanding. Now, TML first appeared on the scene, so far as the Bartles were concerned, on the 10th of October 2006, and that was with the approval in principle of the Bartles' loan proposal, which had been submitted on their behalf by EML. You'll find that document in volume 5 – sorry, it's not. It's in volume 6, perhaps.

McGRATH J:

Is it 1429?

MR FARMER QC:

Oh, thank you. So you'll see – this document is a little hard to read, but in the top left-hand corner, it's headed, "Tasman Mortgages Limited, 10th of October. Loan proposals. We have pleasure in advising your loan has been approved in principle, following our indicative terms and conditions that will apply". The borrower, mortgagor, guarantor are all the same people, but a trust, apparently, to be advised. And then the lender, GE Custodians, mortgage servicer, Tasman Mortgages Limited. And then you'll see the statement, "The mortgage servicer does not act as an agent of any of the above parties in relation to the proposed loans".

BLANCHARD J:

Just a query while we're referring to GE Custodians. I notice it doesn't have "Limited" after its title. Is it an unlimited company?

MR FARMER QC:

Yes, apparently it is. Then you have the mortgage details, loan amount. Now, this is the first loan, the maximum aggregate amount of your loan is $137,484. The purpose of loan, to utilise equity for investment purposes. You'll see on the next page, no early repayment fee if it's a variable rate of interest. If the interest rate – I should have mentioned that was a feature of the joint venture. If interest rates went up, that was to Blue Chip's account. They took the risk of that.

ELIAS CJ:

What do you say that statement means, "doesn't act as agent", because it's doing something.

MR FARMER QC:

Well, it's the - various terms that have been used to it. It's the mortgage originator.

ELIAS CJ:

Yes, but it must be an agent for some purposes.

MR FARMER QC:

Of course, yes.

ELIAS CJ:

So is this really just a sort of indication that it's not an agency in – it's meaningless, really, isn't it?

MR FARMER QC:

Well, if you go back to the –

ELIAS CJ:

It's probably not part of your case, so you don't need to –

MR FARMER QC:

TML and GE had, a few years earlier, entered into what was called a correspondent deed. And, in fact, GE had entered into a correspondent deed with a number of other similar entities that were nothing to do with TML, about nine of them altogether. And so what those entities did was to, in effect, present mortgage proposals to GE to consider. But it was for GE to decide whether or not they would accept the proposal. So in that sense, certainly TML had no authority –

ELIAS CJ:

To conclude an agreement.

MR FARMER QC:

– to bind GE to any agreement.

ELIAS CJ:

Yes.

MR FARMER QC:

And indeed, the correspondent deed and also a separate document called the operations manual contained some quite detailed provisions that made it plain – I'll give you the references, actually. The operations manual, for example, said that GE, or GE which operated through a company called AMS for this purpose, was under no obligation to accept a mortgage proposal. The mortgage proposals had to be in a particular form. That's clause 4.1 of the manual. 4.3 is the no obligation to accept a mortgage proposal. The correspondent deed, TML was stated – these documents are considered in the judgments – to be an independent contractor and not to be agent, partner or employee either of AMS or GE. And perhaps most importantly, TML was prohibited from holding itself out as a mortgagee or agent of AMS or GE. Those restrictions and provisions as to how TML was to operate in terms of compiling mortgage proposals and presenting them to GE or AMS does actually contrast the situation with the Australian case that the President relied on, *Commissioner of Inland Revenue v Colonial Mutual Life Assurance Society Ltd* [2001] 64 (PC), which I'll say something about in a little while, because in that case it was found that the insurance agent who canvassed the business, and who signed people up for business, was, really, for all intents and purposes, representing CML when he did that. Whereas here, when you look at these documents, we would submit it can't be said that TML was representing GE. Quite the reverse.

McGRATH J:

Mr Farmer, the provisions you're referring to really go to whether or not there was actual authority, and displaced actual authority?

MR FARMER QC:

Or ostensible authority.

McGRATH J:

Well, I was going to say that at page 1429, in a letter that's to the Bartles, they're really concerned with displacing any apparent authority argument, aren't they?

MR FARMER QC:

Well, that's certainly true, too, yes.

McGRATH J:

Because they have no knowledge of the actual authority.

MR FARMER QC:

No, no.

McGRATH J:

But this is intended to stop any argument of apparent authority being advanced later.

MR FARMER QC:

Your Honour is quite correct, and puts it better than I have tried to. I'll give you the references, but I won't take you to them. The correspondent deed is in volume 5 at 1031. I've mentioned the feature of it, that TML was an independent contractor, and wasn't an agent, et cetera. Prohibited from holding itself out, and then the operations manual prescribed the way in which a proposal had to be put together, and that's in – I think the operations manual is at volume 5 at 1176.

TIPPING J:

The documents immediately before the one we're looking at is a good example of how the operations manual worked out in practice, because there we find the form that they had to use, as I understand it, to pass it on.

MR FARMER QC:

That's right, it does. And the operations manual also provided for these different classes of fastdocuments, and in particular, the one that we're interested in that was called a fastdocument 70, which was designed for self-employed people, with a loan to value ratio of 70% or less, and where in those cases, GE would accept a declaration of affordability without there being any requirement to go beyond that. There's a discussion about – there's evidence given by an independent expert, and also discussions in the judgments about this particular product, as it was described. In New Zealand and Australia, I think something like f5 to 7% of mortgage applications were of this kind, and they were designed, as I say, for a person who was self-employed where the security was clearly within good prudential limits and where, for one reason or another, perhaps a self-employed person was not able to verify their income. So long as a declaration of affordability was given, then the financier would proceed on that basis.

ELIAS CJ:

Is that a convenient time to take the adjournment?

MR FARMER QC:

Yes, it is.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.55 AM

ELIAS CJ:

Yes Mr Farmer.

MR FARMER QC:

Just a couple of points from this morning that I can now clarify. First of all Your Honour the Chief Justice, the paragraph numbers in Justice Randerson's judgment where he finds there was a, what he calls a significant degree of misunderstanding by Mr and Mrs Bartle and that they were not told that they would be responsible personally for total borrowings or that they stood to lose their home if Blue Chip collapsed are paragraphs 123 and 124.

Your Honour Justice Blanchard, on the question you raised with me about the questioning of Mr Grant on the sample of files, after Blue Chip went through the GE itself understood an analysis of its loan book. The Blue Chip files in the loan book were a small proportion only of its total loan book, as you'd expect, something like 403 Blue Chip files. They identified 48 of them as being what, at the time, were regarded as problem files and I'll just give you the reference. They're referred to in volume 8 at 1809. What the analysis showed, and this is in the cross-examination that you referred me to a little further on Mr Grant's cross-examination, volume 4 at 880, of the 48 problem files, 10 of them were Mr Mathias. There were 12 different lawyers in that sample of 48. Now, so that gives the proportion anyway, that we're talking about.

BLANCHARD J:

That's at volume 4, page 880?

MR FARMER QC:

Yes. Now finally just on where I'd got to, the – where I'd been talking about the correspondent deed and the operations manual and the requirements that any correspondent, whether it be TML or one of the other eight, were required to observe, in putting together a loan proposal, unlike some of the other cases that have been before the courts and in particular some of the Australian cases, the lending criteria and requirements here contained in those documents had not, to GE's knowledge, been breached. In fact they hadn't been breached at all and that was an express finding by Justice Randerson at paragraph 211 where he said, "All steps required by the operations manual had been met in respect of the first line and there was nothing on the face of the documentation received by AMS or GE which indicated fraud or anything untoward."

So now I think we've reached October, where TML have arrived on the scene. The first Bartle loan was presented by, or loan proposal, was presented by TML to AMS. You'll recall of course that TML had written to Mr and Mrs Bartle and said, "Your loan application has been approved in principle." What then happened was that when the Bartles said yes that's fine, TML went to AMS, which was in other words GE, and presented them with what was called a mortgage purchase application and you'll find that document, I won't take you to it, still volume 6, 1424 to 1441. AMS accepted the application and solicitors were then instructed. The firm of Sanderson Weir, they were instructed and you'll find that at volume 6 at 1448. A few days later on the 20th of October, Sanderson Weir instructed Mr –

BLANCHARD J:

Just before we move to that, on page 1427 one of the attachments is a valuation. Which valuation is that?

MR FARMER QC:

1427?

BLANCHARD J:

Is it the valuation that starts on page 1410?

MR FARMER QC:

Ah it was the government, apparently the government valuation. It's at 1441. It's a valuation, I think, of their home.

BLANCHARD J:

Right. The valuation at 1410, did GE ever see that?

MR FARMER QC:

I'm told no.

BLANCHARD J:

Thank you.

TIPPING J:

Of course on the GV at that time there was enough margin just for that first loan wasn't there?

MR FARMER QC:

Oh yes, absolutely, yes. So Sanderson Weir instructed and they in turn instructed Mr Mathias to investigate the title to arrange signing of documents, settlement of the loan advance and registration of the mortgage. So this is a situation similar to what you have with bank, a regular bank who when it comes to having documents with a mortgage in particular signed will, for reasons of efficiency and cost, will instruct the mortgagors' solicitor to do that work but in the capacity, therefore being both solicitor for – solicitor for both parties – and we'll see that that's a situation that's been considered recently in case law. So –

ELIAS CJ:

Can I just ask, how was the identify of the solicitor acting for the Bartles communicated to GE?

MR FARMER QC:

To Sanderson Weir, it would have come from TML.

ELIAS CJ:

When you say it "would have" there's no evidence –

MR FARMER QC:

I think there is.

ELIAS CJ:

It doesn't matter.

MR FARMER QC:

I think there is.

BLANCHARD J:

Well AMS knew that identity because it wrote to Mr Mathias.

MR FARMER QC:

Yes. So AMS is, for this purpose, GE.

TIPPING J:

There's a handwritten note at the top of 1448 which I think one could reasonably infer originated at AMS.

MR FARMER QC:

Yes.

ELIAS CJ:

But there's no communication from the Bartles is what I'm asking for? About the identity of who's acting for them.

MR FARMER QC:

Not direct to AMS.

ELIAS CJ:

No.

MR FARMER QC:

There was no communication at all between those parties, no. So the instruction given by Sanderson Weir to Mr Mathias, you'll find this at 1448. Sorry, that's the letter of instruction from AMS to –

McGRATH J:

It's 1453 I think.

MR FARMER QC:

Yes, thank you. 1453 you can see there an application for mortgage finance has been approved. You've been nominated as a borrower's solicitor and then there's, halfway down the page, AMS as trust manager for the lender would like to appoint you to act as solicitor for the lender to make all necessary investigations in regard to the title of the security property, arrange for the signing of all documents, settlement of the loan advances and registration of the mortgage. Now that's, as I say, a completely standard provision that's seen in any kind of loan from a bank.

Over the page there is a paragraph, extentive instructions. "In acting for the lender you are asked to investigate and approve all matters you consider necessary and prudent to protect the lender's interests and to ensure that it obtains the required security for the advance." So it is not intended to be exhaustive. "We would expect you to search the relevant titles and investigate all title matters including land covenants, memorials or other aspects of a title which may detrimentally affect our interest and undertake any other investigations that you consider appropriate." And they give as an example of that, "If there's any prior interest on the property. If you're obtaining a LIM report then it has an impact on value, we'd like to know about that." And then, "If you are aware or become aware that any of the details in the loan contract, mortgage or guarantee is incorrect, incomplete or inaccurate, such as the name of any borrower, guarantor or mortgagor, or if any properly is mis-described, we ask that you advise us and obtain our approval to any required changes."

Now our submission about that is that those general words don't, in fact, enlarge the scope of what Mr Mathias was being asked to do, which was basically to make sure that everything was regular as far as title was concerned and execution of documents et cetera. And this kind of situation was actually considered fairly recently by His Honour Justice Stevens in a case called *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC) which you'll find in volume 2 of our bundle of authorities at tab 15 and I won't spend too much time on this. But in effect it was a situation where there was a jointly instructed solicitor, ASB Bank, and there were issues of fraud and the indefeasibility situation with land title and questions of attribution to the mortgagee bank of the knowledge of the solicitor and His Honour said well the solicitor was instructed for the limited purpose in that all of his knowledge about his borrower client was not to be attributed to the bank, and I won't read it to you in the interests of time, but I'll give you the relevant paragraph numbers.

Beginning at paragraph 71 where there's actually a very interesting review of writings of Professor Peter Watts who had relied on some very, very old cases going back to the early 18th century too, which took a contrary view but Justice Stevens said, well look, these days where we've got to have, be – we have to, what he called in 71, follow an efficient process for a limited formal function and to keep the costs, which fall to the borrower to pay, to a minimum. So he said he wasn't prepared to attribute to ASB Bank all of the knowledge which the mortgagor's solicitor had.

So that probably completes the examination of the evidential, factual matters. What we would say is that it was Blue Chip initially and then later TML who were instrumental in assisting in advising the Bartles to proceed with the investment, the investment being based on these joint venture arrangements between them and Blue Chip under which monies would be borrowed from a lender introduced by TML, which happened ultimately to be GE. And it was TML which put together, prepared with the Bartles the fastdoc documents that the Bartles signed, which included the declaration that they could afford the loan, and which also incidentally contained the statement that they were self-employed, so that that brought the application, the loan application within the requirements, the criteria laid down for that kind of proposal, fastdoc proposal.

So certainly as far as GE was concerned it wasn't given a complete and accurate picture of the Bartles' financial position. It can legitimately say that it was to some extent misled variously by TML, Blue Chip and the Bartles, even though at the time GE certainly didn't know about Blue Chip's involvement in the Bartles' transaction. It was misled to the extent that the Bartles were described, and described themselves, as being self-employed rather than retired and that brought them, as I say, within the qualification of a fastdoc loan in which their income did not require verification by the lender. There was an initial allegation to the effect that the self-employed description had not been made by the Bartles but Justice Randerson rejected that so far as the fastdoc application was concerned. He found that on the balance of probabilities they signed it in that form and of course they did sign the declaration of affordability which did not disclose the fact that the affordability of the loan and of the repayment of the loan was dependent on a source of income that was not personal income of theirs. It was a source of income, of course, from Blue Chip pursuant to the contractual arrangements that Mr and Mrs Bartle were entering into with Blue Chip. So there's no doubt that GE took a decision to lend based on misleading information, and that's the context, I would submit, in which Mr Grant's evidence that the Bartles'

financial position would not have met GE's servicability requirements, and that their pension income, and the rental from the apartment, would not have been sufficient to service the total loans, and therefore, since they didn't meet those requirements, they wouldn't have got the loan. That's what he addressed, the question of their personal situation, their personal income, including within that rental they would receive from the property. What he didn't address, and wasn't asked to address, was what effect the Blue Chip payments, the Blue Chip underwrite, if I might call it that, would have had on any GE decision to lend the money, and we've dealt with that point in our written submissions in paragraphs 106 to 113.

TIPPING J:

That's a pretty significant point, isn't it, because in essence they could afford it if Blue Chip was sound. I mean, as I understand the fastdoc scenario, it doesn't say that you can afford it literally out of your own pocket, so to speak. That seemed to me to be a little bit elusive, and that in a sense, they were entitled to say they could afford it, provided they had no reason to doubt Blue Chip's soundness.

MR FARMER QC:

Yes, that's at the very heart of this case, that point. In fact, I think one of the examples given of a fastdoc situation with self-employed people is that they might be dependent on, to be able to afford the loan, as it were, for example, on the rent from the property, would be one thing.

TIPPING J:

Conceptually the same thing. If your tenant goes bust, well, you might have difficulty getting another –

MR FARMER QC:

Well, there are other examples one can give, too, of things that can go wrong. If someone takes out a large mortgage, but has a very good income, but then becomes ill, or is made redundant in a tight employment market, then in that situation, there is an assumption of an ongoing source of income. That's a personal source of income. Here, the assumption is that Blue Chip will continue to meet its contractual obligations.

TIPPING J:

And it's highly debatable whether or not that was – when I say "highly debatable", it seems to me to be at the heart of the case as to whether that was a reasonable assumption, both for per se present purposes and particularly vis-a-vis what your client knew, or ought to have known.

MR FARMER QC:

Well, my client didn't know about Blue Chip.

TIPPING J:

No, I know they didn't know.

MR FARMER QC:

But Justice Hammond – I'll come to this shortly – actually addressed this situation of if they had known, and I think he says, well, if they had known Blue Chip, really a very cursory enquiry would have been all that would have been required. I'll come to that. "Cursory" isn't the word he uses, but I'll come to that. That is certainly an aspect of it. Now, there are five findings of facts that Justice Randerson made that I wanted to quickly summarise.

The first is that the lender's risk was managed on the fastdoc 70 product by requiring a lower maximum loan value to ratio of 70%. There are three things. That, and secondly the borrower's declaration of affordability – four things, actually. Thirdly, a credit check which they did on the Bartles. That's just whether they had bad debts anywhere. And fourthly, mortgage repayment insurance. Now, that protected the lender's risk. The fastdoc product was designed for people who might not have independent income to service loans, but were – and this is Justice Randerson saying this, giving his examples – relying on rental streams and/or an increase in capital value. You might say that in a sense, it was recognising that self-employed people as a category might be slightly more riskier than other people, particularly if they were relying on such things as an increase in capital value. That's paragraph 195.

Thirdly, the point I've already made, that all steps required, or processes or forms, required in the operations manual had been met. That's paragraph 211. I should just add in that same paragraph His Honour records that the original loan application, the very first one that the Bartles made to EML, was never sent to either AMS or GE.

So they never actually saw that one. Fourthly, Blue Chip paid the required loan interest payments to the Bartles under the first loan for 18 months, paragraph 212. And Justice Randerson says, well, if Blue Chip hadn't collapsed, it would well have worked out very satisfactorily for the Bartles, and, indeed, it did for a lot of people. The man, or the lady, on the jury, rather, was more than happy that payments were always made. In fact, they were going to do it a second time. Certainly at the point of considering the second and third loan applications, there is a note that is made by GE or AMS that the loan repayments on the first loan had been made satisfactorily for a long time for that first – in effect, by that time, 12 months, I think, on to 18 months before the balloon went up. And, indeed, as Justice Randerson said, in respect of the second and third loan applications, the operations manual requirements were met, once again, and there was nobody called evident fraud or anything untoward in the documentation received. That's paragraphs 223, 224 and 230, and the point I just made, there was a note made of the excellent payment history in respect of the first loan. You'll find that at 227 and 228.

Now, dealing with the legal issues that arise out of all of this, Justice Randerson gave these rulings. First of all he said that when you looked at the correspondent deed and the operations manual, they tended to indicate an independent operator rather than an agency relationship. That's paragraph 272. Viewed overall, his view was that TML was not the agent of GE or AMS. Its function was that of what he called a non-exclusive originator of loan applications, one of nine, which it submitted to AMS for approval, supported by the compliance with the correspondent deed and operations manual. In the absence of any evidence, His Honour found that there was no evidence that TML was held out as an agent, or that its conduct might be so interpreted. The fact that, of course, TML could not approve loans or bind AMS or GE in any way, and an expressed acknowledgement by the Bartles in the application form that TML was not acting as an agent. All those matters he put together in paragraph 276 and concluded that TML was not an agent for the financier.

He also in that context referred to a long line of authorities, and I won't take you to them, including the House of Lords decision in *Branwhite v Worchester Works Finance* [1969] 1 AC 552, involving consumer finance, in which the finance application is prepared by the retailer or the dealer, but has never been regarded as the agent of the finance company. It simply has that – performs that function of putting together the loan proposal, the finance proposal, for the consumer, sends it on to the finance company, and is not regarded as the agent. His Honour considers

those cases in paragraph 253 to 260. He also held there was nothing which might have alerted GE to the Bartles' circumstances, or put it on inquiry. That's dealt with at three different places, paragraphs 281, 305, and 329. He said that he held that GE had no knowledge of Blue Chip's involvement in the transaction, and was not aware that the Bartles were pensioners of modest means, and that's paragraph 290. He said there was nothing which ought to have put GE or AMS on inquiry in relation to the ability of the Bartles to meet their mortgage commitments. That's 292 and again at 329. He observed in that respect, in passing, that the Bartles, by the time of the first loan contract, were already unconditionally committed to the purchase of the unit, and GE wasn't responsible, he said, for that. That's 292. He thought that the fact, also in 292, that the Bartles were receiving independent legal advice was material, both to the issue of disadvantage and to the question of whether it could be said that GE took advantage of any disadvantage or disability, if it were shown.

TIPPING J:

Well, you're not normally treated as being under a disadvantage of any kind of you have proper, independent advice. It nullifies, as you were saying in earlier discussion, what would otherwise be a disadvantage.

MR FARMER QC:

Yes. He held – this follows on, I think from that point – that GE had no knowledge that the advice given by Mr Mathias was inadequate or wrong, and there was no reason to put it on inquiry in that respect. That's 293. Then there's the passage, the point that Your Honour has just made. The loan transactions, he said, did not constitute an unconscionable bargain. He didn't think there was any special disability, but in any event, if there was, that it was one that ought to have been redressed by the availability of independent legal advice. GE was entitled to assume that the Bartles were receiving proper, independent legal advice, and that's at 304 and again at 341. He thought that the fastdoc loans were not inherently unconscionable, that's 308, and indeed, I don't think there's any disagreement by the Court of Appeal on that point. He said there was nothing improper or dishonest, or in the nature of bad faith, by GE or AMS, and that GE was entitled to rely on the Bartles' declaration of affordability. That's 309.

He held that GE had no actual or constructive knowledge that the borrowers could not pay, 310 and 342, and that the law does not intervene on the grounds of unconscionability where the borrowers are at full capacity, loan on normal

commercial terms, and relative weakness and bargaining power, or lack of complete understanding, can be addressed by the receipt of independent legal advice. He thought that the loans were not oppressive within the meaning of the Act, that's paragraph 343. And importantly, also, but for the downturn, he said, in the market, which was a significant contributing factor to the collapse of Blue Chip, the outcomes anticipated by the Bartles may have been realised. So that is pinpointing the cause of the problem that subsequently happened. That's 306. And relevant to that, of course, is the point referred to Mr Bartle's jury colleague's experience at the time when the market was still strong. The people who were receiving what they contracted to receive with Blue Chip. It all turned to custard later when the market turned.

His Honour also considered various New South Wales authorities, all of which have names that are very hard to pronounce. *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413 and *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41. He distinguished them on various grounds; first, that there was no evidence here that GE knew of the Bartles' limited resources, which is a contrary position in *Elkofairi*. There was no evidence of any breach by GE of its usual lending requirements, or operational procedures, and I think *Schmidt* is a case where there was. Thirdly, the Bartles were not under any disability that could not have been met by independent legal advice, and again, some of those Australian cases there was no legal advice given. So those paragraphs dealing with those cases variously, 329, 341 and 342.

He ruled at 351 that a lender is not bound to make inquiries to ascertain whether it is commercially sensible to make a loan, though it would normally do that to protect its own position. Banks want to know what you're borrowing the money for, and if they think – you know, if you say I'm borrowing it because I think a particular horse is going to win on Saturday, they might query that. But if you say, well, actually, I want to invest in a rental property somewhere, then they understand that. I'm almost at the end of the list. A borrower must assume responsibility, His Honour said, to protect his own position, and take such advice as he or she considers appropriate. That's at 351.

In *Khoshaba*, interestingly, I'll give you the reference when I come to it, the Chief Justice of New South Wales said even pensioners must take responsibility for their own actions, and that's perhaps a harsh statement, but clearly there is a recognition that there are responsibilities on both sides, and that has to be taken into account

when considering issues of oppression. And then finally, His Honour ruled that the Bartles had declared that they could comfortably afford the loan, and they were not relying on AMS or GE to verify or review their financial position. That's paragraph 352.

Now, on those same set of issues, the Court of Appeal took, of course, a quite different approach, and I can give you what I hope is a helpful summary on that relatively quickly. Dealing with the learned President first, he addressed this question of agency at some length. He said, correctly, that TML was GE's agent for some purposes in terms of applying for mortgage repayment insurance, in terms of managing the loan once it had been granted, and if necessary managing the enforcement of the loan, if there were a default. He went on to say that it's artificial, if that's the situation, not to attribute all the knowledge of TML to GE, all knowledge that it acquired when it was performing as an agent to GE in relation to issues where GE was not acting as agent. Now, that's contrary to the approach taken by Justice Stevens in *Burmeister*. It's a different factual situation, of course, where His Honour, as I indicated, wasn't willing to attribute to the ASB Bank –

TIPPING J:

Did the learned President elaborate on what he meant by "artificial" in that context?

MR FARMER QC:

No. I've struggled with His Honour's judgment, and he does make the point that in order to – he focuses very much on the mortgage repayment insurance, and says, well, you know, if TML was performing the function of obtaining, for the benefit of GE, mortgage repayment insurance, then you will expect the insurer to want to know everything about what might conceivably be relevant to a possible default, and if the insurer wants to know it all, well, surely – and if for that reason, TML's knowledge can be attributed to, or should have been disclosed to the insurer – well, then, surely because, although the purpose is different, the function is different, then that kind of, any knowledge that would or should have gone to the insurer should also have gone to GE.

ANDERSON J:

You see a logical hiatus there?

MR FARMER QC:

Do I see one?

ANDERSON J:

Yes. Because if there is it could only be justified on the policy basis and then the competing policies would have to be addressed –

MR FARMER QC:

Yes, yes.

ANDERSON J:

– if they weren't.

MR FARMER QC:

Yes, yes. just the references, 243 to 245 and at 247, I think relevant to that, he puts it differently, but I think there maybe another way of saying the same thing. His Honour said that TML's functions in conducting the mortgage origination where what he said closely integrated into GE's lending business and it was representing GE and in that respect he referred to this *Colonial Mutual* case in Australia. What he said, at paragraph 249, I do want to take you to that case in a moment, he said, "In originating business for GE, TML was operating in a way that was conceptually similar to the canvassing agent in *Colonial Mutual Life*. In that sense TML was representing GE. All in all it seems to me reasonable to conclude that when TML carried out its credit assessment functions, it did so for and on behalf of GE so that its actions, and particularly its knowledge, can for present purposes be attributed to GE."

Now if I can just ask you to have a look at the *Colonial Mutual* case. It's it he respondent's bundle.

BLANCHARD J:

Is he saying that when TML goes to GE and asks GE whether it will make a loan, that TML is representing GE?

MR FARMER QC:

Ah –

BLANCHARD J:

Is that what it –

MR FARMER QC:

No I think it's saying that when TML deals with the Bartles and puts together the loan proposal, that TML is for all purposes GE.

BLANCHARD J:

Well it could have taken that loan proposal to –

MR FARMER QC:

To anyone else, that's right –

BLANCHARD J:

– one of the others.

MR FARMER QC:

That's right, it could have. It could have taken it to anyone.

TIPPING J:

Before we go to CML, and I'm not trying to prolong this, but I got the impression that the reasoning in this respect, and I think to a certain extent it may have been shared by the other Judges, was covert agency but really a policy decision to say well you can't shelter behind – but you may want to develop –

MR FARMER QC:

There's a lot of reference to policy.

TIPPING J:

In other words, speaking with respect, they've pressed it into an agency mould I order to serve a policy function.

MR FARMER QC:

Yes they've, I mean none of them, not even, with respect, the learned President, comes quite to the point of saying that for all purposes TML was GE's agent. They stop short of that, but rather what I think the learned President is saying is, is well because they're an agent for some purposes and because there was this degree of

integration of the two businesses, TML and GE and that TML was in effect carrying out a function that GE would have had to carry out if TML hadn't been carrying it out, namely credit assessment, putting together –

TIPPING J:

Well it's linked with this outsourcing.

MR FARMER QC:

Pardon, yes.

TIPPING J:

It's linked with the outsourcing issue.

MR FARMER QC:

That's right. So saying because of that therefore I'm going to attribute knowledge but equally the other side of the same coin is that he, and Justice Arnold was quite strong on this, is saying, well under the Act the lender must not enter into an oppressive contract in fact and therefore if the contract is oppressive, objectively speaking, then the lender can't excuse itself by saying, oh but I didn't do that, someone else did that. That's – and that's sort of –

TIPPING J:

Has it ever been discretely argued in this case that you can attribute TML's knowledge to GE irrespective of whether a relevant agency relationship exists?

MR FARMER QC:

If there'd been no agency function at all?

TIPPING J:

Yes. I would not read that as having been argued from the judgment but –

MR FARMER QC:

I, because I haven't been in the case when the argument has been previously presented I can't say –

TIPPING J:

You can't say.

MR FARMER QC:

– but I don't believe so.

ELIAS CJ:

That would amount to a financier being under a duty to avoid oppression –

MR FARMER QC:

Exactly.

ELIAS CJ:

– which the Judge disallows.

MR FARMER QC:

And my learned friend says that wasn't argued but the – and indeed that the whole question of duty, which I'll come to shortly, was argued and rejected. The question of whether there's a duty by the financier owed to the borrower and –

TIPPING J:

To avoid objective oppression?

MR FARMER QC:

Yes.

TIPPING J:

Well that's a long step.

MR FARMER QC:

Yes, yes.

TIPPING J:

Against the traditional approach to these problems.

MR FARMER QC:

But the difficulty I have, with respect, with the Court of Appeal judgment is I, I've read them many times on this issue. I find it hard to tie down exactly what is being said. First of all I think what is being not said is that there's definitely an agency – that

there is an agency relationship for all purposes, although the learned President comes close to it when he says, well it's artificial. And I think what's also being said is that objectively a lender shouldn't enter into an oppressive contract but I think again they stop short of saying, and they couldn't have said because the point wasn't before them, that there was a duty by the lender to the borrower. Rather what they say is that if the contract does end up being oppressive, and if the oppression somehow arises out of a function such as, in this case, doing a credit assessment thoroughly that should have, that normally the lender might have performed, as many do, banks in particular, then you can't say well actually I didn't, somebody else did that.

TIPPING J:

You needn't analyse it in terms of duty to get to that result. You could simply say that the legislation involves the lender taking the risk. It may amount to the same outcome but it would be conceptually different. You wouldn't say the legislation casts a duty. You'd say the legislation requires the lender to assume the risk of it being objectively oppressive. Now I'm not saying that's my view Mr Farmer –

MR FARMER QC:

No, no, no –

TIPPING J:

– I'm just saying.

MR FARMER QC:

– I understand what you're saying, yes.

TIPPING J:

Now you would have to justify that, if at all, by saying that the legislation, being of a protective kind, necessarily ignores the mind state of the lender and simply says, if you have an objectively oppressive contract, bad luck.

MR FARMER QC:

Well that would be certainly radically different from the position in equity then because equity, as Your Honour knows, attaches to the conscience –

TIPPING J:

Exactly.

MR FARMER QC:

– and so – and it would also be difficult to reconcile with this notion of moral probity and moral repugnance that, particularly in the Australian cases, under their statutory divisions so – but I, as I say, I don't intend any disrespect to the members of the Court of Appeal but I have struggled a little bit just to understand precisely what –

TIPPING J:

Well they don't seem to me, with respect, to have clearly articulated the precise basis, whether it be a finding of agency, relevant agency, or the imposition of a policy outcome.

MR FARMER QC:

Yes.

TIPPING J:

There may be a little bit of fluidity if you like, in that respect.

MR FARMER QC:

Well they tend to cross over I think. I mean one, one and the other to some extent, certainly I think the learned President does. But perhaps I'll keep going –

ELIAS CJ:

Are you going to develop an argument – are you going to take us to the statute at some stage in your argument?

MR FARMER QC:

Well we've – I wasn't – we've dealt with that, in our written submissions we've dealt with the statutory provisions and the history of it. I've taken you all through the history in some detail and the sequel to it –

ELIAS CJ:

Well the derivation but we haven't got anything of the legislative history, have we?

MR FARMER QC:

I think you have.

ELIAS CJ:

Have we?

MR FARMER QC:

Yes indeed. I think we've dealt with the history through the Money Lenders Act, the original Credit Contracts Act –

ELIAS CJ:

Yes, yes, I understand that but I mean –

MR FARMER QC:

– this particular Act and the subsequent report –

ELIAS CJ:

Okay.

TIPPING J:

The original Money Lenders Act, as I understand it, was designed to codify and make into a statutory regime the previous approach of equity dealing with the conduct of money lenders.

MR FARMER QC:

Yes.

TIPPING J:

One of the classic functions of the Court of the Chancery was to keep money lenders on the straight and narrow in a number of respects.

MR FARMER QC:

Yes.

TIPPING J:

That, as I understand it, is the sort of fundamental origin of all this but it's developed, of course –

MR FARMER QC:

It has and it was a lot of, at that time, a lot of emphasis on the interest rates and something, I think there was a case, I seem to remember seeing an 18th century or 19th century case of 450% interest rates and things like that and –

TIPPING J:

Well money lenders used to buy from expectant heirs the expectancy.

MR FARMER QC:

Yes, yes.

TIPPING J:

Which was worth £100,000 shall we say for £5,000 because the expectant heir was hard pressed. I mean all those traditional cases are the source of this now more generic restraint on the conduct, inter alia, of money lenders.

MR FARMER QC:

Right.

ELIAS CJ:

It is a wider concept though. The section 118 definition is wider. It does seem to have been assumed in the cases that the equitable, the previous equitable case law is embraced by it but I wonder if there is not perhaps a wider argument. Just thinking about the Court of Appeal grasping for policy reasons, as I think they were.

MR FARMER QC:

Yes. Yes they were and they do expressly address it in terms of policy. My point is that perhaps, with respect to them, it's not that clear as to just how the policy is being formulated and then applied.

ELIAS CJ:

The emphasis on the contract, on the objective circumstances of the contract rather than the conduct of the parties may be a slightly different emphasis. I'm not sure.

MR FARMER QC:

Yes and I've been quite happy to address the contract, the objective nature of the contract, but what I've said is that if we're going to do that three things have to

happen. One is that we've got to take account, we can't just say, oh these people are retried and only have pension income. You've got to look at the full contractual context which includes the Blue Chip underwrite, that's one point. Secondly you can't, certainly you have to assess risk at the time of entering into the contract. You can't come along afterwards with the benefit of hindsight and say, oh, dear me we have this economic recession that's now come along and ruined everybody's expectations. Then the third thing is the role of the lawyer advising. So all of those things have to be fed into any objective analysis. That's the point I would make.

TIPPING J:

Well it's not strict liability deriving solely from –

MR FARMER QC:

No, well no, but it starts to look like that.

TIPPING J:

Yes well that's what, calling a spade a spade, you're arguing for some degree of shall we say mens rea, to be very, very loose in one's terminology, but there are appearances in some places of strict liability.

MR FARMER QC:

Yes. But then at the same time how does one reconcile that with the sort of no-duty concept. So it's –

TIPPING J:

Well there's got to be a fair balance between the interests of lenders and borrowers one would have thought. That's the fundamental starting point. That it's not a one-way street and that's where I'm quite attracted to the idea of concentrating on that which was either known or ought to be known, in the sense that it was unconscionable not to make the inquiry, that the known facts demanded, if you like. But, as the Chief Justice says, it is possible to read into the statute something other than that. Well she didn't say that but I think that was the implication. That – how much does one read into the statute beyond the simple fact of the transaction being oppressive?

MR FARMER QC:

Well, ah –

TIPPING J:

Because read very literally that is a tenable interpretation of the statute.

MR FARMER QC:

I'm not sure what "that" is.

TIPPING J:

That, absolute, strict liability.

MR FARMER QC:

Ah yes –

ELIAS CJ:

Well a broadly remedial jurisdiction to respond to the fact of a credit contract being oppressive within the meaning of the section. Bearing in mind that the consequence is not that the contract is voidable.

MR FARMER QC:

It may be a rewriting of the contract.

ELIAS CJ:

Yes, or readjustment of the incidents.

MR FARMER QC:

Right, fine, I understand that. But I would also go back to the starting point and say we certainly argue strongly that this contract was not oppressive.

ELIAS CJ:

I can't remember. Was the argument – I had thought that the Court of Appeal, at any rate, was looking at it in terms of 120 paragraph C but was it at paragraph A that they were looking at? Maybe they didn't distinguish. I thought that somebody –

MR FARMER QC:

It's not under C, it's certainly not under C because –

ELIAS CJ:

No.

MR FARMER QC:

– it says, it can only be under A.

ELIAS CJ:

Yes. That's fine Mr Farmer, don't bother to take –

McGRATH J:

Mr Farmer, is there anything in this scheme of the legislation in relation to consumer transactions, which I gather have a tighter regulatory focus that indicates that the type of transaction we're looking at now, which can only be addressed under the reopening provisions of part 5 of the Act, is a credit contract. Is there anything in those other provisions that would signal that the type of approach the Court of Appeal was taking, which really came down to saying the Act won't work unless you can attribute, wasn't intended by Parliament?

MR FARMER QC:

Well there is a distinction between credit contracts and consumer credit contracts, I think is what Your Honour is drawing my attention to –

McGRATH J:

Yes.

MR FARMER QC:

– and asking whether perhaps, if the provisions of the Act are more stringent in relation to consumer credit contracts does that –

McGRATH J:

That's right. I mean as I understand it, this transaction was not a consumer –

MR FARMER QC:

No.

McGRATH J:

– variety, largely because the purpose was investment.

MR FARMER QC:

Yes.

McGRATH J:

And in those circumstances what I'm really enquiring is if it had been of a consumer nature, if the money had say just been used, if the purpose had been disclosed of its investment, you used ordinary purposes of living say or something of that kind, would there have been a stricter, would there have been more power, if you like, to the plaintiffs?

MR FARMER QC:

I haven't, I have to confess, I haven't thought about that question but I did touch on it earlier that, the reason banks ask what are you going to spend the money on is because they'll feel more comfortable if you're going to invest it in something that is bricks and mortar with another mortgage over it and where you're looking in rent as opposed to –

McGRATH J:

No, I'm really focusing on whether – what there might be within the statutory scheme that would support the President's approach.

MR FARMER QC:

Well I suppose there would be a likely policy objective that we don't like people borrowing money to waste it by squandering it on overseas trips and that kind of thing, where you've got nothing to show at the end of it, other than a good memory.

McGRATH J:

I think the President's policy is more that it defeats the purpose of the legislation if you allow outsourcing to basically give it what he calls an immunity for a financier –

MR FARMER QC:

Yes –

McGRATH J:

– from the actions of someone who's really standing in the shoes of the financier. I think that's putting it in his words

MR FARMER QC:

Well that was – yes, it is and he, I've been diverted away from where I – because I was going to take you to the claim in the *Mutual Life* case because His Honour did say, in this case, he took the view that TML was representing, was the word he used, GE or AMS and he likened it – precisely to the *Colonial Mutual* case and I was just going to say that I, on the facts of that case, it's a very different kind of case and you'll find it in the respondent's casebook at tab 10 I think it is. There what had happened is the insurance agent had gone out canvassing for business for CML specifically, so it was tied to CML. It wasn't like here, where TML could have been, could have sent the mortgage proposals to any one of a number of financiers. And there was a particular prohibition in the contract between the agent and the canvasser or agent in CML which prohibited him from slandering competitors. It didn't stop him, he just went ahead and slandered them something horribly, and so then they were, CML were sued and they said well your agent said these terrible things, brought us into disrepute, et cetera. And the holding by the Court was, just looking at the headnote at the moment, was that in performing the services for CML the agent was not acting independently but he was acting as a representative of it, which accordingly must be considered as conducting the negotiation in his person and therefore CML was liable.

But when you, just getting a couple of references, because the argument was that well, we prohibited him from actually making these statements and therefore he was in a sense acting outside his authority and in the judgment, particularly of Sir Owen Dixon, he pointed out first of all that the, at page 47, that the agreement between CML and the canvasser, he was actually described as an agent although he didn't think that was conclusive. But at the bottom of page 48, about five lines up, is actually the, he referred to the canvasser as being an independent contractor. He says, "The independent contractor carries out his work not as a representative, but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity. In this very case the 'agent' has authority to obtain proposals for and on behalf of the appellant and he has, I have no doubt, authority to accept premiums. When a proposal is made and a premium paid to him the company then and there receives them because it has put him in its place for the purpose."

So the agent had an authority to accept the premiums, that was a critical factor in that. His Honour continued, "This does not mean that he may conclude a contract of insurance which binds the company," because that's still to come, "it may be, and probably is, outside his province to go beyond soliciting and obtaining proposals and receiving premiums; but I think that in performing these services for the company he does not act independently but as a representative of the company which accordingly must be considered as itself conducting the negotiation in his person."

Now that doesn't fit, we would submit, with our case, where not only did TML have no authority to accept a loan proposal but it was a free agent in the sense it could have taken its loan proposal to any –

BLANCHARD J:

At what point did it makes its decision to take these loan proposals in the particular case –

MR FARMER QC:

In this case?

BLANCHARD J:

– to GE?

MR FARMER QC:

I don't know the answer to that. I don't know the answer to that I'm afraid but I made – I did make the point earlier that they came on the scene relatively late. That all those earlier discussions were with Blue Chip, EML and the Bartles.

BLANCHARD J:

Did they tell the Bartles they were going to GE in advance of doing so?

MR FARMER QC:

No, no. Oh sorry in the sense, yes they did in this sense that you recall that original so-called "approval in principle" referred to GE as being the lender, that we would go to GE, and then they went to GE with a, called a mortgage purchase application. I took you to that before. So there must have been a decision made by – to go to GE at that point.

TIPPING J:

Who were they purchasing the mortgage from?

MR FARMER QC:

Well –

TIPPING J:

I mean that doesn't help much. That's strange terminology.

MR FARMER QC:

It is strange and it doesn't seem to fit with what actually happened.

TIPPING J:

No.

MR FARMER QC:

So going back then, if I may, just to finish with my learned President. The third ruling he gave, he did say this, the financier is not under a statutory duty to avoid oppression but outsourcing of virtually all the usual functions of a lender, which is inimical to the ordinary operation of the Act, then as a matter of policy in that situation he said the knowledge and actions of TML are properly attributed to GE. Now that's paragraphs 241 and 250 to 251 and in that context you will recall he referred to the Privy Council's judgment in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7, Lord Hoffman's judgment, and we submitted in our written submissions that *Meridian* is not even analogous, which is the word that Justice Arnold used when he did the same thing, because *Meridian* was a case where we weren't looking at all at third parties and attributing knowledge of third parties. It was a case where you're looking at one of the employees or agents – servants of the company and considering whether in the scope of what they were doing and the scope of their authority they, in effect, could be regarded as performing an act for the company and –

TIPPING J:

Well it's interesting you should use the terminology of "for the company" but strictly if it's attributed they are acting "as the company" –

MR FARMER QC:

Thank you Your Honour, you're quite right, as the company and that point is made quite strongly. There's all that very interesting English case law in the *R v ICR Haulage* [1944] 1 KB 551 and *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL) and so on –

TIPPING J:

Well we followed that in *Giltrap*, or at least two members of the Court did. The other one might not have been quite so keen.

MR FARMER QC:

But where the distinction is drawn and questions of corporate personality and all the rest of it, but I took much heart from reading my learned friend's written submissions where he, they do seem to have dissociated themselves from any reliance on *Meridian*, that's paragraph 85 of their submissions, and we've dealt with *Meridian* in 84 to 88 of our submissions so I wasn't going –

TIPPING J:

It's a wholly different case.

MR FARMER QC:

Yes and I wasn't going to say anything more about *Meridian* unless you want me to. But Justice Arnold also relied on *Meridian*, and I'm turning now to him, he said that, his judgment is not too dissimilar really from the President's. He said these things. First that TML acted as agents for GE in some respects, and he identified them, but was otherwise an independent contractor, and that's paragraphs 184, 185 and 187. Then he said that TML acted on behalf of GE in making or having the responsibility to make enquiries going to the issue of oppression in compiling loan applications, that's 192. Or alternatively, he put it differently, GE had a statutory responsibility to enquire into matters going to oppression so that any failure by TML was attributable to GE and in that context he referred specifically to *Meridian* and that's paragraphs 192 and then again at 230.

He did say though, and this takes us into this outsourcing issue, he did say a lender is entitled to organise its business by sub-contracting out or relying on others to perform functions associated with its lending activities but it would undermine the scheme and purpose of the Act. Scheme and purpose of the Act was not allowed –

was not a phrase we're allowed to use any longer after *Ben Nevis* but never mind. It would undermine the scheme –

TIPPING J:

That's a bit tough, Mr Farmer.

MR FARMER QC:

But it would undermine the scheme and purpose of the Act if lenders could avoid its application by adopting lending processes and requirements that meant that they could disclaim all personal knowledge of factors that objectively indicate the existence of oppression. That is 193. And then two more. He said GE remained responsible for any oppressive lending if third parties were left to protect the borrowers, whether it was TML or the borrower's lawyer, and they failed to carry out that task adequately. So not only GE can't, not only can it not rely on TML to put together the loan proposal, but it can't rely either on the borrower's lawyer and if either of these people fail in their duties then GE remains responsible if the lending in fact is oppressive. And that's paragraph 190(2)(c), 190(3) and 227. And then finally His Honour –

ELIAS CJ:

So this is strict liability?

MR FARMER QC:

Yes.

BLANCHARD J:

But some kind of non-delegable duty.

MR FARMER QC:

Yes. That's right.

ELIAS CJ:

Or responsibility.

TIPPING J:

Whatever formula one adopts I would have thought you've got to leave room for the independent lawyer. In other words, even if it is objectively oppressive, if there is a

truly independent and ostensibly competent lawyer, it would be extraordinary, and it would add enormously to the costs of commerce, if you couldn't allow that.

ANDERSON J:

That might go to the nature of any remedy.

MR FARMER QC:

Well the way that Justice Hammond put it, this is in his paragraph 49, he said, "The statutory imperative is to see that those who borrow money understand what is going on in the transaction and what they are getting into." I read that before and then he went on to say, "If they do understand and adopt the risk then such borrowers can hardly be heard to complain." Now one can then add to that though if they have a lawyer advising them et cetera –

TIPPING J:

Well I'd need a lot of persuasion personally that there's no room for the curative function of an independent lawyer, even if the transaction is, per se, oppressive**.**

MR FARMER QC:

Well that's what, in particular, in that case I referred to in –

TIPPING J:

Lord Brightman in *O'Conner v Hart* said, in his definition of an unconscionable bargain, included the concept of independent advice as denying unconscionabilty.

MR FARMER QC:

Indeed and the other case I referred you to is the English Court of Appeal *Bank of Baroda v Rayarel* which was Lord Justice Hearst and Lord Justice Hoffmann same, to the same, very much to the same effect.

ELIAS CJ:

Mr Farmer did you want to finish off?

MR FARMER QC:

Just one point and I've then finished it. Justice Arnold's judgment, the final point he considers, this is paragraph 211, is asset lending and I'm going to say more about asset lending this afternoon. He said, "Asset lending may be appropriate for

genuinely self-employed persons who for some reason are unable to verify their past incomes but will not necessarily be appropriate for all borrowers, particularly retired persons on modest incomes and with modest assets." So after the luncheon adjournment I'll deal fairly quickly with Justice Hammond's judgment and then just go on and make the submissions, build upon everything that's hopefully come to this point.

ELIAS CJ:

How much longer do you expect to be Mr Farmer?

MR FARMER QC:

I would think certainly an hour, perhaps an hour and a quarter, something like that.

ELIAS CJ:

We'll take the luncheon adjournment now, thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:

Yes Mr Farmer.

MR FARMER QC:

I was just going to identify the rulings by the third member of the Court of Appeal, Sir Justice Hammond. He – his paragraph 49, which I've referred to a couple of times already, identifies what he saw as the issue under the Act which was whether those who borrow money understand what is going on in the transaction and what they're getting into. So it's understanding and risk. He said, at paragraph 87 that TML was not a full agent of GE but it was an agent for very important purposes, namely loan servicing and enforcement. So again that examination, along with the other two Judges, of the areas where TML was an agent. He in fact didn't really take that any further in terms of attribution of knowledge but he did make that ruling or finding.

Thirdly he said, in common with the other Judges that GE cannot avoid the application of the Act by the interposition of a intermediary loan originator, particularly where he said the intermediary was performing major agency functions. That's paragraphs 88 and 90. So there's the link between partial agent for some purposes

but then linking it to the question of the application of the Act and what he called avoidance.

Fourthly he said the loan was an asset lending scheme. In substance he said it wasn't a loan but it was an asset sale because the loan was not serviceable. The lender risked nothing but the borrower risked the assets. This is paragraph 78. He did say there that, "Asset lending is not necessarily unconscionable per se… but it has a substantial potential for injustice." And this term "asset lending" like all these sort of terms, needs to be examined fairly precisely to see exactly what we're talking about. But the definition of asset lending that, at least asset lending of the kind that would give rise to concern, is where the loan is not serviceable. That was the phrase that His Honour used and so when we look at this case, of course, we say the loan was serviceable. It was serviceable because of Blue Chip's obligations. That matter was actually considered, at least in passing, by His Honour at paragraphs 66 and 67. I wonder if you wouldn't mind just looking at that and I'll read that. After looking at the particular loan document, or contract, in 66 he says, "I consider that in some cases a wider view can properly be taken (that is, beyond the face of the loan agreement itself into the surrounding non-credit documents). This inquiry into surrounding non-credit documents is appropriate where the surrounding transactions are the only means the borrower has of meeting their loan obligations short of realising the asset. If there was evidence that the lender knew of a regular income stream and other significant asset ownership which could be utilised, then that might be relevant."

Well here of course the regular income stream was the Blue Chip obligation. Then he continued in 67 and said, "Here, the joint venture with Blue Chip Joint Ventures Ltd was the only known way that the Bartles could repay the loan without realising the asset, GE having no information as to income level. The Bartles were entirely reliant on the scheme's success, and so at least a brief consideration of the risks associated with the joint venture would have been reasonable." I did refer this morning to what I said a cursory, His Honour referred to a cursory consideration and that's what I was thinking of. "At least a brief consideration of the risks associated with the joint venture would have been reasonable."

He then went on to explain though the context of that statement. He said, "This is especially so considering that after the five-year period the interest rate would change from fixed to floating and include repayment of the principal as well as

interest." Now His Honour seemed to have been of the view that in those circumstances the Bartle's obligations would increase under the loan contract and in fact what he doesn't seem to have appreciated is that under the joint venture agreement, and I'll give you the reference, Blue Chip assume the risk first of all of an increase in interest rate and secondly undertook to meet not only interest payments for the first period of the loan but also interest and principal repayments thereafter and you'll find that at volume 7, case on appeal at page 1468, and it's clause 6.10.1 of the joint venture agreement.

ANDERSON J:
Can we have the reference again Mr Farmer?

MR FARMER QC:
Volume 7, case on appeal 1468, clause 6.10.1.

ANDERSON J:
Thank you.

MR FARMER QC:
His Honour said that a second, what he called "striking", feature of the arrangements was that it was a fastdoc loan. He did, this is paragraph 80, he did say there was nothing commercially improper or inappropriate per se about that but he said it was a type of process in respect of which there was a substantial potential for injustice which had to be guarded against.

Also in paragraph 80 he said that if anything went wrong such as a Blue Chip or market collapse the Bartles had no way to continue to service the loan at their ages and on their pensions. And finally he dealt with the matter of legal advice, paragraph 97, he said GE cannot avoid an oppression finding by relying on borrowers having had legal advice which he said was "neither competent not independent" and we do take issue with his statement, I'm sorry, at 94, that needs to be read together with 94. At 94 he said, "The High Court Judge found as a fact that Mr Mathias was not independent." That, with respect, is not correct. That was not a finding made by Justice Randerson at all. Justice Randerson treated Mr Mathias for all purposes as being an independent legal adviser.

ELIAS CJ:

But incompetent, or negligent?

MR FARMER QC:

But negligent, oh yes indeed. So it's the finding of, alleged finding of independence that –

TIPPING J:

But one of the issues in 97 must –

MR FARMER QC:

Where sorry?

TIPPING J:

Paragraph 97, the conclusory statement why GE couldn't rely on the borrowers. It's an ex post assessment. I mean –

MR FARMER QC:

Yes.

TIPPING J:

– even if there was lack of independence, surely it's fundamental that one must look at this as at the time the transaction was entered into at which time the issue is what knowledge was there of –

MR FARMER QC:

Yes.

TIPPING J:

Unless we're back into the strict liability country.

MR FARMER QC:

Right. And that's, again, where Lord Justice Hoffman, in that case I referred to you, he said that the borrower, the bank, is entitled to assume independence and competence and indeed he went further and said it would be positively, I thought it was him or Lord Justice Hearst, I'm not sure, be positively rude and discourteous to

make inquiries of the lawyer on the other side and to ask the question, are you competent. Are you –

TIPPING J:

I would have thought if you had –

MR FARMER QC:

– independent.

TIPPING J:

– such knowledge that would lead you to suspect then that's a different matter but without that, yes you can hardly sort of as a standard practice say, I say old chap, are you independent and competent.

MR FARMER QC:

Yes. He's not here yet, but Mr Miles would be highly outraged if I asked him that question of whether he was competent. I think he'd come back with interest I would think the response. So –

McGRATH J:

Mr Farmer, paragraph 94, was there any issue at the trial about Mr Mathias not being independent?

MR FARMER QC:

I think there were – I'm told there was certainly discussions about whether he was a tame lawyer, chosen, question of whether he would be robust enough, that sort of thing, but I, but – yes there is - Justice Randerson has made an express finding as to his independence and I'll give you the reference.

McGRATH J:

Thank you.

MR FARMER QC:

Now what, so that really completes my consideration of the Court of Appeal judgments and what I wanted to do now was just to wrap up with a series of submissions that in one way or another we've probably covered them all.

The references in Justice Randerson's judgment, Your Honour, a variety of places. Paragraphs 163, 285, 292, 304, 310 and 352.

McGRATH J:

You're saying that none of those provide a basis for what the Court of Appeal said at paragraph 94 in –

MR FARMER QC:

What Justice –

McGRATH J:

– Justice Hammond's judgment?

MR FARMER QC:

– Hammond said, yes, yes. The other Judges don't make that finding or comment. So by way of submissions then the – I started this morning by saying there was essentially a different philosophical approach between the –

TIPPING J:

Just before you go on, Mr Farmer, awfully sorry to interpose but could there be an important distinction between a finding that Mr Mathias was independent of GE as opposed to a finding as to his independence vis-à-vis Blue Chip? There's no suggestion, as I understand it, that there was any lack of independence vis-à-vis your client.

MR FARMER QC:

No, that's true.

TIPPING J:

And that there could be a little bit of, perhaps, potential looseness in the observations in this respect.

MR FARMER QC:

Yes, I certainly think that any comments that were made about Mr Mathias really related to Blue Chip rather than –

TIPPING J:

Because it couldn't possibly have been asserted?

MR FARMER QC:

No, but –

TIPPING J:

But the question is what is important for present purposes? Certainly if he's independent of you, you'd have to be on serious notice, I would have thought, that he had some conflict.

MR FARMER QC:

Yes, yes and GE didn't even know about Blue Chip's involvement in the case so there was absolutely nothing that could have alerted us to a problem even as between Mathias and Blue Chip and Mr and Mrs Bartle.

TIPPING J:

I'm sorry, I just wanted to clear that in my mind.

MR FARMER QC:

No, thank you, Your Honour. It's worth clarifying that point. So the difference in philosophical approach, Justice Randerson took the view that a lender would not be held to be accountable unless he had actual constructive knowledge that the borrower had no means to meet his or her commitments and he said that wasn't the case here. Again, I'll give the reference to paragraph 310 and also 342. In his view, borrowers had to take some responsibility for their actions and unconscionability would not be found, he said, and I've given you this, again at 310, in circumstances where the borrowers are a full capacity, the loan is on normal commercial terms and any relative weakness and bargaining position or lack of complete understanding, can be addressed by the receipt of independent legal advice. So, again, that's 310 and also 351.

Now, the responsibility of the borrowers is also something that's been referred to in Australian cases and I mentioned Chief Justice Spigelman in a case that actually two of the Judges of the Court of Appeal referred to: *Riz v Perpetual Trustee Australia Ltd* [2007] NSWSC 1153 (2008) which is in our volume 1, tab 2, a judgment of Justice Brereton in the New South Wales Supreme Court in 2007. In that case,

which concerned a Lebanese immigrant whose first language was not English but in the course of that case, His Honour referred to the earlier authority of *Khoshaba* which I've referred to a couple of times already, which is New South Wales Court of Appeal. I'm looking here in the judgment, page numbers are at the top, 56589 in the right-hand column, the middle of the page, paragraph 53, reference to the judgement of Chief Justice Spigelman in that *Khoshaba* case and over the page 56590 he, in the second column on the page, he referred, he quoted from paragraph 90 of the Chief Justice's judgment. There was an issue, well, there were three parties and there was an issue about whether or not one of them should have been advised to go and get separate legal advice and Chief Justice Spigelman said no, because basically their rights and obligations were not affected by what was happening here and you'll see at the end of that paragraph 90, there's the reference, the statement I made earlier, "Even pensioners must take responsibility for their own actions" and we'll see also the House of Lords, on one occasion at least, have taken a similar somewhat robust view and I'll come back to that.

So there's the approach of borrower's responsibility. Justice Hammond as we saw said, adopted by, what he called a "paternalistic" approach, perhaps paragraph 49 and on the face of it, yes, it seems reasonable to say buyers should, borrowers rather, should understand what they're getting into. They should understand the risks of what they're getting into, and as he said, if they do understand and they adopt the risk, they can't be heard to complain, but the sting in the tail is in terms of that apparently reasonable proposition, is that the Judges of the Court of Appeal also held that the Act imposed obligations on the lender to satisfy itself that the borrower could, in all circumstances, service the loan including, in this case, the circumstance of a subsequent collapse of the property market and of Blue Chip. In other words, the approach was very, very close if not, in fact, adopting a proposition that the lender was an insurer for the transaction and for, against loss by the borrower, and then add to that that the lender was not entitled to assume that legal advice received by the borrower was sound, and that the lawyer had adequately explained the risks in a timely way, then you do get into a situation where the Act becomes very onerous for lending and, indeed, the Court, with respect, was quite aware, I believe, that I would submit, that that was the approach it was taking. Justice Arnold said, this is paragraph 230 and also look at 227, that "GE had an obligation under the Act to consider whether a lending transaction is oppressive from the perspective of the buyer." An obligation under the Act to consider whether a lending transaction is oppressive from the perspective of the buyer, and in our submission, that amounts to

a finding that if the transaction objectively viewed, ignoring altogether the borrower's own view of the transaction and the fact that they had their own legal adviser, if the transaction, and taking account of the benefit of hindsight, in this case the failure of Blue Chip, if it's so risky as to be regarded as burdensome or oppressive, then it will be subject to review by the Court under the Act. We would submit that that approach is tantamount to placing all the risk on the lender, even though to add another factor to this, even though as in this case, the borrowers may have misled the lender about their ability to service the loan without resource to a guarantor or underwriter, by signing a declaration that they could afford the loan but without, at the same time, adding the qualification, but of course, assuming that Blue Chip remains valid.

Now, I'm not being critical of the Bartles in that respect. I'm just saying that is the fact that GE certainly received that declaration of affordability and, in that sense, were misled by it because the affordability statement was obviously subject in the long run to GE, to Blue Chip's underwrite and to Blue Chip's ability to continue to honour that underwrite. So that it does amount in our submission to placing all the risk on the lender of subsequent market reversals which affect the efficacy of the contractual underwrite from a listed company that we would submit the borrowers were entitled to rely on and did rely on at the time of the borrowing and, in fact, an underwrite that was actually honoured for the first 18 months of that first loan, and we've developed that submission in our written submissions, paragraphs 53 to 56.

I've commented before too that the view the Court has taken the Court of Appeal has taken, of the merits of the overall transaction, the emphasis on the position of the age of the Bartles, the 25-year term of the loan, really seems to ignore completely the fact that the expectation of the parties and the intention of the parties was to sell this property, re-sell it within four to five years and, therefore, to bring the arrangements to an end at that time.

ELIAS CJ:

Is that a complete answer though, because – well, I don't imagine you put it forward as a complete answer, but the question really is risk, isn't it?

MR FARMER QC:

Yes.

ELIAS CJ:

It's not what their expectations were because their expectations might well be disappointed.

MR FARMER QC:

I think this is really, what I was really trying to respond to was this suggestion that there's something inherently wrong about a 25-year contract for someone who's 65.

ELIAS CJ:

Yes, I understand that, yes.

TIPPING J:

That was pro forma 25 years?

MR FARMER QC:

Yes, that's right.

TIPPING J:

That's about it?

MR FARMER QC:

That's about it, that's right, yes. Now, there is no doubt we submit that the Bartles were looking to Blue Chip to meet their mortgage payments. Those payments were made for that period before the economic depression and the property market collapse brought them to an end and, in effect, perhaps not expressly but in effect, counsel for the Bartles in this Court has effectively conceded that GE in making the loan would have been entitled had it known of Blue Chip's involvement and of the contractual obligation, it would have been entitled to rely on its market knowledge of Blue Chip as a known large public company with significant assets and that it would not have been necessary for GE to enquire into Blue Chip's solvency. That's paragraph 131 of my learned friend's submissions. He does go on to say, to be fair, that one matter that had they known about Blue Chip, the Blue Chip underwrite, that one matter that GE might have asked questions about was the fact that the underwrite was by a Blue Chip subsidiary and that would raise questions as to whether the parent would honour obligations of the subsidiary, and you get into that whole sort of debate which is not just a legal debate, it's also a reputational debate and so forth, and indeed, there's the passage I've just referred to a little while ago

from Justice Hammond's judgement where he said if there was evidence that the lender knew of a regular income stream and other significant ownership which could be utilised, then that might be relevant. So I think both my learned friend and Justice Hammond are really saying, well, if GE had known about Blue Chip and known about the contractual underwrite, so that it had known that there was this regular income stream, well, that puts a very different complexion on the whole thing, but I think the sting in the tail of that one seems to be, but they didn't know about it and so, therefore, somehow they can't rely on it and we would say, well, no, just a moment, you can't really have it both ways.

TIPPING J:

If you've got a duty of inquiry, you're entitled to the good that comes out of the inquiry as well as the bad.

MR FARMER QC:

Exactly, that's right, yes.

TIPPING J:

It seems very odd to suggest you can only get tired by the bad.

MR FARMER QC:

Yes, exactly, with respect and so, indeed, when I, what I've written here next, it is submitted that where the oppressiveness of the loan is being assessed objectively by reference to all the circumstances, it is illogical to require that GE both knew and relied on Blue Chip's contractual obligation to meet the mortgage payments, when the fact is that when deciding to enter into the loan, the Bartles themselves knew and relied on that obligation. In the same vein, Justice Hammond found as the basis for his ruling on oppression that GE failed to look into the transactions which were vital for the loan to be serviced and hence were indifferent, he said, to the Bartles' ability to meet their obligations under the loan. That's paragraph 68.

Well that, with respect, ignores the fact that GE was entitled to assume, first of all there's a number of points here, the first one that I've said many times that through their lawyer, the Bartles would have an understanding of the transaction and of the risks to them, but His Honour's indifference approach is very much like saying that a lender is under a duty of care to borrowers and it's also that, assuming for the moment, that GE was under a duty to make inquiries and not simply rely on the

declaration of affordability, then what would have been discovered was the existence of Blue Chip and the obligations undertaken by Blue Chip. In other words, what would have been found was the regular income stream that Justice Hammond said was would put a different complexion on the whole picture and so one has to sort of look at it in that way.

Just on the duty of care to borrowers, that argument, as I said earlier, was run in the High Court. It was rejected by Justice Randerson, paragraphs 348 to 351 and it was not appealed. His Honour relied on, Your Honour Justice Tipping's judgments in *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 and *Dovey v Bank of New Zealand* [2000] 3 NZLR 641, the first being High Court, the second one being Court of Appeal and in *Schmidt*, a case that my learned friend relies on so heavily, even there – I'll give you the reference and that, you will recall, was in my learned friend's bundle at tab 4 and in paragraph 173 under the heading, "Breach of Duty by VHLA", VHLA being the equivalent of TML, 173 says, "The assertion of breach by Mr Schmidt pre-supposes the existence of such a duty. The law, however, does not recognise any duty upon a lender to assess the capacity of a borrower to repay a loan or to ascertain the viability of a loan or to verify the details provided in loan applications, nor is a lender under any duty to provide either a borrower or third party with commercial advice, although once such advice is tendered, the financier may assume a duty of care." That's a sort of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 type situation. Then there's a reference to a case called *Micarone.*

TIPPING J:

Sorry, what case are you starting from at the moment?

MR FARMER QC:

This is *Perpetual*, sorry, *Perpetual Trustees v Schmidt* tab 4, 173, 174 reference to a case called *Micarone* and then still on the same paragraph on the next page, about five lines before the end of the paragraph, this reference to English authority to adopt a phrase used by Vice Chancellor Scott in *Banco Exterior International SA v Thomas & Ors* [1996] EWCA Civ 558 (31 July 1996), "A lender is not to be treated as a branch of a social services agency. It's entirely for a lender to determine what inquiries it should make to verify information given in support of a loan application on receipt of an apparently regular and satisfactory loan application. There is no obligation on the lender to pursue further detailed inquiries as to the circumstances of

the application for the loan, the proposed business transaction to which it relates, or the commercial viability of the loan." Although, as was said in one of those earlier cases we looked at, if only to protect its own interests, lenders generally will be very interested in what the purpose of the loan is.

McGRATH J:

Some of these Australian cases use this concept of being indifferent which you've just, you referred to a few minutes ago, and I take it you're really just distinguishing that on the facts. You're saying that GE just didn't have the knowledge to be indifferent, or are you actually taking those cases on? I found that the *Perpetual Trustee Co Ltd v Khoshaba*, I might be pronouncing that incorrectly but the one that Justice Basten gave a well-known judgment in and I think addressed this concept. I'm just really wondering what is, is this notion of indifference a legal concept that the Australians have tacked on?

MR FARMER QC:

Well, I don't – the passage I've just read to you, I think I'm making it pretty plain that there's no obligation on the lender to make those inquiries, borrower's circumstances, so that might be categorised as indifference, perhaps but –

McGRATH J:

But that's really where you, if you don't get the knowledge, if you don't make, if you don't have the knowledge that is perhaps essential to being indifferent but it may be that you don't want to go down there but I'm really wondering if this idea of being indifferent, on which I think that *Perpetual Trustee Co Ltd v Khoshaba* case really turned in the end, is one that we need be concerned about.

MR FARMER QC:

I think the concept of indifference before it could have any relevance to what we're looking at here – just looking at how Justice Hammond used the phrase, he said that GE failed to look into the transactions which were vital for the loan to be serviced and hence were indifferent to their ability to meet their obligations under the loan and I'm contrasting that, obviously –

ELIAS CJ:

Sorry what paragraph was that?

MR FARMER QC:

That's 68.

TIPPING J:

I would have thought, Mr Farmer, with indifference in this context meant that if you had a duty to inquire, and you failed to do so, it could hardly be used as a sort of question-begging duty because you can't be said to be indifferent if you've got no duty.

MR FARMER QC:

Well that's right and that's what Justice Forrest said in *Schmidt* under that – when he, under the heading – lost again, but under the heading was – when he said there was, in considering whether there was a breach of any duty he first had to ask is there a duty and he said there wasn't. And so if there wasn't a duty owed to the borrower by the lender then there couldn't be any question of breach and so I – if that's the correct approach, and there's obviously any amount of respectable authority that supports it.

TIPPING J:

You can't be wilfully blind unless you've got a duty to look.

MR FARMER QC:

Unless you've got a duty to look and unless you've got probably some ground of thinking. But if you do look –

TIPPING J:

Precisely, well that triggers the duty.

MR FARMER QC:

Yes. So my submission would simply be that what Justice Hammond says there is really a duty in drag and that's not, with respect, a finding that's open. First of all in light of the fact that that very issue was considered and rejected and not appealed but secondly because the whole weight of authority is against it in any event. And I think you get –

ELIAS CJ:

What is the authority?

MR FARMER QC:

Pardon?

ELIAS CJ:

The *Khoshaba*, that is the authority relied on for this concept, is it?

MR FARMER QC:

Well not just *Khoshaba* there's also –

McGRATH J:

Khoshaba at paragraph 92 and it's not Justice Basten it's Chief Justice Spigelman.

MR FARMER QC:

Yes that's right.

McGRATH J:

It just seemed to be determinative in that case, the Chief Justice anyway.

MR FARMER QC:

Right and I would –

ELIAS CJ:

Where do we find that?

McGRATH J:

Paragraph 92 –

ELIAS CJ:

No, where do we find the place?

McGRATH J:

Tab 18 of volume 2 of the appellant's authorities.

MR FARMER QC:

And I also referred you to *Schmidt* at paragraph 173 and 174, and at 174 the Judge refers to Vice Chancellor Scott in *Banco Exterior International v Thomas* which is the,

when on a lending social services agency but where he also expanded on that by saying it is entirely for a lender to determine what inquiries it should make to verify information given et cetera et cetera. There is no obligation on the lender to pursue further detailed inquiries as to the circumstances of the applicant for the loan and so forth and I think you get some of the same kind of thinking, although it's under the equitable jurisdiction –

McGRATH J:

I don't know if this is the difference between New South Wales and Victoria but I do sense that you find Chief Justice Spigelman in the *Khoshaba* case is taking a rather different attitude to Justice Forrest in the *Schmidt* case.

MR FARMER QC:

Well I hadn't kind of taken it that way. I mean the facts of the two cases are different but the, the fact is that Justice Forrest is the one who cites Justice Spigelman and in particular the "even pensioners must bear responsibility", that statement. He doesn't criticise it, he cites it, and appears to adopt it as a valid proposition. *Khoshaba* did have some very irregular features about it. The application form was blank, it was an income-based application for a loan but the application form was blank. Well that would put anyone on inquiry as to what was going on.

TIPPING J:

Well the citation by Chief Justice Spigelman at 96 immediately follows a reference to reasons of Justice Meagher where it said significantly that you make the judgment at the time the contract was made and in this case without regard to the ignorance or innocence of the appellant. Now I don't – I haven't studied this case carefully but –

MR FARMER QC:

Sorry was that –

TIPPING J:

Perhaps at paragraph 95. The indifference paragraph is 96 but the immediately preceding paragraph cites –

McGRATH J:

Well it's 92 as well.

TIPPING J:

Is it 92 as well?

MR FARMER QC:

I'm sorry which, you were looking in?

TIPPING J:

Of *Khoshaba*.

MR FARMER QC:

Oh you're looking in *Khoshaba* itself?

TIPPING J:

Yes. Sorry this was actually, he's referring to observations of Justice of Appeal Sheller.

MR FARMER QC:

I'm sorry, I've lost it.

TIPPING J:

But it doesn't really matter Mr Farmer. I think this concept of indifference has to be kept under some sort of control because otherwise, you know, people can be indifferent to all sort of things but they may not have any obligation to give them attention.

MR FARMER QC:

Yes that's right and –

TIPPING J:

I think it was, the key point in this *Khoshaba* case seems to be this absence of any reference to the purpose of the loan on what you might call the standard form and it was that which was the springboard to the reasoning in light of that stark fact there was a duty to inquire, and if they didn't they could be said to be indifferent as to something that they were truly on notice of or had a duty to inquire about.

MR FARMER QC:

Yes. I did read the facts of this case and they struck me as being not attractive.

TIPPING J:

Well in 92, as my brother McGrath said, "Had the appellant or its representatives made any inquiries about the purpose of the loan I would have allowed the appeal." So it turned on them not doing so.

McGRATH J:

It did in a context where a purpose was omitted, I think, from the form. The form wasn't blank generally but the purpose was omitted.

TIPPING J:

Yes.

MR FARMER QC:

Yes.

TIPPING J:

And you would immediately wonder, or at least it could be held, that you had some obligation to pursue that. So the indifference here was indifference as to purpose when there was found to be, at least implicitly, an obligation to inquire as to purpose.

MR FARMER QC:

Right. Yes because in that paragraph 92 what's said, just after what you read to me, was, "I do not mean to suggest that the appellant had to determine that the proposed investment was reasonable and capable of servicing the loan. It is the indifference, suggesting that the appellant was content to proceed on the basis of enforcing the security, which I find determinative."

TIPPING J:

It's linked with this asset lending point.

MR FARMER QC:

Yes. Yes it is.

McGRATH J:

I think, Mr Farmer, anyway your position is firmly anchored on *Schmidt* and the case of – the judgment cited from Lord Scott?

MR FARMER QC:

Yes.

McGRATH J:

And I can certainly understand the force of that argument.

MR FARMER QC:

I had intended – I did just mention it in passing, Justice Vautier's judgment in *Italia Holdings* where at page 16 of the judgment he made the statement at the bottom of the page. "The Courts will not protect a fool from his bargain nor intervene in a transaction merely because it is unreasonable. Adequacy of consideration has never been a fundamental of a valid contract." Now of course that statement does need to be read in the light of the discussion we had earlier this morning as to whether the scope of the Credit Contracts legislation might go somewhat further. But that case is also significant though for the fact that, noted at page 17, line 45, that in the case His Honour was heavily influenced by the fact that the plaintiff had independent legal advice available to it.

Now on this question of risk and on the question of the degree to which the risk of a change in market conditions subsequently might be said to have an impact, the decision of this Court, the judgment of this Court in *Gustav v Macfield* – and you'll find that in tab 4 of our submissions – in that case, as Your Honours know, it was held that the contract, whether the contract was unconscionable must be assessed at the time the contract is entered into and we rely particularly on what Your Honour said at page 745 of the judgment, beginning at line 25: "Once a transaction is entered into, whether conditionally or unconditionally, the parties thereafter take the risk of adverse changes in fortunes and circumstances, subject, of course, to the doctrine of frustration. Whether conditions are fulfilled or not is something which, as we have said earlier, must be addressed on ordinary contractual principles. If a contract is not unconscionable at the time it is entered into, it would be inconsistent with the deliberately limited scope of the doctrine of frustration to allow a further avenue of release, under what might be called supervening unconscionability. Any such doctrine would risk undermining contractual rights which have been properly acquired. That would be to the detriment of the security of contractual relationships."

Now finally if I can just say something about asset sales. The first question is whether there's anything inherently unconscionable about a situation where a borrower pledges his or her home in circumstances where there is no ability to service a loan and indeed if you put it that way there are no, if there was no ability to service the loan then the answer is hardly contentious and in fact Justice Hammond said at paragraph 78, also Justice Arnold at 201, Justice Hammond said, "If the loan is not serviceable then in substance it is not a loan but an asset sale. In economic terms the lender risks nothing but the borrower risks the assets." And Justice Arnold, in making a similar point, made reference to the Australian National Consumer Credit Protection Act 2009, which contains a presumption of substantial hardship if the consumer would have to sell, would have to sell their principal place of residence to meet the contractual obligations. So that's the extreme asset sale situation. Where you have no ability to service the loan. The only way you can repay it is by selling your home.

Now taking that situation the respondents in their written submissions here seek to build on that analysis by referring to the sub-prime lending market in the United States. That situation has a number of features not present here and in fact there's quite an interesting discussion between the trial Judge and an expert, independent expert called by GE at trial and you'll see that, I won't take you to it, but it's in volume 4, pages 939 to 941, and Justice Randerson refers to it at paragraph 303 of his judgment. Now my learned friends have put in their casebook an academic article by Engel & McCoy, it's tab 6, I won't take you to it but it's called *Turning a Blind Eye: Wall Street Finance Predatory Lending* which is, I have always admired the ability of academics to think up wonderful titles, very emotive titles to what they're writing about. But there the situation, as you say, as discussed by the Judge with the expert, is very different. The scale of it, the particular features of mortgages in the United States beginning with the fact that no mortgage – that mortgages there don't have personal covenants attached to them beginning, particularly, leading, obviously to a whole lot of other features. So certainly it's of interest to read that material but in our submission it's of limited relevance or application to what we're talking about here.

My learned friends perhaps recognising that then rely, as I've said, very heavily on the *Schmidt* case which is actually under appeal I should mention. The facts of that case are certainly more extreme than the present case. The borrower there wasn't legally advised and I've nevertheless taken from the judgment to show you

statements of principle by the Judge with reference to other case law, which we would say indicates a sound acceptance of the basic principles and that therefore that case is probably best understood as being decided very much on its own facts. The same is true of cases like *Khoshaba* and other Australian cases on the particular facts, contracts that have been found to be unconscionable.

Even in *Schmidt* the Judge said, in considering assets sales, he said, the mere fact that the loan is asset based is not of itself sufficient to make it unconscionable. There must be some other factor that makes the conduct of the lender morally repugnant. That's at paragraph 200 in his judgment. There must be some other factor that makes the conduct of the lender morally repugnant.

In terms of putting the home at risk, which is always an emotive issue, and quite rightly so, this is of course a case where the Bartles were using the loan in order to acquire another asset. It's not like *Khoshaba* where in fact the home was put up to borrow money which was then taken by a conman and used for a shonky investment, or really actually it was misappropriated. Here the Bartles were using the loan in order to acquire another asset, the apartment, and also a contractually guaranteed income stream to augment their pensions, which is what they were particularly interested in. Those benefits which were, in fact, received by them for up to 18 months and only ceased when Blue Chip failed, it needed to be balanced against the fact they were putting their home at risk. Mr Bartle's own assessment was that this was a superior form of investment to the Sentinel Reserve Equity alternative that they'd been considering and we saw that.

So in essence we submit that certainly the concept of moral repugnance doesn't apply here. It can't be said to apply to GE and we submit that when careful consideration is given to the facts of this case, which we've sought to do, then the requirements of the Act to set aside, or to review the transactions, simply haven't been met and we do submit that the preferable and sounder approach is that of the trial Judge rather than the more perhaps amorphous approach taken by the Court of Appeal.

Those are our submissions if the Court pleases.

ELIAS CJ:

Yes thank you Mr Farmer. Yes Mr Miles, did you want a short adjournment? Are you able to…

MR MILES QC:

Well if I occasionally break out, start talking about section 100 notices under the Commerce Act Your Honour will be understanding.

ELIAS CJ:

Yes. We might find it illuminating.

MR MILES QC:

I'm happy to –

ELIAS CJ:

I just wanted to know if you wanted to check with Mr Dale but that's fine, thank you.

MR MILES QC:

I apologise Your Honours for not being here at 10 o'clock but I had little alternative. Could I start I suppose just with going briefly to two of the judgements in the Court of Appeal. Firstly the judgment of Justice William Young at volume 1 and at page 274, where His Honour set out the reason why the transaction was highly improvident, from the Bartles' point of view. Now Your Honours have probably had this information already given to you at some length, but His Honour set out half a dozen or so reasons why the transaction was essentially flawed. The heart of it, of course, was the purchase price, 552,000. He said well really the market value couldn't have been more than 470 because you deduct the 15% commission and of course it was sold, as we know, for 240. Well that reflected the market value, I suppose, at the time. But crucially a purchase price of 550, which of course included the furniture, but that was reflected by the loan of 630,000. On the face of it it's a most unusual loan but more importantly of course the only income that could be generated from it was the rent, the maximum rent was I think about 600 a week. It came to 30,000 a year. The outgoings on the mortgage of 630,000 was somewhere between 9 and 10% so one can take 60,000 as a sort of mid figure if you like, so that on the face of it the loan was never going to be serviced on any conventional basis. The only way it could be serviced ultimately comes from assets.

McGRATH J:

And out of the 80,000, I suppose, difference? The fact that more was borrowed than was required to be paid.

BLANCHARD J:

Out of the secret commission.

MR MILES QC:

Well that went, yes, quite.

McGRATH J:

Well, secret commission, but also the fact that more was borrowed than what the apartment was going to cost.

MR MILES QC:

Yes but that's part of the improvidence though, isn't it Your Honour? That of the 630, 75,000 or so was going back to the secret commission if you like and another 16,000 I think for brokerage, and of course the 50,000 so-called capital which provided the source of the 430 or whatever a fortnight. So the deal was profoundly flawed –

TIPPING J:

Well improvidence doesn't equal oppression.

MR MILES QC:

Of course not.

TIPPING J:

Per se.

MR MILES QC:

Of course not Sir.

TIPPING J:

I think we'd all agree with you, it's somewhat –

MR MILES QC:

Yes but what I'll be going on to say is that the factors that made up that improvidence was, the key factors were known to GE and I'm saying that independently of the agency argument. Once agency is satisfied then I would have thought it was open and shut because the knowledge that TML had was – inevitably would have made it oppressive, because they knew that the Bartles were 65 and 66. They knew they were pensioners. They knew they had a combined income of 21,000. They knew, of course, that the application had been altered. That they were no longer called retired, they were now called independent investors.

TIPPING J:

When you say "the key factors were known to GE" what are you –

MR MILES QC:

The two factors –

TIPPING J:

– taking as the key factors?

MR MILES QC:

The two factors actually known to GE, Your Honour, was the age of the Bartles and their assets. They knew their assets because the only factor that interested GE was the loan to asset ratio. It had to be 70% of the combined assets. So they knew the assets were the 550,000 apartment and the 400,000 home.

BLANCHARD J:

Did they know they didn't have other assets?

MR MILES QC:

Well they must have because that was their assets Your Honour, so it had to follow that they knew there were no others.

BLANCHARD J:

Well, are you going to take us to some evidence about this?

MR MILES QC:

Hopefully Your Honour.

ANDERSON J:

They knew they were the securities, it doesn't necessarily mean they knew they were the only assets.

MR MILES QC:

Well I'll –

BLANCHARD J:

Because my impression was that they didn't know.

MR MILES QC:

Well they – my understanding, Your Honour, was that the list of assets needed to be disclosed because that was the only important issue.

BLANCHARD J:

Well I'd like to see the evidence about that. I didn't notice it when I went through the papers but I could have overlooked it.

TIPPING J:

But I thought the fastdoc was designed to circumvent a need for extensive supply of that sort of information?

MR MILES QC:

The fastdoc loan – that was devised to avoid having to give evidence of income.

TIPPING J:

Related only to income is it?

MR MILES QC:

Because that was, because the original rationale for fastdoc or, I'll call them fastdoc, I think fastdoc, lo-doc, they're interchangeable, but the original rationale was for, typically for professionals who were unable to show evidence of an income stream but –

BLANCHARD J:

Chaps like you.

MR MILES QC:

Very similar, Your Honour. But when I was younger it was another matter. But that was the, typically that's how it started and of course it quickly morphed into the inherently objectionable form of lending that it became, but the original idea was that you would be, it would be lent to somebody who had the ability to be able to service the mortgage without recourse to the asset but he wasn't able to show a provable, if you like, income stream of the sort that always influenced traditional banks when lending. So it had an admirable concept to start with.

TIPPING J:

But if they'd been asked to produce the income stream they would have undoubtedly included the Blue Chip income stream.

MR MILES QC:

Well it's –

TIPPING J:

Now the value of that, the strength of it, is another matter but it would have been shown. That they could service it without resort to an asset.

MR MILES QC:

It still wouldn't have helped, Your Honour, because their income was 21,000 from their pension and the rent, which actually went to Blue Chip under the terms of the joint venture, but let's suppose they were able to disclose that, that still only came to 30,000.

TIPPING J:

Yes but Blue Chip were going to tip in the rest. They were going to use the rent and top it up to get to the 60 that you mentioned a few minutes ago, weren't they, they fundamentally misunderstood it?

MR MILES QC:

Well GE didn't know that. GE –

TIPPING J:

No, no but if they had inquired that's what they would have found out.

MR MILES QC:

But that wouldn't have helped them much because you still have to live.

TIPPING J:

Well they had the pension to live on.

MR MILES QC:

No, no I've added that.

TIPPING J:

You get 30,000 from the rent.

MR MILES QC:

Yes.

TIPPING J:

GE would put in the balance to make up the outgoings, leaving the Bartles living on their pension as before plus the 430. Isn't that right?

MR MILES QC:

Well, yes I see what you mean. You mean Blue Chip would have actually paid all the outgoings.

TIPPING J:

Well that was what was designed to happen and did happen for a while.

MR MILES QC:

Yes, for a year, but if you're going to, if you're going to suppose that GE have that sort of information, then you must suppose that actually GE would have had all of the information.

TIPPING J:

Yes, I accept that.

MR MILES QC:

Which included the extraordinary one-sided joint venture agreement, a joint venture with a subsidiary with $100 capital and no guarantee from the principal. In other

words, a joint venture partner that had no backing whatsoever and a system, a model if you like, which was fundamentally flawed. Now I'm not talking about this original transaction now. I'm talking about the whole Blue Chip model which was fundamentally flawed and as the GE witness said, if we had known about the facts, if we'd known about the Bartle's income, we'd never have dreamt of lending and the reason they'd never have dreamt of lending is because a prime requirement, which is in the operations manual, is that the correspondent TML had to be satisfied that the borrower could service the loan, without undue hardship I think is the phrase, and without –

TIPPING J:

Well they could. They could provided Blue Chip kept going. That's the problem I see in this case.

MR MILES QC:

Well, Your Honour –

TIPPING J:

Who's going to bear the risk of Blue Chip folding?

MR MILES QC:

Well, well that brings up the next issue, I suppose, which is the fundamental problem with asset lending is the transfer of risk. The reason why the Australian jurisprudence is so single-mindedly against this form of lending is because they say it's inherently unfair. Now this - before we get into the unconscionable issue, they say asset lending itself is inherently unfair because of the transfer of risk. There is no risk essentially for the lender. All of the risk is on the borrower. Once that risk is linked with the unlikelihood of the mortgage being serviced without recourse to the asset on which the loan is secured, and if the asset is the matrimonial home, then those factors are the factors that tip an unfair loan into something that is unconscionable. The primary reason is the transfer of risk. The, if you like, the, what Dr Patterson in her article described as transactional – what was it, institutional neglect? Transactional neglect, yes, that structural disinterest which GE and other lenders of this sort set up in order to ensure that the risk moves solely to the borrower and if they get caught as a result of –

ELIAS CJ:

Sorry, which risk are you talking about here –

MR MILES QC:

The risk of –

ELIAS CJ:

The property?

MR MILES QC:

The property, exactly. The risk –

ELIAS CJ:

The property market on which all of this is based?

MR MILES QC:

That's the bigger issue, Your Honour. The primary risk is that whatever happens, the matrimonial home is likely to be needed to repay the loan.

ELIAS CJ:

But if the people, sorry, what if people choose to do that to finance their lifestyle by freeing up their equity, which is really the way this is sold, why do you say it's inherently unfair if they appreciate that?

MR MILES QC:

Well, the – what was inherently unfair is that the, there was, in fact, this transfer of risk without the Bartles being aware of it. This wasn't a, there was no consent in the traditional form, the sort you're talking about here, and the reason there wasn't, was because the documents, the whole structure was so complex that they couldn't understand it no matter how hard they tried.

ELIAS CJ:

But that is the agency argument. I thought you were going for rather higher ground in suggesting that these sort of, this sort of lending is inherently unfair –

MR MILES QC:

Yes.

ELIAS CJ:

And I'm just questioning that.

MR MILES QC:

Right, it's, the reason why it's inherently unfair but not objectionable, not open to be set aside without these other factors is because this risk gets transferred. If they did it with their eyes open and they say, "We're prepared to put," whatever asset it happens to be, "at risk here. I know we're never going to be able to actually repay the loan on the basis of the investment without recourse to that asset, but I've never liked it, can't stand the children and I'm going to take –

TIPPING J:

Blow it all.

MR MILES QC:

And to hell with it.

ELIAS CJ:

And I believe the money is, the market is going to go up and I'll stay ahead and I'm willing to take that risk because this is the trend.

MR MILES QC:

And if it's clear that this was a risk that they openly accepted and understood, then I could understand that argument. The reason why that sort of argument is very rarely raised is because it's very rare for people to be quite so reckless with their one asset, and when particularly the sort of market which the lo-doc market tends to target, which was the Blue Chip target audience, if you like, elderly with relatively low in assets but probably a home which is unmortgaged and the possibility that they might get a small income, and a tiny bite of the capital gain, one can see how that could become attractive if you simply didn't understand the consequences of it, but the reason why GE set up the structure that they did is that they wanted to guarantee that they would not know about all of these details. That they deliberately set up the structure, this –

TIPPING J:

Have you got findings to that effect?

MR MILES QC:

Mhm, ah, not deliberately, Your Honour, I just –

TIPPING J:

You're just hyperbolising, Mr Miles are you?

MR MILES QC:

Well, it's not done accidentally. It's a very carefully structured –

ANDERSON J:

It has the effect of insulating them against the type of allegation that is now being made.

TIPPING J:

It may have the effect.

MR MILES QC:

Well, I'll be taking Your Honours at some stage to the, obviously, to the agency relationship and I'll be suggesting that if one looks through the deed and the operations manual, it's clear that they have divested themselves of virtually every responsibility that typically a lender ever had and you cannot do that without then accepting the repercussions of such a structure which is despite boiler plate paragraphs in the deed saying you're an independent contractor and you're not an agent, if you essentially have the correspondent standing in the shoes of the principal, the sort of concept that *Nathans v Dollars & Sense* talked about, then it doesn't matter of course how you describe them. It doesn't matter of course that you solemnly say they're independent contractors et cetera, if the relationship, in fact, is one of principal and agent, then you get caught with the knowledge of the agent.

ELIAS CJ:

Well, sorry, there's a torrent of concepts came out then. You said that they have shed all responsibilities lenders have. Beyond oppression, what responsibilities are you talking about there because surely –

MR MILES QC:

Fundamentally, it's the responsibility to ensure that when you lend money, you have a responsibility to ensure as far as possible that it is likely to be repaid.

ELIAS CJ:

Well, they ensured that by taking security.

MR MILES QC:

Well, that's my point, Your Honour. That's exactly what they did and that's why, that's asset lending that they knew perfectly – well, through their agents, they knew perfectly well that this loan could not be serviced without recourse to the asset.

ELIAS CJ:

Well, but then the only objectionable feature, surely, is if that was not appreciated by the borrowers and that the knowledge of that ignorance is sheeted home to the lender, so that the lender's taking advantage of it.

MR MILES QC:

I think it's more than that, Your Honour. I think the concession by the GE witness that had they known of the facts, they would never have lent the money, is an important concession and the reason it's important is because GE recognised that whatever the form of the lending, lo-doc or traditional lending, whatever it might be, there was still that basic obligation to ensure –

ELIAS CJ:

What's the source of that obligation in law?

MR MILES QC:

Well, I'm concentrating at the moment on the obligation that GE stated in its own documents. It set out the criteria which it wished loans, how loans should be approved.

ELIAS CJ:

Well, if its own criteria aren't fulfilled, how does that make it responsible as a matter of law? I'm just trying to understand the legal basis of this argument.

MR MILES QC:

Well, you move then into that, the last phrase if you like, of the definition of oppression et cetera under the Act, where the deal is, was it below the usual –

TIPPING J:

Reasonable standards of commercial but that's –

MR MILES QC:

Which, as Your Honour pointed out years ago, was the concept that underpinned the whole section so that if there is specific evidence from the horse's mouth in this case, that there was certain, that there was a particular criterion of the loan and that had they known that that criterion had not been fulfilled they would never have lent, and if the reason –

BLANCHARD J:

But those criteria are for their own protection.

MR MILES QC:

Not just for their own protection, Your Honour, it's also for the protection of the borrower because the borrower's entitled in these circumstances.

BLANCHARD J:

Well, very indirectly but I would find it somewhat startling proposition that the criteria in a lender's documentation, internal documentation are not primarily intended for the protection of the lender, that the lender's thinking of its own interests that it doesn't want its staff and agents making silly loans that are going to get it into trouble, because a lender likes to have a quiet life.

MR MILES QC:

It's more nuanced than that Sir, and the reason for that is the emphasis they place in their own documents on the significance of this loan being able to be repaid without recourse to the security.

ELIAS CJ:

But if that isn't realised, if that hope is not realised, so what?

MR MILES QC:

Well, it's a major "so what", Your Honour, because they have said that they regard that - I've forgotten the word, something like pre-eminent or, I've forgotten the precise word and I'll take you to it in due course, you'll find it in the operations manual, but they say that this, the declaration which essentially says that we're able to pay this from our own resources, essentially, they see this as being of significance, paramount significance and it's not just for their own protection, it's also for the protection of the borrower who's borrowing on the basis of not having to disclose an income. They're saying to the borrower it is important, not only for us but for you, to be sure that you can actually pay this from, if you like, from the investment itself.

ANDERSON J:

I've rather doubted the weight that should be given to that declaration because no one's going to apply for a loan and say I can't service it.

MR MILES QC:

Quite, and TML, which is why TML not only, of course, got them to sign the declaration but actually altered the proposals so that they stopped being described as retired and were described as self-employed investors.

ANDERSON J:

Well, in a sense they were euphemistically, I suppose, part of the attraction if the package is to say you're going to be a self-employed person now instead of a pensioner.

MR MILES QC:

Yes, because they knew, or one suspects they knew, that if the word "pensioner" appeared, it was improbable that this loan would proceed.

ELIAS CJ:

Really?

TIPPING J:

Mr Miles, I just have a fundamental difficulty that your submission seems to be assuming what, for me, is a very contestable issue namely that this was asset lending. I don't know that objectively this was asset lending at all. It objectively, when you know all the facts and you rightly say you can't sort of select, you either know it all or you don't, this was covered by the Blue Chip income stream. The real

problem was that that wasn't 100% secure but it wasn't on its face asset lending. At least – I'd need some persuasion unless I've misunderstood the concept.

BLANCHARD J:

It might have been from GE's point of view though.

TIPPING J:

They might have seen it that way but that doesn't alter its objective categorisation and my view is you have to show, first of all, that it was objectively oppressive and then that GE, either personally or by attribution, knew enough to realise that it was objectively oppressive. In other words, you may well want to take issue with that, because when we had that debate you weren't here, when I had that debate and others members of the Court with Mr Farmer, you weren't here, and it's extremely important to get the starting points secure as to what the methodology is here, but objectively, surely, you have to put into the mix all the relevant factors ignoring your client's knowledge for the moment. Now, if you do that, a highly material factor was GE's feeding into the income stream. The problem with that was, it wasn't 100% secure as we later found out, but at the time –

BLANCHARD J:

And also involved use of a secret commission.

TIPPING J:

Yes, it did and it's complicated by that.

MR MILES QC:

But it's –

BLANCHARD J:

It's amplified by that, I think.

MR MILES QC:

And it's further complicated, Your Honour, because the basic model which Blue Chip was operating was fundamentally unsound. It depended on capital growth. It depended on interest rates remaining the same. It depended on tenants continuing to be available.

ANDERSON J:

Yet depended upon more and more investors coming in from the bottom to make up the difference.

MR MILES QC:

And more - exactly, Your Honour. At the heart of this, it was a property ponzi scheme and –

TIPPING J:

It may well be that you can satisfy me that it was objectively oppressive, but I think that's the first step. Then arguably, one has to turn to what your client knew of it. It's equally arguable that objective oppression is enough.

MR MILES QC:

And I would certainly be saying that, Your Honour and –

TIPPING J:

Well, I don't think that's really been argued below.

MR MILES QC:

Well, I –

TIPPING J:

Otherwise we wouldn't have had all this business about agency.

MR MILES QC:

Well, I think one of the reasons is that there was a finding of fact by Justice Randerson that the Bartles did not know what this transaction was essentially about even though they tried. It wasn't a case of a couple who were greedy and careless and simply didn't look after themselves, although even in those circumstances the Courts are prepared to say that some deals are sufficiently bad to be annulled, but the finding of fact by Justice Randerson is an important fact because –

TIPPING J:

What, sorry – it was just again, what's that?

MR MILES QC:

His Honour found as a fact that the Bartles did not know what this transaction was essentially about.

ELIAS CJ:

But they were liable for any, for the full amount of any shortfall.

MR MILES QC:

For all the -

TIPPING J:

Exactly, yes that's certainly an important dimension in the picture objectively.

MR MILES QC:

I think it's a starting point which, of course, this Court must accept as one of the building blocks. So you start with a couple who tried quite hard to understand this. Justice Randerson said, "I understand why you didn't understand it." The documents were complex and appallingly drawn and I've only just mentioned the one, the joint venture agreement which, incidentally, Your Honours would have probably picked up, it wasn't even given to the Bartles until two or three weeks after they signed the original agreement. I mean, so cavalier was their treatment and so appalling the legal advice. They'd committed themselves before they even saw the joint venture agreement.

ANDERSON J:

Mr Miles, just while we're on the matters of discussions we had when you weren't here, not for you to address now but just to bring it to your attention so you might like to think about it overnight. There was discussion to some extent, oblique and sometimes more direct, about whether the statutory scheme intends strict liability and that the amelioration of unconscientious aspects might be found in the broad range of remedies that are available under section 127 and, indeed, under the statutory discretion whether to re-open at all even if a loan is found to be oppressive. So just ideas that might require some examination.

MR MILES QC:

Yes, well, I'm obliged to, Your Honour and I will deal with that tomorrow.

TIPPING J:

But I understand your scheme of argument to be, this was objectively oppressive and that's enough. In effect, strict liability.

MR MILES QC:

Correct.

TIPPING J:

But if that's wrong and knowledge is required, GE had enough –

MR MILES QC:

Precisely.

TIPPING J:

By means that you're going to demonstrate.

MR MILES QC:

Exactly, Your Honour.

TIPPING J:

That's what I wanted to get clear in my head.

MR MILES QC:

Yes I'm sorry, Sir. That is exactly –

TIPPING J:

No, that is exactly it, right.

MR MILES QC:

And I start by and if I just go back now to the minutiae of the argument. I deliberately wanted to start with just those findings of Justice Young setting out why the transaction was highly improvident, His Honour described them as far as the Bartles were concerned and that's, I would have thought, largely unarguable because those are essentially either facts or conclusions that irresistibly arise from the facts and that's A to G, paragraph 322. His Honour then went on to set out why those additional considerations warranted the conclusion that the agreements were oppressive and first there was asset lending, and I'll come back to that in due course.

Secondly that they're entitled to proceed on the basis that at least in the case of asset lending to an elderly retired couple reasonable standards of commercial practice require lender inquiry into whether a loan can be repaid without substantial hardship. Thirdly, because they were retired and had no income other than the super, they were putting their house at risk, and lastly that the certificates were misleading. That, as I say, even a cursory consideration the investment plan would have shown the likely probability that they could only repay by selling the house.

Now could I then just go back to Justice Arnold's judgment because I just want to cover three or four points that His Honour made. Because without – well I think it's clear that Justice Arnold's judgment is probably the lead judgment, if one wanted to use phrases like that, because His Honour went into considerable detail setting out the agency argument and why it was that these loans were oppressive. And I'd like to start with the – at paragraph 115 where he – no, that doesn't seem right. Sorry Your Honours there's a paragraph somewhere where he sets out the Blue Chip model –

TIPPING J:

115? Is that not –

MR MILES QC:

It is 115 isn't it?

TIPPING J:

Yes, I think it is.

MR MILES QC:

Sorry, I was looking at something else.

TIPPING J:

On page 229 of the –

MR MILES QC:

I was looking at 115 of Justice Randerson's judgment.

ELIAS CJ:

Tabs help in assembly of the case on appeal. Tabs help.

MR MILES QC:

Yes, well it's volume 1.

ELIAS CJ:

No, no it was a comment for the appellants.

MR MILES QC:

Well Your Honours, of course, you obviously have had your attention drawn to this but His Honour's assessment of the flawed model depended on strong rental demand for apartments of this type. Apartment prices increasing significantly. Interest rates not increasing significantly and ongoing ability to persuade people to invest in its products. In other words, put more colloquially, the a Ponzi aspect. What His Honour went on to conclude, of course, is that when you set up a scheme such as this then you have to accept the consequences. That the economy might start running against you, any one of these factors might stop applying, and that the scheme collapses. So you have, as building blocks in the argument, those series of factors that made the deal so improvident for the Bartles and a scheme that was fundamentally flawed in the first place. Neither of those factors, of course, mean on their own that it's unconscionable but they're part of the process by which you reach that conclusion.

Can we then go to the obligations under the deed which is at 133? This, of course, goes to the issue of agency because my case becomes a whole lot simpler to run if Your Honours are satisfied that the conclusion on agency was an appropriate conclusion. What I'll be suggesting to Your Honours is that virtually all of the traditional requirements of the lender were outsourced, if you like, to the correspondent. Now he starts at A just noting that TML was stated as being an independent contractor and not an agent. Perhaps what I describe as the boiler plate paragraph. Now B, TML entitled to make mortgage proposals. These have to conform with the operations manual. It doesn't seem to me, Your Honour, to be of any great significance that TML had other possible borrowers who would apply for. The evidence is that it applied in a, it turned out, major way to GE, there was something like 250 loans I think with GE, so GE was one of the primary suppliers if you like. What is crucial is the contractual relationship between this correspondent and the lender.

Under D, TML was obliged to advise AMS of any information that might reasonably be material to a decision to accept or reject the loan application which it became aware of. Even in the period between approval and settlement of a proposal. Now immediately that creates potential conflicts if it was going to be argued that TML was an agent of the borrower, because this provides an obligation on the part of the agent to advise the lender of any information which might be material.

E, if AMS accepts the loan proposal TML was required to implement the proposal in terms of the operations manual, and the test is the same as a responsible and prudent mortgagee. If one looks at this in the context is the agent essentially standing in the shoes of the lender, which is the rather simplistic restatement of the principles of *Nathan* but this is the context in which one should be looking at these, at these clauses. Then once the loan proposal is implemented, TML again are required to manage the relevant mortgage, again using the same degree of skill and care as would a mortgagee. And it was required to exercise the powers and perform the obligations and functions of the mortgagee under each mortgage. In order words, doing what the lender would normally be required to do, which is simply monitor and operate the mortgage.

TML has no liability for the actions of any approved solicitor, provided the appointment is consistent with the operations manual. Then H, TML required to keep records and to produce them for inspection. Obliged to comply with the law et cetera. Required to exercise its own judgment, skill et cetera. I, and this is a major further obligation under the deed, on default TML is required to enforce GE's powers under the mortgage in such a way that TML considered reasonable through the remedy the default. Recover the outstanding amount under the mortgage and finishing with the remarkable right that it was entitled to take any action that GE was entitled to take under the mortgage including commencing legal action.

So it's difficult to see what more TML could have done other than literally lend the money. It was doing everything that a lender normally is required to do.

TIPPING J:

The only thing it wasn't doing was making the ultimate decision whether to lend. Now you will – I'm just drawing that to attention because you will no doubt say well that doesn't affect the analysis.

MR MILES QC:

It doesn't Sir, because that was provided the button – well provided all the correct boxes were filled and there were only, I think there were only two boxes essentially that had to be filled. They had to satisfy them of the loan to asset ratio and it had to satisfy that it was insured. Those, that was all that GE/AMS required. Oh I'm sorry, yes, and the declaration, yes. Yes. So you've got the declaration, the asset ratio and advice that the insurance had been obtained.

TIPPING J:

Are you saying that provided those were all there it was sort of automatic or axiomatic?

MR MILES QC:

Axiomatic.

ANDERSON J:

Is there any evidence of loans that were declined?

MR MILES QC:

I would need help on that.

ANDERSON J:

If there were, it wasn't just a –

MR MILES QC:

My recollection is –

ANDERSON J:

Automatic response.

MR MILES QC:

Yes. My recollection is not every loan was a classic lo-doc loan.

BLANCHARD J:

They didn't make one to a 96-year-old?

MR MILES QC:

That's right.

TIPPING J:

How did they manage not to?

MR MILES QC:

Well, it slipped out.

TIPPING J:

It's certainly pretty odd if you were truly an independent contractor, all your records have to be disclosed to a counter-party on demand.

MR MILES QC:

It's a bit odd, isn't it? A bit odd.

ANDERSON J:

Could I take you back to H, Mr Miles – what do we make of the obligation to comply with the Credit Contracts Act?

MR MILES QC:

Boilerplate. I mean, it's –

ANDERSON J:

The Credit Contracts Act applies to lenders.

MR MILES QC:

Yes, of course.

ANDERSON J:

Has it been an attempt to delegate the lender's obligations under the Credit Contracts Act?

MR MILES QC:

Well, that would seem to be the intent.

TIPPING J:

Well, it could be argued –

ANDERSON J:

But I think at some stage, we're going to have to take a look at the relevant sections of the Credit Contracts Act, the meaning of credit contracts, the discretion to open, the meaning of oppressive, the range of remedies, that sort of thing, because we're dealing with a statutory scheme and there seems to have been just a total emphasis upon former equitable doctrines without reference to the statutory scheme.

MR MILES QC:

I think Mr Dale would say that the reason for that is that the Act is wider than the classic equitable basis for oppression. You may say not in a material way here, but in the choice of remedies, I think from memory, I'd rather not get into that argument because Mr Dale knows more about it than I do but –

ANDERSON J:

Well, the Chief Justice was pointing out this morning that the equitable remedy was voidability but the statutory remedy is just comprehensive.

MR MILES QC:

Yes and I think that's one of the reasons why Mr Dale argued, rightly so, I think, that the Act, of course, was wider than the purely equitable principles.

TIPPING J:

There's no dispute about that?

MR MILES QC:

No.

TIPPING J:

Just building on my brother Anderson's point about H, or the second half of H, if a person in this situation is contractually obliged to fulfil what obligations under the Credit Contracts Act, might it not be said that, in substance, that must amount to an appointment by the real lender, that person is its agent to satisfy those requirements, because otherwise it doesn't really make much sense, because these people don't have any obligation under the Act –

MR MILES QC:

No.

TIPPING J:

They have an obligation by delegation, if you like, from the lender – maybe just filling in the, what my brother was saying.

MR MILES QC:

I'm grateful to Your Honours. I think that must follow.

TIPPING J:

Well, it's at least arguable. It's a difficult field and –

MR MILES QC:

But, well, I don't know that ultimately you need to make a final determination. It's probably enough to say that that is consistent with the whole structure of the deed which is to, as I put it, literally outsource every obligation or responsibility which a lender traditionally takes, and the, although undertaking to comply with something as significant as the Credit Contracts Act is such a significant gesture.

TIPPING J:

Well, of course, the Credit Contracts Act has a huge number of elements in it. I mean, there are documentary requirements, there are disclosure requirements. There are no oppression requirements. It may be that all they meant was the sort of more administrative facets of the Credit Contracts Act.

MR MILES QC:

Well, it would have to be constructive. I mean you'd have to construe it, wouldn't you, in the way the whole deed is, is draft it and if it's consistent with a contractual structure designed to ensure that the lender has transferred all its primary responsibilities, then this is consistent with that.

ELIAS CJ:

It may be because it's towards the end of the day, but I'd like you to tell me what the credit contract is in this case.

MR MILES QC:

Do you mind if I do that tomorrow, Ma'am?

ELIAS CJ:

No, I don't mind. Do you want to add anything or would you prefer to take the adjournment?

MR MILES QC:

I'm very happy to take the adjournment now.

BLANCHARD J:

And overnight, will you check on that proposition that GE knew of the other assets or knew that there weren't other assets?

MR MILES QC:

Yes I will, Sir.

TIPPING J:

And I wonder if you'd reflect overnight, Mr Miles, on the proposition as to whether or not it might not be not only actual knowledge, whether actual in the ordinary sense or by attribution and because of the equitable province, if you like, of this legislation, albeit not confined, whether constructive knowledge might be enough that if you were on notice of some things, it puts you on inquiry if you like, it may not, you may say you don't need that. You may say you have enough actual but I think it could be quite significant as to what if anything could be advanced in the – get the constructive air.

MR MILES QC:

There's certainly indications of that in the Australian jurisprudence, Your Honour.

TIPPING J:

Well, on unconscionable bargains. It's common ground that it's what the stronger party either knows or ought to know.

MR MILES QC:

Or ought to know, exactly, and that is why I will seek to convince you that this was a form of asset lending where the high probability was that the asset would ultimately

have to be used to repay the loan and that in those circumstances, that obligation kicks in.

COURT ADJOURNS: 3.58 PM

COURT RESUMES ON THURSDAY 21 OCTOBER AT 10 AM

MR MILES QC:

Ma'am, just dealing with at least three of the questions that were left for me to deal with this morning. The question from Justice Blanchard on assets I will deal with in about 20 minutes, and will take him to the appropriate document. The issues of asset lending I will also discuss, once I've taken Your Honours through the actual files, which will be helpful, I think, in assessing that issue. Your question, Your Honour, on what is a credit contract –

ELIAS CJ:

Much more simple, and you can deal with it in two sentences.

MR MILES QC:

Well, it sounded much too difficult for me, so I left it for Mr Dale, which may be a mantra which will be repeated on a number of occasions.

ELIAS CJ:

I wasn't asking what is a credit contract. I wanted to know what is the credit contract you want reopened in this case.

MR MILES QC:

Quite. And I think it's a little more complicated than just the mortgage, but, again, Mr Dale will be able to discuss that issue with Your Honour.

ELIAS CJ:

Yes, thank you.

MR MILES QC:

I think I was taking you through the deed, and I was using the judgment of Justice Arnold, because he had gone through the key components of the deed, and I was on page 235. It's volume 1 of the case on appeal. It was paragraph 133, and he had set out a number of the features of the deed which he thought were significant, and I

think I'd taken you to H, which is where we'd touched on the obligations to comply with the Credit Contracts Act. Under I, they deal with the obligations where there's a default under the mortgage, and TML, under those circumstances, was required to enforce GE's powers under the mortgage in order to remedy in and receive the outstanding amount and preserving all their rights, and that included the remarkable power of being able to issue proceedings in GE's name. That's picked up again in the operations manual, which I'll be taking Your Honours to in a few minutes. That is a remarkable example of how TML was firmly placed, if you like, in the footsteps of the lender. Then TML is required to ensure the mortgagees held adequate insurance over the insured property, that's where the application to Genworth, the insurers. In that application – and I'll take you to it, hopefully – in the small print at the bottom, TML is specifically recorded as being the agent of the lender. In the representations of warranty clause, you'll see that provides a warranty that the Credit Contracts Act 1981 had been complied with, except to the extent that non-compliance was caused by the act or omission of AMS. So once again, a very specific obligation.

Now, His Honour – and then the boilerplate clause at the end, TML acknowledges in performing its obligation that it didn't act as agent for the mortgagor, and, of course, that depends entirely on the relationship between the parties and what, in fact, was the position. His Honour concluded that under the deed, TML originated, implemented, managed, and took recovery action in respect of loans, albeit within the requirements of the operation manual. The only significant function AMS retained was the formal power to accept or reject applications. In due course, I'll be taking Your Honours to the three documents, the three pages, of the approval, if you like, of AMS, where they set out precisely what they did, and it's perfectly apparent, when you look at that, that they've literally just ticked a few boxes that related primarily to the security. Can I take you now to the operations manual, because that's the other key contractual document to finding the relationship between GE or AMS and Tasman.

Your Honours, I'll take you to the actual document, which you'll find in volume 5 of the case on appeal, starting at page 1054. Now, there's actually a schedule at the back of that supplementary submission which sets out most of the paragraphs I will be relying on, but I think it's helpful just to take you to the actual paragraphs in the manual itself. Now, you'll see under 1.2, what does AMS do, and you'll see in the second paragraph, if you like, "The mortgages will be originated and managed by the correspondents". So that's the first significant paragraph. Under 2.1 at page 1056,

the role of the correspondent, and you'll see that it's the relationship between AMS and the correspondent, governed by the deed and the manual. And then they originate mortgage loans in accordance with the approved guidelines, as outlined in the operations manual. So it's GE that lays down the criteria, and it's the correspondent that is obliged to conform to it. Under eligibility qualification criteria, you'll see that the second paragraph is significant because TMS is required to have professional indemnity insurance, including not just errors or omissions but negligent and fraudulent acts of the employees, et cetera. So again, another factor in ensuring that GE is completely safe in this transaction.

Now, under 2.3 down the bottom, again, that's a significant right that AMS has, under the correspondent deed to inspect all documents and records, and that it will review that documents and records at least annually. If we go to 1068, a very significant paragraph under borrower's income at 4.4, the ability of the borrower to repay the loan without substantial hardship and in accordance with the loan terms is paramount in the assessment of a mortgage proposal, and this seems particularly significant to me. Then they set out an obligation to verify the income, et cetera. But those specific details are not required for a fastdoc product, and you see that on the second-to-last paragraph under that section. The above requirements are waived where the applicant applies for a fastdoc product, and they're required to swear a declaration as to income and affordability, but capacity to fund loan payments from rental income will be verified by reference to a current lease agreement and a schedule of property expenses. So a clear recognition that the income from the investment is a crucial aspect in considering whether the loan is appropriate or not.

ELIAS CJ:

I might have missed a beat here, but is the fastdoc product really for loans which are secured against rental income, I mean, where the servicing turns on rental income?

MR MILES QC:

Well, typically they were, Your Honour. Conceptually, I don't think that's a crucial aspect, but time and again, that would be the point, that would happen, because that was the only way, typically, that the loan, of course, could be serviced.

ELIAS CJ:

Well, was it a product that came about because of the property market – yes, when did they come in, fastdoc documents?

MR MILES QC:

Well, we've actually, in the bundle of authorities, given you a very interesting, if somewhat arcane, article written by American academics, setting out the whole background and history of the securitisation of loans, and how the fastdoc type of loan became an integral part of that. Actually, the securitisation of loans and the fastdoc principle actually went back quite a long time in America. I think it kicked off when Clinton was concerned that a number of relatively low-income families were unable to get loans the conventional way, and put some pressure on the big lenders, Freddie Mac and Fannie Mae, to put aside a proportion of their loans on this basis.

TIPPING J:

There's no necessary connection between fastdoc and securitisation, though, is there?

MR MILES QC:

No, there isn't.

ELIAS CJ:

But was there in practice, given the emphasis on ascertaining the borrower's ability to repay the loan without substantial hardship, it does look as if it's a product designed simply for property speculation.

MR MILES QC:

Well, I suppose a more attractive way of putting it from people like the Bartles, and this is the way it was put to them by Blue Chip, this is a way of freeing up and using the equity to enable you to have some extra income. Of course, the deal was so totally weighted against the Bartles that they shared, I think, a fraction over 10% of any possible capital gain that might have taken place when it was going to be sold in four to five years' time.

ELIAS CJ:

But they got income.

MR MILES QC:

Well, yes, they got four hundred and something a fortnight, but the irony was that they actually borrowed the money to service that.

ELIAS CJ:

Yes, I understand that. But I'm just trying to understand how these two very different requirements are reconciled, how a decision is taken whether you're in one group or the other.

MR MILES QC:

Well, that's, I guess, that decision tends to be made by the correspondent.

ELIAS CJ:

Yes, I understand that.

MR MILES QC:

But the importance, I think, of that first paragraph, is the recognition that if lenders are going to rely on a declaration, that declaration has to be checked to ensure that there is the ability to service the loan without recourse to the asset.

ELIAS CJ:

Is that what it says? I thought it may waive those requirements.

MR MILES QC:

No, no, ma'am. The first paragraph applies to lo-doc lending. What they have waived is the verification of the borrower's income by payslips, et cetera.

ELIAS CJ:

Yes.

MR MILES QC:

But overall, GE were insistent that the declaration was significant and that the obligation on the part of the correspondent to confirm that the declaration was accurate was paramount, as they say, because what they didn't want was to be in a position, ostensibly, was having the family home sold out, because that was obviously what they were talking about, the substantial hardship, and it obviously

goes without saying that if the matrimonial home is being sold out, that would obviously amount to substantial hardship.

ELIAS CJ:

But to adopt your term, isn't paragraph 1 boilerplate and isn't the significant aspect that Tasman is not required, or AMS is not required, to verify if it's a fastdoc product that's being used?

MR MILES QC:

Well, it's hardly boilerplate, Your Honour, because they specifically say it's paramount.

ELIAS CJ:

Well, it's language, isn't it?

MR MILES QC:

No, it's fundamental.

BLANCHARD J:

I guess, Mr Miles, really the question is, do the words "The above requirements are waived" apply to the first paragraph, or do they start applying at the second paragraph?

MR MILES QC:

For myself, I don't think there's any doubt, Your Honour.

BLANCHARD J:

Well, perhaps you'll tell me which it is, because it seems to me a bit doubtful.

MR MILES QC:

It applies from the start of the second paragraph, because it is precisely the obligation to provide specific evidence of your income which was waived.

ELIAS CJ:

Well, how are they to check it, then?

MR MILES QC:

Well, quite, and that was one of the fundamental problems with fastdoc lending.

ELIAS CJ:

Yes, I don't think we're at cross-purposes, and I, too, agree that it reads as though it applies – the waiver starts from paragraph 2, but this seems to me to be an indication that checking is not required.

MR MILES QC:

Yes, but what it is, is an indication that GE isn't required to check it, but what the manual and the deed make clear is that the obligation is on the correspondent to check.

TIPPING J:

It's the verification that is waived. AMS were verifying.

ELIAS CJ:

Yes.

MR MILES QC:

Quite.

TIPPING J:

But they're saying it's fundamental, you know, that they can repay, but if it's a fastdoc, we don't have to verify them.

MR MILES QC:

Or to put it perhaps a little more specifically, they'd waived that form of verification.

TIPPING J:

Well, that's stretching it, Mr Miles. I think it's procedural, in a sense, in that they don't have to go through the verification process if it's a fastdoc.

MR MILES QC:

Yes. When one checks – and I'll take Your Honour, hopefully, to the other paragraphs in the deed and the manual, which indicate that there is a primary obligation on the part of the correspondent to ensure that the declaration is accurate.

TIPPING J:

Well, how do they do that?

MR MILES QC:

By getting the applicant to filling out a form.

TIPPING J:

So they do actually verify it?

MR MILES QC:

Oh, they do. The correspondents do. I'll be taking you to it.

TIPPING J:

Are you saying that the distinction here is between AMS – AMS is verifying –

MR MILES QC:

And TML.

TIPPING J:

And TML, exactly. TML always has to verify, you say, but AMS is relieved from cross-checking if it's a fastdoc.

MR MILES QC:

It's part of the outsourcing.

TIPPING J:

I see.

ANDERSON J:

Just on the question of what it relates to, if the first paragraph were not independent of the rest, it would mean – in fastdoc situations, they were utterly indifferent as to whether it causes hardship or not.

MR MILES QC:

And GE is not that irresponsible. And, of course, you get a further indication from that in the last paragraph under that segment.

ELIAS CJ:

I think, really, your answer is to the point that was bothering me, is that it's outsourced. The verification obligation is outsourced. I hadn't really appreciated that distinction between AMS and the correspondent.

MR MILES QC:

Yes, indeed.

TIPPING J:

Nor had I, until it was –

MR MILES QC:

And in a few minutes' time, I'll be taking you to the actual files, and you can see exactly what the process was. But just that last paragraph, you'll see that it's clearly not part of the above requirements, the capacity to fund loan payments from rental income will be verified by a lease agreement. So at the very least, they want to be satisfied that the investment is self-supporting.

BLANCHARD J:

Did AMS, in this particular case, do that verification in relation to the lease?

MR MILES QC:

Not a suggestion of it, Sir. And in three pages where they tick all the bits they choose to tick, there's not a hint of that.

ELIAS CJ:

Are you going to take us to that?

MR MILES QC:

In a few minutes, Ma'am.

ELIAS CJ:

Yes, thank you.

MR MILES QC:

Can I just take you quickly through – because there are a number of other paragraphs that I think will point to the outsourcing proposition. Under 4.9, lender's mortgage insurance. This was important. LMI coverage required from an approved mortgage insurer for all loans. You remember this was one of the three requirements that AMI always had. They wanted the declaration, they wanted a valuation, and they wanted to be confident that the loan had been insured, and that was to be arranged, of course, by TML.

TIPPING J:

I'm sorry to be tedious, Mr Miles, but while this is still in my mind, because it's so easy for these things to slip away, this last paragraph of 4.4, this is an operations manual addressed, in effect, to TMS, isn't it?

MR MILES QC:

Yes.

TIPPING J:

Doesn't it mean that this is what TMS must do, not what AMS must do? TML, sorry.

MR MILES QC:

I think that's right, Your Honour.

BLANCHARD J:

Well, I'm not sure about that, because the second paragraph starts, "AMS will verify" and then it goes on talking about what AMS is going to require in relation to that verification. Then there's the waiver. Then there's "capacity to fund loan payments from rental income will be verified". Well, the implication is that that's AMS doing that verification.

MR MILES QC:

I think Your Honour is right, when I look at it more closely.

BLANCHARD J:

And frankly, if you were relying on the property, you want detail about the lease in order to be able to check its value.

MR MILES QC:

Quite, Sir. And ultimately the ability of the borrower to –

TIPPING J:

The use of the same word, "verified", tends to support my brother's point, in that there's a symmetry, if you like, of language. It's rather awkwardly arranged, but there is, nevertheless, that –

MR MILES QC:

Yes, and I don't recall any reference in the voluminous TML files and the AMS files relating to a lease, a rental agreement, or the request to look at one.

BLANCHARD J:

Are you saying even TML didn't know about the lease?

MR MILES QC:

I don't – Mr Grove knows it backwards, but I don't recall any reference to a rental agreement or a lease, or verifying any of those.

TIPPING J:

Or bank statements evidencing –

MR MILES QC:

Oh, no, no.

TIPPING J:

Of course, there wasn't rental income at the beginning.

MR MILES QC:

Not at the beginning, no. It wasn't until September '07, because, of course, it wasn't dealt with – when the first loan of $139,000, that was for the deposit, part of that was for the deposit.

TIPPING J:

You would have thought you might have asked for an estimate.

MR MILES QC:

Or something.

BLANCHARD J:

If there had been verification by reference to a lease agreement, that would have revealed that the lessee was a $100 Blue Chip subsidiary.

MR MILES QC:

Precisely, with no indemnity from the parent company.

ANDERSON J:

All 4.2 is doing is saying, this is the process we're going to follow, and we're telling you so that you can provide us with what we need for it.

MR MILES QC:

Exactly. And you'll see subsequent obligations, which are to check all of the obligations, if you like, that TMS has.

TIPPING J:

Yes, I think that's right. I originally tended to read it the other way, but I think it's more persuasive to read it –

MR MILES QC:

And I do as well, with respect, yes. At 1073, you've got process, quite a revealing analysis of the process. You've got a box there, setting out all the steps. This is all the steps that TML had to do. I can only say, Your Honours, when I was last applying for a loan from the bank –

TIPPING J:

This is getting into dangerous territory.

MR MILES QC:

You're quite right, Your Honour. I seem to remember this is the sort of thing the banks ask for.

ANDERSON J:

It must be so long ago, Mr Miles.

MR MILES QC:

Yes, my memory is unreliable on this issue. But when you look at the activities which the correspondent, in this case, TML, was obliged to undertake, and it says this is sound lending practices, a little ironically, and it's literally every step in the process to satisfy TML that the loan application compiled with the appropriate criteria.

TIPPING J:

This is really building towards a submission that AMS, otherwise GE, didn't follow its own manual.

MR MILES QC:

It's two things, Your Honour. Firstly, agency, and secondly, it didn't follow. And that's what Grant, the key witness for GE, conceded. He said had we known that they were pensioners with an income of $21,000, we'd never have lent, because, of course, it doesn't comply, because you can't service the mortgage without undue hardship. Given that that's their paramount requirement, it just sticks out like a sore thumb.

TIPPING J:

The wording of the first paragraph, I think 4.4 is going to become quite important.

MR MILES QC:

Oh, I think it's significant.

TIPPING J:

Borrow to repay the loan must mean, more generically, service the loan, one would have thought.

MR MILES QC:

Oh, undoubtedly so, without undue hardship. And that can't conceivably be the position when you're putting the matrimonial home, your only asset, of this modest family in Whangarei.

TIPPING J:

Are you really saying, well, whether they knew it or not, they ought to – well, subject to the agency point – whether they knew it or not, they ought to have known it?

MR MILES QC:

And I'll be coming to that. I know that that was a question Your Honour had in mind and I'm going to be dealing with that, and what will become apparent when I take you through the AMS file, is that they actually had more information than even I had realised, including a list of all of their assets and liabilities. They knew – we don't actually even need the agency argument, I believe. The actual constructive knowledge is so strong now but they knew that this so-called independent investor had no other assets or investments because they had the list of assets and liabilities and it was a modest little house at 400,000 and a car and a camper van, and a few dollars in the bank, so I will be submitting that there is an almost irrebuttable argument that despite GE's attempt to outsource all of this, all of the roles of what a lender traditionally did, they nevertheless received enough information that gave them actual knowledge or constructive knowledge that this did not comply.

TIPPING J:

So they either had actual knowledge or they were on sufficient notice that they should have made further inquiries which would have led them to that conclusion?

MR MILES QC:

And if you reach a conclusion which the Court of Appeal reached without difficulty and which I'll be suggesting Your Honours will be in the same position on agency, then it's just open and shut because then they've got the original application that the Bartles made to TML which, of course was never passed on to AMS, and that said retired, income 21,000 and that –

TIPPING J:

You've still got the apparent strength of GE, of Blue Chip, and the solicitor to deal with, Mr Miles.

MR MILES QC:

We don't have to worry about that, of course, on the GE knowledge before they were aware of that and remember, Your Honour, at the time that GE lent, they had no knowledge of Blue Chip at all so their only criteria for lending was their own criteria, could this mortgage be serviced in accordance with 4.4.

TIPPING J:

They're not bound though, I would have thought, by their own criteria. If, as a matter of objective fact, there was, at least, on a reasonable appraisal, an ability to service, that can't be oppressive.

ANDERSON J:

Unless it's indicative of prudent business practice.

ELIAS CJ:

Reasonable?

TIPPING J:

Yes, reasonable.

ANDERSON J:

But Mr Miles, leaving aside the question of agency, assuming there were none, wouldn't one have to draw a distinction between the first loan and the second and third as two different, requiring two different appreciations, really. I mean, the first loan was $138,000 and that's relatively modest and mightn't cause much concern but a year later, it goes up to 630,000 which raises quite different considerations.

MR MILES QC:

Yes –

ANDERSON J:

Because they are three separate loans, aren't they?

MR MILES QC:

Yes they are, and I understand the point Your Honour is making. Conceptually, of course, they were all identical loans. They were all loans, we would say, that relied solely on the security to ensure that they were repaid so at a fundamental level, we say all three should be treated in the same way. All three were unconscionable because they could not be repaid without recourse to the primary asset, that primary assets was the matrimonial home and GE chose to put the whole issue at risk because they outsourced the whole deal, if you like and, as it turned out, the whole business model of Blue Chip was fundamentally flawed, an assessment which GE almost certainly could have made in an hour or two if they'd looked at it and hence,

we say, oppressive. But if Your Honour has in mind the possibility of remedies and other such issues, I might leave that to Mr Dale who's going to discuss the Act with you and perhaps –

TIPPING J:

But we could be faced with a situation when the first was not oppressive, the second two were. It's not a question of remedy. It's a question of whether they qualify. I'm not forecasting a view at all.

MR MILES QC:

Of course not.

TIPPING J:

But in theory, that could easily be the case.

MR MILES QC:

In theory, it could be, Your Honour. I would say that you wouldn't because the processes were identical. It just so happened the amount was less but the processes were identical and the asset was identical and there was no ability either on their income to be able to repay that –

TIPPING J:

They were being advised by an apparently independent solicitor and they sent in a document which said, "We can afford it." What's the unfortunate lender supposed to do? It's a double-guess, all that.

MR MILES QC:

No, no. Your Honour –

TIPPING J:

I'm talking about the first one.

MR MILES QC:

Yes. Well, what you will see from the file is that there's no – I think I'm right here – there's no record of what AMS did on that first loan. There's a – we've got the TML file for it, which includes the altered application, if you like. We've got the – the

altered application, by that, I mean the change from retired to independent, what was an investor and the removal of the income et cetera –

TIPPING J:

Are you saying that even with the solicitor there and the self-certified affordability that the lender had a duty to go behind that, and I'm talking about the first one, a duty to go behind that? That must be the submission.

MR MILES QC:

It depends – yes, I do, Sir, but it depends entirely on the knowledge they had and whether they were put on notice –

TIPPING J:

Yes.

MR MILES QC:

That this deal was potentially unconscionable.

TIPPING J:

Well, with a solicitor there, subject, of course, to being on notice that there was something problematic in that respect, I would have thought with a solicitor there, with not being on any such notice, it would be a very long step to say that a lender where there was no ex facie oppression has to go further.

MR MILES QC:

I'd be struggling to push that argument, Sir, but the good news is that I don't have to.

TIPPING J:

Right.

MR MILES QC:

And, of course, on the big picture and, again, Mr Dale will be dealing with the solicitor issue, but on the big picture, it is an unattractive proposition that GE can be involved in a scheme inherently unconscionable, for the reasons that I have been discussing, in fact, unconscionable because of the activities of the correspondent and then say, "But we're completely relieved of all of this," because of the boiler plate requirement that they get independent advice, and we just hope, we just hope that they happen to

get a solicitor that might be clever enough to actually see through this extraordinary scheme.

ELIAS CJ:

You didn't have to be very clever.

MR MILES QC:

Quite. All you had to be was tame and that's exactly what the position was, and –

TIPPING J:

It may have been the position but the crucial thing is, were they either aware of that or should they have been aware of that?

MR MILES QC:

Well, I certainly go back to the proposition that they were on notice.

TIPPING J:

i.e. you say they should have been aware of that?

MR MILES QC:

They should have been aware –

BLANCHARD J:

Of the tameness?

TIPPING J:

On the –

MR MILES QC:

Oh, I'm sorry.

TIPPING J:

Of the tameness, that's the point because frankly, if there's nothing to suggest that a solicitor is not tame or otherwise bonkers, if you'll forgive my colloquiality Mr Miles, I mean I think it's getting far too tough for lenders to go behind that.

MR MILES QC:

Normally, I'd agree with you entirely. Keep in mind and, again, Mr Dale will have this concept, well, he'll be dealing with this but keep in mind that Matthias had 150. Yes, he was the solicitor for 150 of these loans. Now, at the very least and he's a sole practitioner –

BLANCHARD J:

Through GE?

MR DALE:

No, he – I'm sorry, he had a 150 Blue Chip clients and his concession was that he made no negative comment about any Blue Chip transaction ever. He had a number – in this case I think 10 was the number out of 48 of a sample. We don't know for sure of the total number of loans, how many he had. There were, generally speaking, about six law firms that did all the Blue Chip work, save for one or two exceptions. Mr Mathias, by far the biggest, followed by some South Island lawyers and Tauranga lawyers.

BLANCHARD J:

You'll be taking us to the evidence on this.

McGRATH J:

And, I hope, dealing with the way this matter was addressed in the High Court, because the references that were given to us yesterday in Justice Randerson's judgment indicate, almost, that there was scarcely any controversy about the independence of Mathias, and I don't really recall of anything arising in the Court of Appeal judgment in this regard. I just hope we're not developing a new argument in this Court on that matter. But no doubt you'll be referring to the judgments when you address this, Mr Dale.

MR MILES QC:

Can we briefly go back to –

ELIAS CJ:

Sorry, can we just recap on that. Are you putting it as high as saying that if recourse to the security in order to service the loan was apparent, there was a presumption that the transaction was unconscionable?

MR MILES QC:

Well, it's the matrimonial home, yes. That's the view that's been taken by four of five of the Australian cases. That was certainly the view taken by the Court of Appeal. I think what the Australian cases say is that asset lending is not unconscionable per se, but nevertheless, it puts the lender on notice that it has the potential to become unconscionable. It becomes unconscionable when it is apparent that the only way in which the loan will be serviced is by recourse to the principal asset, and when the principal asset is the matrimonial home, the Judges have said that amounts to unconscionable conduct.

ELIAS CJ:

So would that mean that you could never use the factdoc product if the security was a home?

MR MILES QC:

I wouldn't put it as strongly as that, Your Honour.

ELIAS CJ:

Don't you have to?

MR MILES QC:

Um, well, I'm always a bit wary of words like "never".

ELIAS CJ:

Some aren't.

MR MILES QC:

What I can say, and what I do say, is that the process adopted by GE amounted to unconscionable conduct in the case of the Bartles. I think one can say that with some confidence, because ultimately, as Judges have said time and again, it's ultimately a factual issue.

TIPPING J:

I would have thought the degree of risk to the home is central to this. If it's a multi, then very strong suspicion or notice. If it's pretty small, then no.

MR MILES QC:

Well, clearly GE were aware of that, because that's what you have with 4.4. They were well aware of the potential, if you like, for misinformation being given to them, and it was. I try not to say this again; hopefully this will be the last time. As Grant said – by the way, Your Honour, I'll be taking you to this as well, unless I forget – in his evidence specifically conceded this was asset lending with the primary recourse to the asset. Had they known the inability to fund this from some other source, as was the problem with the Bartles, they would never have lent.

ELIAS CJ:

I'm still troubled by 4.4, because it does envisage that in respect of the fastdoc product, the only verification is the ability to cover the loan payments from rental income.

MR MILES QC:

Well, I would accept that if GE or TML had evidence that the loan was able to be serviced from other sources, from other investments, then of course that would be another issue. But the fact that the Bartles filled out an asset and liability form where the only asset was the house and a few – you know, the car and a few bits and pieces – then there was no other basis on which GE or AMS could have made any, could have understood that this would have been serviced other than from the tenant. Given $60,000 being the interest, $30,000 of the rent, it was just inherently unsustainable, as was the whole scheme, because this was just typical of the deals that Blue Chip was doing. The rent never covered the outgoings and the mortgage. They just hoped that the property market would continue to boom, and they'd continue to get new customers in, and just continue to fund it on that basis. Could we go to 1090, still on the manual. This was on mortgage servicing. About three paragraphs down, "The correspondent takes steps and incurs such expenses as are necessary to enforce the terms of each mortgage, or otherwise excising the rights", et cetera. Undertaking necessary repairs and paying rates, et cetera. So again, it's TML that's obliged to do all of that.

ANDERSON J:

It's interesting, really, isn't it, because oppressive conduct can be in relation to enforcement. So if the correspondent oppressively enforced, at least in that situation the argument that the lender can't be held responsible looks rather tenuous. But, of course, there may be agencies for some purposes and not for others.

MR MILES QC:

Quite. Which was the point made by a number of the Court of Appeal Judges. But I think it becomes apparent when you read this that they were the agent in effect for almost any action that a lender would typically take.

BLANCHARD J:

I assume that there is somewhere which says that if the correspondent does have to pay the rates under 9.5, they get them back in some kind of priority if the property is sold.

MR MILES QC:

You'd assume so, Your Honour. I can't take you to it, but you'd expect it. At 1092, you have a tricky little clause generating – setting out the income generation for correspondents, none of which, of course, the Bartles were aware of. There's an establishment fee from the borrower, but then they've clipped the ticket on the interest payments, the correspondent margin being a minimum of 0.25%. So every repayment of the interest had a percentage slipping back to TML. And again, when I take you to the files, you will see that the interest rate that GE is charging is actually slightly less – sorry. The interest rate, the interest that is being paid by the Bartles is 0.25% over what GE is actually charging. So TML gets the difference.

BLANCHARD J:

Did the mortgage provide for the gross or the net amount?

MR MILES QC:

I'd have to –

BLANCHARD J:

Presumably, this is just a form of commission, a collection of the gross amount of the interest, which is not at all unusual.

TIPPING J:

No, nothing inherently. He's talking about clipping the ticket.

BLANCHARD J:

It's common for people who collect mortgage payments to take a small percentage as commission.

MR MILES QC:

Ah, well, it surprised me.

BLANCHARD J:

It's been a long time since you collected a mortgage.

ELIAS CJ:

I think he was indicating that he pays them.

TIPPING J:

That was a long time ago.

MR MILES QC:

I do sound a little remote.

ELIAS CJ:

Yes.

MR MILES QC:

Moving on to page 1104, now, that's the correspondent responsibilities. Correspondents must diligently enforce the obligations of each mortgagor borrower under the loan or mortgage, including the obligation to promptly pay all monies when due. Correspondent responsibility et cetera correspondingly to mortgagor, notwithstanding that the trustee is the legal owner. Also responsible for the administration of any default, including selling the mortgaged property. You'll recall that under the deed, they can actually sue under GE's name as well. In that – yes, there are a couple of documents, Your Honour, that were not included in the bundle, and which the instructing solicitor had asked to be included. I'll just pass those up to Your Honours. One of them is the letter from TML to the Bartles in June 2008, advising them of the intention to issue proceedings, and pointing out that a notice of default would be listed with Baycorp. The second document is an undated document. It was never clear when this AMS document came into existence, but it was discovered. It's an interesting document, because it recognises, it expresses a

concern that AMS had that they'd had a significant increase in the number of lo-doc applicants they'd had overstating their income. You'll see the second subheading, "What information is required with a loan doc application", more detail is required. They now want the type of business the applicant is involved in, details of the applicant's business, length of time, any other information you think shows that the declared income is reasonable.

ELIAS CJ:

Well, what use can we put this to if its date is not known? What are you asking us to take from it?

MR MILES QC:

I think what you take from it is a recognition by AMS that the system that they had set up, where they'd outsourced all of these obligations to brokers, was causing problems.

ELIAS CJ:

Yes, but when?

MR MILES QC:

Well, it was during the relevant time, I understand.

BLANCHARD J:

There was some cross-examination on this, because I remember this business about the 3.5 million and the yield of seven percent. Are you saying that cross-examination didn't establish when this document came into play?

MR MILES QC:

Again, Mr Dale would be able to be more specific. But that's what he tells me. My friend has just reminded me that this refers to lo-doc applications rather than fastdoc. My recollection is that the primary difference was the difference in the loan-to-asset ratio, 70% in the case of fastdoc, I think, and 80% for lo-doc, but I'm subject to being corrected.

BLANCHARD J:

With lo-doc they had to state their income. With fastdoc they didn't.

MR MILES QC:

Right, but I think there was also a change in asset ratio.

BLANCHARD J:

Was it 80%?

MR MILES QC:

And it had the obligation to actually give details of income. So it just reflects, perhaps, the recognition by AMS that these systems were open to abuse.

BLANCHARD J:

Well, yes, but that may be a recognition after the event.

MR MILES QC:

It's possible. I'm not placing –

TIPPING J:

As to what they knew or ought to have known at the relevant times in this case, I think one puts it to one side, Mr Miles.

MR MILES QC:

I'll accept that, Your Honour. Could I just take you, then, to – sorry, Your Honour, I'm just looking at another paragraph which Justice Arnold relied on. I'm looking, Your Honour, this is at page 246 of Justice Arnold's judgment at paragraph 159, where there's a reference – there is a slight complication here. There was an updated manual produced, I think in 2007, which had largely similar provisions, but there were some changes. If you see at the bottom of paragraph 159, the clause which interested me and which His Honour relies on, clause 14.1.1, is a significant one, and you find it in the same bundle, Your Honour. If you go to page 1204, which is the updated manual, you see a paragraph about four paragraphs up from the bottom. This is under the section, "Initial assessment and interview". That paragraph says, "Correspondents must consider carefully the information provided in the loan application and any declaration for fastdoc loans. It is the correspondent's responsibility to determine whether any information provided warrants further inquiry. If so, sufficient inquiry must be made by the correspondent before proceeding further with the application". So it's a very specific obligation on the part of the correspondent to check the declaration.

TIPPING J:

There is – and it's probably not decisive – but there is an interesting observation on page 1125 in the Privacy Act statement.

BLANCHARD J:

Sorry which page?

TIPPING J:

1125 where, pursuant to the Privacy Act, the following is brought to your attention. This application collects personal information about you obviously. This application is received on behalf of the lender. Now that maybe, possibly close to the reality of what is actually happening here.

MR MILES QC:

I agree with you, Sir.

TIPPING J:

May be a Freudian, I don't know, I mean there are pointers in all different directions, so you can't be selective, but this is what they're being told.

ELIAS CJ:

This updated manual, when does that arise?

MR MILES QC:

February 2007. Again Mr Dale could be more specific, but my understanding is that all of the clauses that I have been taken to on the original manual have been included in the second, so, but again, yes, but to the extent that that paragraph.

TIPPING J:

Is the primary purpose of the operations manual, in your submission, or your primary reliance on it, is for agency?

MR MILES QC:

And whether they've been complied with, whether agency has shown up and secondly whether –

TIPPING J:

Whether they've complied with their own rules?

MR MILES QC:

Yes.

ELIAS CJ:

And that bears on reasonable commercial practice does it?

MR MILES QC:

Yes. Now, I'm now going to take Your Honours to the files because, and there are, there are two groups of files obviously. There's one TML file and we have also got the AMS files, so they are both significant and I'm just going to have to spend, perhaps 20 minutes, taking Your Honours through those so you'll get a sense of exactly how the processes set out in the operations manual were, in fact, how they occurred in the case of the Bartles. Now the process, and you find that Your Honours at volume 4, volume 4, page 945 and this is taken from the evidence, this is the evidence in chief of a Mr Valib, who is the, he describes himself as the approvals department head at Australia, at AMS, which was part of GE and he sets out the process at paragraph 12 in the case of a fastdoc loan, what AMS needed to see and you'll see there's a whole series of documents. A completed MPA, that's a mortgage purchase application, a slightly odd document, but that's what they call it.

ELIAS CJ:

Sorry, where are you, which paragraph?

MR MILES QC:

This is paragraph 12A.

ELIAS CJ:

Oh I see, thank you.

MR MILES QC:

Yes. A completed MPA, confirmation that all the information that followed the application was correct, that the MPA was compliant with the owner's operations manual. Nothing had come to the correspondent's notice which would indicate the borrower may not be able to pay and no default. Then, not quite sure what B is.

ELIAS CJ:

Do we have the, are you going to take us to the documents –

MR MILES QC:

Yes I am.

ELIAS CJ:

– in the particular case?

MR MILES QC:

Yes I am, I am, but this just sets out what they expected to get.

ELIAS CJ:

Yes.

MR MILES QC:

You've got the declaration of affordability, the loan proposal, declaration of loan purpose, the insurance application and a valuation. Now –

TIPPING J:

It has been said that, at least from the point of view of systems, that these people were very precise weren't they?

MR MILES QC:

Oh, absolutely.

TIPPING J:

There's nothing slapdash about any of that.

MR MILES QC:

Nothing haphazard about that at all, no. Now, if we go then to the TML file and if Your Honours would go to volume 9. It starts I think at 2040.

BLANCHARD J:

20?

MR MILES QC:

2040 and goes through to the end of that volume, and into volume 10 at 2286, so it's about two thirds of the next volume as well as this, so it's quite substantial. Now, key documents. If you have volume 10 as well, I'm going to take Your Honours through to the original finance application by the Bartles and that's at 2236. This is the, it's hard to see the date, but you see it's August, this is 2006 and you'll see the Bartles, they have got their Whangarei address, employment details, occupation, retired, that's Mr Bartle and Mrs Bartle, exactly the same, retired and down the bottom, you'll see under professional services lawyer, you'll see a reference to Webb Ross. Webb Ross was the Bartles, I understand their usual solicitors, but they were persuaded to go to Mathias. Over the page, applicant information income, joint half each pension, 10,868. Then a list of assets. The house, 420, car and some furniture, 65,000 in the bank, that's it. Now, you will see and over the page, for what it's worth, you'll see a similar application, but this is not in the Bartles' handwriting and you'll see they're described as, investors and this was filled out by the correspondent. So, we start with the original application, making it clear that the correspondent knew exactly what the, what the Bartles were. They knew they were pensioners with a combined income of 21,000.

TIPPING J:

Where is the reference to the purpose of this first loan? Is that in this document or is that…

MR MILES QC:

No.

ANDERSON J:

It's interesting on the next page, 2239, the box with income is struck out and only assets listed.

MR MILES QC:

Yes, yes quite. Quite.

TIPPING J:

Surely you have to say somewhere do you, or don't you in a fastdoc, what you want the money for?

MR MILES QC:

Um, you'd have – I seem to remember that that was – I can't remember whether that's a requirement in the operations manual or not. It's certainly one of the factors that influenced the Australian jurisprudence. I'm told, Your Honour, that if we go back to that list from Mr Valib which was at –

ELIAS CJ:

946 is it?

MR MILES QC:

Was that it? Volume 4.

TIPPING J:

Volume 4, 945?

MR MILES QC:

Yes. I'm told that that's one of the purposes there. Oh declaration of loan purpose, yes.

ELIAS CJ:

Loan purpose B.

MR MILES QC:

Yes, under E.

TIPPING J:

Because I've always been curious as to how they describe the – presumably it was just step 1 in the – but it's not described in any shape or form or so it appears.

MR MILES QC:

No.

BLANCHARD J:

That seems to have been primarily to get it out of the consumer regime.

MR MILES QC:

I think it's also just to give an indication or to support the proposition that they're able to pay. To be able to service the loan.

BLANCHARD J:

Well it looked to me, from the documents, but we haven't gone to them yet, but when I was reviewing them it looked to me as though it was really aimed at the consumer – the Credit Act, the name of which I can never remember.

TIPPING J:

I'm sorry, in the document at 2243 there is a reference to purpose of the loan.

MR MILES QC:

Yes and –

TIPPING J:

To utilise equity for investment purposes.

MR MILES QC:

And you've also got at 2248, Your Honour, "we acknowledge" et cetera "used primary for business or investment purposes", "primary purpose" et cetera.

BLANCHARD J:

Yes but look at the top of that. Second line. It refers to the Act, that's what it's for.

MR MILES QC:

Yes.

BLANCHARD J:

Because if it's a consumer loan then a much tougher regime applies.

MR MILES QC:

Yes I see that.

BLANCHARD J:

Under that Act.

TIPPING J:

There was, in fact, nothing inappropriate in them describing it as being for business was there?

MR MILES QC:

No. Because that's exactly what it was.

TIPPING J:

That's exactly what it was.

MR MILES QC:

The problem, of course, is that the, is that TML, and I'll be taking you to AMS in a moment or two, they knew that there were no assets, other than the one they were buying, to be able to service that loan. Now if we – so we were essentially Your Honour, there's not, apart from that application which was obviously crucial, and the fact that the, setting out the crucial information, the fact that then that information, a part of it was deleted and when the new application went to AMS you'll see that they're now self-employed investors and no reference to income, there is, there's nothing of great significance in that first application. Then it's probably worth going to, yes, it's probably worth going then to the AMS file and there are two files for AMS because they broke it down to the first loan, which was the 139, and then topped up the following year, that was taken over the family home. And then the second loan, which was taken out over the apartment, and guaranteed by the Bartles so that there are actually two files and they start at about 1969 I think.

ELIAS CJ:

Which volume?

MR MILES QC:

Volume –

ELIAS CJ:

Volume 9 is it?

MR MILES QC:

Volume 9, yes. This is the – yes so all of these documents up to about 2004 are on the AMS file. You'll see at 1994 you've got the declaration of financial position. The proposed loan 137,484 for 30 years, repayment 1,000 per month. You'll see –

TIPPING J:

That's signed by one of the Bartles –

MR MILES QC:

Yes.

TIPPING J:

– did they sign one each did they?

MR MILES QC:

Yes.

BLANCHARD J:

Preceding page.

MR MILES QC:

Preceding page, yes.

ANDERSON J:

What page are we on?

MR MILES QC:

1993 and 1994 and you'll see they're described as self-employed investors, under occupation. Dated 11 October 2006. Loan proposal at 1995 setting out the security, mortgage over the house, purpose of the loan, equity for investment purposes.

McGRATH J:

So 1993 and 4 are the declarations that are featured in the judgments in terms of their assertion that they can comfortably afford all repayments et cetera?

MR MILES QC:

Yes, yes. You'll see that that's what the declaration says. If you go to 2001 and this is the mortgage – the insurance proposal with Jan Worth. You'll see under the duties of disclosure, two-thirds of the way down that document, the insured acknowledges its duty under New Zealand law to disclose to the insurer every material circumstance et cetera and then the last two or three lines under that declaration, "It will be a term of any contract of insurance with Jan Worth that any loan introducer, mortgage manager, financial agent, broker et cetera involved in the establishment of the loan is agreed to be the agent of the lender for the purpose of provision of information and statements," et cetera. So that's an absolutely specific acknowledgement that when applying for insurance TML is acting as the agent for GE.

And you've got the valuation at page 2004 of the home, and a series of text, which presumably are AMS text. I think this was a recognition, this valuation was wrong. It said the capital was 235 and the improvements 195, that's right yes, that's the Government valuation of course, of 235,000.

ANDERSON J:

Mr Miles on the, page 2001, in about the middle of the page, an enquiry as to whether the financial position of the borrower meets the Genworth Financial Guidelines, do we have the guidelines anywhere?

MR MILES QC:

No we don't, Sir. And what is odd Your Honours is that there are no records of AMS formally approving the loan. This is the file. I don't know what implication one takes from that, either it was just that it was so, it was only 139,000 that it would, just didn't require any formal verification or whether those documents are missing, but the fact is there isn't anything and there is in the subsequent loans.

Now can I take you then to the two further loans that took place in September the following year. The documents essentially start at, yes, at 2000 – yes starts actually at 2005, just skip over 2007, 8, 9 and 10 for the moment because they deal with the way in which AMS dealt with the loans, but let's come to the documents that AMS had when they were assessing – you remember these loans came to, what about 4 or 500,000 didn't they.

BLANCHARD J:

Can I just ask Mr Miles, did GE know that both of these loans were in connection with the purchase of the apartment, despite the fact that they were separate and one of them was secured only –

MR MILES QC:

Yes.

BLANCHARD J:

– on the home?

MR MILES QC:

I'm assuming so, yes.

BLANCHARD J:

But maybe possibly significant.

MR MILES QC:

It – quite.

BLANCHARD J:

You're assuming it?

MR MILES QC:

Well Mr Grove tells me that that is the case but I will – Mr Dale will –

BLANCHARD J:

Well I'd like to see some verification of that, if I may use that word.

MR MILES QC:

Of course. Someone should be. It starts perhaps at 2011 which is the mortgage purchase application signed by Tasman and sent to AMS and it says, "The information contained in the application is correct, each mortgage complies with the criteria set out in the operations manual. We are not aware nor have been able to ascertain by reasonable enquiry et cetera, circumstances under which the borrower might be unable to pay in accordance with the terms of the loan contract or not without substantial hardship." Even though they knew perfectly well the only income

was the income they got from their pension, plus whatever rent they might have got from the apartment, the rent of course going to Blue Chip. Now –

BLANCHARD J:

Did TML know about the arrangement under which the Blue Chip subsidiary was going to –

MR MILES QC:

Yes.

BLANCHARD J:

– make the necessary topping up payment?

MR MILES QC:

Yes, yes. In fact, by this stage, TML was a subsidiary of Blue Chip. I mean, so much for the argument that we've got an independent broker here. The evidence, again Mr Dale will give you the details but I think on about the 5th of September 2006, Mark Bryers is noted as becoming a director of TML and the shares were transferred – I'm not sure whether Blue Chip in fact controlled TML in September 2006 but the suggestion that Bryers is a director indicates that it might have and it certainly took over in February 2007. Bycroft, the man who has signed this letter, was an ex-Blue Chip employee, so –

McGRATH J:

But for all of that, the key point is that paragraph 3 on page 2011, that certificate is given with TML being aware of the Blue Chip arrangements?

MR MILES QC:

Yes. Now, if we go to 2016, this is the fastdoc declaration and it's hard to see the loan Your Honours, but I think it's $368,000. It's a long term of 30 years and it's got the repayment figures there, the occupation "self-employed investor". You'll see down the bottom a fully – the defendant is required to sign –

ELIAS CJ:

Sorry, what page, I'm behind?

MR MILES QC:

Page 2016. "The declarant is required to sign all alterations and a fully complete and signed original must be held on the lender's file." Now, the reason why this document has some further significance, Your Honours, is that it was actually, this was used of course for the 368 but for the other loan that was agreed to in September 2007, TML and AMS didn't simply use this document and twinked out the proposed loan amount and the loan term and just treated that as being the fastdoc. It never went back to the Bartles. It was simply just, I mean, it's a forgery I suppose –

ELIAS CJ:

Well, I was going to ask you, is the previous document you took us to also fraudulent, vis-à-vis AMS, in your submission?

MR MILES QC:

Which, the 2011?

ELIAS CJ:

Yes.

MR MILES QC:

I wouldn't go so far as to describe it as being fraudulent.

ELIAS CJ:

But you say it's wrong?

MR MILES QC:

It's wrong and I would say deliberate –

ELIAS CJ:

And you say it was wrong deliberately?

MR MILES QC:

Yes.

TIPPING J:

Did Mr Bycroft give evidence?

MR MILES QC:

No, no. TML was, I think, in liquidation.

TIPPING J:

But Mr Bycroft wasn't in – anyway, the simple fact is he didn't give evidence?

MR MILES QC:

No.

BLANCHARD J:

Where are the other fastdoc declarations, the ones for the second or –

MR MILES QC:

Yes, you'll find it under 1960. So if you just keep your fingers, as it were, on this one of 2016 and if you go to 1960. Now, you'll see, Your Honours, and you can tell it's the same document because you'll see the mistake in the signature which – wait a minute, that's the, sorry, 1961. I mean, we're talking both the Bartles here, we've just got mirror – they're two declarations by Mr and Mrs Bartle but if you're comparing 2016 it would be with 1961 and you'll see the date is identical, it's the identical document.

TIPPING J:

Yes, the date is identical but in one of the documents the date is in a different hand?

MR MILES QC:

Which one is that, Your Honour?

TIPPING J:

1960. The date is clearly in a different hand from 1961.

MR MILES QC:

Yes, but you compare –

BLANCHARD J:

Yes, 2017.

MR MILES QC:

Yes, you compare that with 2017, exactly, Sir.

TIPPING J:

Yes, but my point is that 1960 is not a complete copy.

MR MILES QC:

No, no, it –

TIPPING J:

But it probably makes not the slightest difference.

BLANCHARD J:

No, you've got to compare 1960 with 2016 –

MR MILES QC:

2017.

BLANCHARD J:

– and 1961 with 2017.

MR MILES QC:

Yes.

TIPPING J:

Well, all right, I'll withdraw gracefully.

ELIAS CJ:

Each of the Bartles did.

TIPPING J:

Okay.

MR MILES QC:

A fast – did a declaration.

TIPPING J:

So these went by fax –

MR MILES QC:

Yes.

TIPPING J:

– on the 5th of September.

MR MILES QC:

On the same day, you'll see, both lots.

TIPPING J:

Yes.

MR MILES QC:

And you'll see the figures. If you look at 1960 you'll see the amount has now been altered to 125,000. It's still 30 years, but they've twinked out the repayment and inserted 1063. And, as you say, these are faxed from TML to AMS, so AMS is sitting on these documents knowing perfectly well that the new declaration is the identical, it's the same document.

BLANCHARD J:

Well, they mightn't have appreciated that, having got essentially photocopies, which wouldn't make it obvious that these alterations had been made, unless you look closely at them and realise that in fact one was an altered version of the other. But you could forgive them for perhaps not spotting that.

MR MILES QC:

Well, I can understand Your Honour's defence, if you like, of AMS, but it was – they did in fact pick it because they used the same document again, because they wanted to alter the term. They decided that for these two loans the term shouldn't be 30 years, so they sent back the application to TML. And if you go now to 1931, which is in the previous volume, that's volume 8…

TIPPING J:

So you mean there's a double forgery, in a sense. There's a double – if one likes to use that terminology, they made the copy twice.

MR MILES QC:

Exactly.

TIPPING J:

Once, for one purpose was to put in the new amount, and the other purpose was to put in the new term, and they didn't have the wit to do the two together –

MR MILES QC:

You'll see –

TIPPING J:

– it might be said.

BLANCHARD J:

And they're still bearing the original date in June, which couldn't possibly be right any longer.

MR MILES QC:

Of course. Now, the date, you'll see, this one is now 28th of September, and –

TIPPING J:

That's the fax notation at the top.

MR MILES QC:

Yes. And what happened was that AMS altered the term, and if you go to 1938 you will see – this is their acceptance – and if you look under "Conditions B, subject to loan term, fastdoc declaration to be 25 years," and someone has written in, "Done 6 September," and –

McGRATH J:

Are these discrepancies referred to in the evidence of the AMS witness?

MR MILES QC:

I …

McGRATH J:

Perhaps after morning tea you could just give us a page reference, don't bother to take us but –

TIPPING J:

And what does the trial Judge say about all this?

ELIAS CJ:

Yes, I was going to say, what findings do we have on all of this?

TIPPING J:

I mean, this is getting a bit – I mean, it may be important, but if it's not been put…

MR MILES QC:

Oh, yes.

TIPPING J:

You mean, it was put, but the trial Judge didn't deal with it?

MR MILES QC:

Mr Farmer keeps muttering, "Paragraph 238," so obviously that supports him, but –

ELIAS CJ:

Well, you can point to the paragraph that supports you, Mr Miles.

MR MILES QC:

It –

ELIAS CJ:

Well, it's teatime, I think. 238 – did you want us to go there?

BLANCHARD J:

This is of Justice Randerson, presumably?

MR MILES QC:

In 239. Yes, well, yes, His Honour I think is being kind to AMS. He accepts the probabilities, he said that this was done by someone from TML. Well, there's no, I wouldn't have thought there's much doubt about that. Having reviewed the material myself, I don't consider AMS can be criticised for failing to notice the alterations. Well, that was Justice Blanchard's point until he pointed out the third change, which was sent in three weeks later –

BLANCHARD J:

With the same date on it.

MR MILES QC:

The same date, quite…

TIPPING J:

Well, what it simply means is that the – Bartles didn't actually certify –

MR MILES QC:

Oh, quite.

TIPPING J:

– but for the third loan.

MR MILES QC:

Well, it's so cavalier. It's just – what it indicates is that they just, AMS just doesn't care. All it is concerned about is the valuation of the security, the fact that it's insured and that there is a fastdoc declaration. The fact that it's turned into a complete formality, and one that clearly hasn't been signed by the Bartles.

ELIAS CJ:

Well, that's the issue. But it clearly hasn't been signed.

MR MILES QC:

Oh, no, it hasn't been, Your Honour.

ELIAS CJ:

Oh, no, I mean, in the perception of AMS, if you want to level a criticism.

MR MILES QC:

Well, it suggests a lack of care when checking that is profoundly surprising.

ELIAS CJ:

Because, as you said, they've outsourced. All right, we'll take the morning adjournment now.

COURT ADJOURNS: 11:36 AM
COURT RESUMES: 11.55 AM

ELIAS CJ:

Yes Mr Miles.

MR MILES QC:

Just to complete that last transaction. You'll recall that the declaration which can be found at page 1960 and with the note that was faxed on 5 September, and that had the term loan of 30 years, and the response from AMS which you find at 1938 was that they wanted the loan to be 25 years rather than 30 years. The response from –

ELIAS CJ:

Where is that? Is that from AMS did you say?

MR MILES QC:

Yes.

ELIAS CJ:

Where's that?

MR MILES QC:

At 1938 and you'll see the handwritten note down 6 September, this is volume 8, page 1938.

McGRATH J:

No date?

MR MILES QC:

No date but you'll see "Done, 6 September." That handwritten note.

McGRATH J:

Yes, thank you.

MR MILES QC:

And as a response obviously the AMS people contacted TML because the email from TML is at 1934. If you just go back a few pages you'll see an email dated 6 September from Samantha Nah and that was to AMS, and it says, "Please find attached conditions required for Bartle." And if you go onto the next page you'll find the declaration at 1935 which – where the term loan has now been twinked out of 30 years, has now been replaced by 25. So it is difficult to believe that AMS could not have picked up, this time, that the same declaration has just been altered and, without the Bartles re-signing.

BLANCHARD J:

But I suppose they could, if they noticed that, which they may have done, have thought that this was just a shortcut and it didn't make any overall difference, it only altered the loan term.

MR MILES QC:

Personally I think the more significant difference was the alteration of the amounts of the loan.

BLANCHARD J:

Where did they get altered?

MR MILES QC:

The original one was at 2016 which is in volume 9.

ELIAS CJ:

Volume 9?

MR MILES QC:

Yes.

ELIAS CJ:

2016?

MR MILES QC:

Yes, and that was for the 368,000.

ELIAS CJ:

Mr Miles I may be quite wrong in this but is there – I noticed in that covering letter the – or you mentioned it I think – the indication that further documentation was not required.

MR MILES QC:

Which covering letter is that, Ma'am?

ELIAS CJ:

Sorry I'm trying to – I thought, oh it doesn't matter, if I find it I'll draw it to your attention. I was just wondering whether – no I'll find it and ask you a further question.

BLANCHARD J:

Mr Miles, sorry, I still don't understand what you meant by the alteration of the amount of the loan?

MR MILES QC:

You'll see it at 2016, Sir?

BLANCHARD J:

Yes.

MR MILES QC:

That's where the loan is 368,000.

BLANCHARD J:

Yes but isn't the one 1935 the other loan?

MR MILES QC:

But it's the same declaration.

BLANCHARD J:

Yes, yes.

MR MILES QC:

But they've twinked it out though.

BLANCHARD J:

Yes but we were focusing on the alteration of the term which had been made.

MR MILES QC:

Well that was the second alteration.

BLANCHARD J:

That was the second alteration, yes, and that one might have been a bit more obvious to the AMS person who was dealing with it, but could well have been thought to be just a technicality not, not having any greater significance?

MR MILES QC:

It could, Sir.

ANDERSON J:

It wouldn't alter the amount of repayments, the servicing costs.

MR MILES QC:

No, no. What I think it's indicative of was the cavalier approach to –

BLANCHARD J:

But it doesn't really go much further than that?

MR MILES QC:

Um, well AMS said it was a requirement that there had to be an original of each of these documents. You'll see from the, that article –

BLANCHARD J:

But it's not an indication, I would have thought, in itself that there's something wrong that needs further inquiry?

MR MILES QC:

I'm not sure about that Your Honour.

BLANCHARD J:

Many commercial people would not really think of it as a forgery, for example.

MR MILES QC:

Once you have a – well once AMS has evidence that its correspondent is now altering documents in this way, it must put it on notice that it's not, it's not behaving professionally. It's not complying with the operations manual.

BLANCHARD J:

I don't mean to take you any further than that. Thank you. I think you've got better points or you may have better points.

MR MILES QC:

Well I'll move on then.

BLANCHARD J:

Including a couple you haven't answered me on yet.

MR MILES QC:

I will now however, Your Honour, and you'll find that at page 2037. We're still, remember, on the AMS file. At 2037 we have the asset and liabilities analysis. Now you remember this is the document in a slightly altered form which TML obtained from the Bartles back in 2006.

ELIAS CJ:

This is on the AMS file?

MR MILES QC:

Yes. If you have a look at the top of the, of that document Ma'am, you'll see the fax reference, page reference 27/29?

ELIAS CJ:

Yes.

MR MILES QC:

This was a 29-page fax sent from TML to AMS and that's the file, if you like, that's one of the files. So every document starting at page 2011, that was the mortgage purchase application which is page 1 of 29, and extends through to the passport at 2039.

TIPPING J:

So all these documents were sent as part of one fax from TML to AMS?

MR MILES QC:

Exactly, Your Honour. So here we have express knowledge by AMS of the asset and liability position of the Bartles.

ELIAS CJ:

And what findings of fact do you have in the High Court on this?

MR MILES QC:

I don't recall, Your Honour. I don't recall but I'll have a look at that. There's no, I don't think this is an issue –

ELIAS CJ:

No.

MR MILES QC:

I don't think there's the slightest doubt that this is, there's no issue that this is the file. This was given to us on discovery and you'll see the list of assets, the 450,000 for home, motor vehicle, campervan, furniture, cash in hand, term investment and they seem to have got it up now to 650-odd thousand and you'll note there on the liabilities the earlier loan of 137,000.

BLANCHARD J:

The term investment has come down a bit too, not that AMS would have known that.

MR MILES QC:

No they wouldn't but what, of course, is significant of this is the recognition there's no other asset. There's no ability on these assets for them to be able to repay the interest on a $630,000 loan.

TIPPING J:

So you say that with this knowledge they shouldn't have taken the Bartles' self-certification at face value. That's the thing in a nutshell isn't it?

MR MILES QC:

Exactly. That's the –

TIPPING J:

That's the argument in a nutshell?

MR MILES QC:

Exactly.

ANDERSON J:

Is there any relevance in the previous page where they talk about how long they've been employed?

MR MILES QC:

Yes, quite. Exactly Your Honour. They say self-employed, 12 months. I mean this is a document that's been, that has been prepared by TML and that is just simply false.

ANDERSON J:

However the first loan had been unfailingly serviced.

MR MILES QC:

Yes, it had.

ANDERSON J:

And the liquid assets, which here is both cash in hand and term investments, have increased because they didn't have anything like that cash in hand earlier on. They had term investments of 65,000, now they're looking at 95,000, so they seem to be on the up.

BLANCHARD J:

Is the cash in hand, I haven't done the adding up here, is that 50,000?

ANDERSON J:
It might be $50.

BLANCHARD J:
Yes, that's what I –

MR MILES QC:
That's what it looks like to me.

BLANCHARD J:
But I haven't added it up.

ANDERSON J:
Yes, could be $50.

BLANCHARD J:
Yes, well –

TIPPING J:
Is this really the high point of your client's case, that this is actual knowledge or at least something they should have, they had it on their file, they should at least have read it and that with that actual knowledge, or constructive, they shouldn't have lent without further inquiry?

MR MILES QC:
Quite Your Honour. This is the high point of the knowledge that GE had on its own, if you like.

TIPPING J:
Yes, yes ignoring the agency issue.

MR MILES QC:
Exactly, so what they had was, they had the knowledge of their ages, because the ages are here, in the previous document, plus their passport of course, but they've got the dates of birth. You've got the list of their assets and liabilities. They know

that the primary asset is the matrimonial home and they know that by this stage the total loans are 630,000.

TIPPING J:

You've still, in my mind, got to deal with the solicitor point, because quite honestly if it's supported by a solicitor's certificate saying that they know full well what it's all about and that they're able to do it, I would think the processes of commerce would grind to a halt unless you could rely on that – unless you were on pretty solid inquiry that that's not right or there's something objectionable about the advice.

ELIAS CJ:

Your submission is this is solid notice?

MR MILES QC:

Yes.

TIPPING J:

Well I'm not sure even with this knowledge one should be behind the – I mean, it's arguable but –

BLANCHARD J:

If you can't see an asset or produce enough income to service the loan, and you've got a list of what purports to be their assets and liabilities, I would have thought at the very least you'd expect the lender to inquire about the rental stream from the building that was being bought, because obviously it's not included in the assets and the manual suggests that even with fastdoc you do that.

MR MILES QC:

You have an obligation to verify the declaration mmm.

TIPPING J:

Well no you've got an obligation to verify the income stream from the rental. I don't think it's to verify the declaration across the board.

BLANCHARD J:

It's to verify the income stream.

MR MILES QC:

Well actually there was a further paragraph I took Your Honours too which was to verify the declaration as well.

TIPPING J:

Well what is your client's case, Mr Miles, about how you – I accept that even with a solicitor it is arguable that this would put you on notice, as my brother says, but can you impugn the solicitor in the sense of being on notice, your client being on notice that there was something dubious about his independence or competence?

MR MILES QC:

It's just an irrelevance, Your Honour.

TIPPING J:

I beg your pardon?

MR MILES QC:

It's just an irrelevance, it's an irrelevance, because –

TIPPING J:

That's a fairly high-level point to take.

MR MILES QC:

Well, it's an irrelevance because of the nature of the loan. I keep coming back to the fact this is not a typical loan –

TIPPING J:

But if you get a certificate from a solicitor, apparently independent, apparently competent, saying everything's all right…

MR MILES QC:

But that doesn't –

BLANCHARD J:

But could the solicitor possibly give a certificate in circumstances where there doesn't appear to be the income to support the loan, because there's no asset to produce the

income, these people are investors. They're not in employment and there's no mention of any superannuation.

TIPPING J:

Well, it's come very nicely out of my brother's mouth, Mr Miles, but that has to be the argument, doesn't it? But ex facie this information, no competence, no reasonable lender would rely on a solicitor's certificate.

MR MILES QC:

And that is, the reason why I'm grateful to the way Justice Blanchard has put it, but the reason why the income stream and the asset is so important, is that this isn't a normal loan. It was recognised by GE that this was an asset, a form of asset lending, and I'll take you to that evidence in a moment. And what is more, it was a form of asset lending where they didn't require specific evidence as to how it could be met. But what a prudent lender would do, what GE says a prudent lender must do, is to satisfy itself that the loan can be repaid without undue hardship and, what is more, that is a paramount requirement. And the –

TIPPING J:

So can I put it to you this way: the crucial steps in your argument – because, frankly, we've been all over the place, and I don't mean that in any disrespectful sense. The crucial steps are that GE knew that this was a form of asset lending –

MR MILES QC:

Yes.

TIPPING J:

– but ex facie from what they knew from this statement about the Bartles and their assets the loan couldn't be serviced, and a solicitor's certificate in those circumstances doesn't cure the matter.

MR MILES QC:

Quite. Because there's an independent requirement by a lender to satisfy itself that these requirements have been properly met.

TIPPING J:

And now we've got a framework to sort of concentrate on.

MR MILES QC:

And that must be, it seems to me, Your Honour, that must be the case, because the law can't say a lender can set up a system of lending that it knows doesn't comply with its own requirements, or even if its own requirements are essentially unconscionable, but say, "But we require you to get a solicitor's certificate, and if with any luck the solicitor certifies it's okay, because certain solicitors are so incompetent that they are prepared to do so, we'll get away with it. If the solicitor says it's no good we've lost nothing, we've just lost that particular loan." But you can't escape the responsibility for sending out into the marketplace a loan that is, on the face of it, unconscionable.

TIPPING J:

And you're saying really that if ex facie on the assets and liabilities the loan can't be serviced, there's a duty to inquire further –

MR MILES QC:

Absolutely.

TIPPING J:

– and if you fail to do so –

MR MILES QC:

You take the consequence.

TIPPING J:

– you take the consequences of what the objective position may be.

MR MILES QC:

Exactly.

TIPPING J:

Is that a fair encapsulation of the argument?

MR MILES QC:

It is.

BLANCHARD J:

And I think you would be saying that that doesn't depend on any form of agency or attribution.

MR MILES QC:

Indeed, it doesn't, Your Honour, correct. And this is essentially, Your Honours, what the Australian Judges both at first instance and on appeal have said, although on occasion they have taken advantage of agency as well.

McGRATH J:

The impression I have from the Australian cases is that dealing with borrowers who are in sort of in extremis situations, that they're dealing with borrowers, for example, in one case, who had that constitutional type of disadvantage I think, if you like, language problems, or were having to refinance a loan that was already incurring, had already capitalised a lot of interest, they weren't dealing with people who were simply looking to improve their lifestyle by generating some more income and prepared to give security over their house for that purpose, is that not relevant?

MR MILES QC:

I don't think it's even right, with respect, Your Honour. In not one of the cases that we're relying on do the Judges say they come within those classic categories of disability.

McGRATH J:

Yes.

MR MILES QC:

Now, I accept that in one or two of the cases there are factors such as English not being the first language, but the key point is that all of those judgments have ultimately come to the view that it's unconscionable because of the form of lending and because of the knowledge of the lender. The form of lender being that it's asset based, with the security being the matrimonial home, and that they are aware that the loans can't be serviced. They're either aware because they know it anyway, or because of similar structures that we've got here, where they're deemed to have the knowledge of the agent.

McGRATH J:

What I'm suggesting is that there is a distinguishing characteristic in the Blue Chip arrangement, with Blue Chip committing itself to delete interest charges over the first four years, the property then under the tentative scheme to be sold.

MR MILES QC:

At least one of them, Your Honour, was one of the K ones, *Khoshaba* or one of the others, I'll come to it when I'm dealing with that.

McGRATH J:

Yes.

MR MILES QC:

But he was involved in a scheme to –

McGRATH J:

A pyramid scheme?

MR MILES QC:

Yes.

McGRATH J:

Yes, I'm not sure if it was quite the same sort of scheme as was proposed here.

MR MILES QC:

No, no, but it was an attempt to use what equity they had as an investment. I mean, he was the – I think there was a suggestion that English wasn't his first language, but –

McGRATH J:

You have to look at the nature of the investment though, don't you, and what obligations were being assumed in relation to servicing the loan from the investment.

MR MILES QC:

I don't think it matters what the investment is, Your Honour, so long as it is apparent, either because the lender has express knowledge or attributed to it, that the loan

can't be serviced without recourse to the primary asset, that's the heart of the reason why they're unconscionable.

McGRATH J:

I'm really suggesting to you that if you have to take it, look at the particular context, because the loan would have been thought by the Bartles to be serviceable, not from the primary asset but from the arrangement that the transaction involved with Blue Chip.

MR MILES QC:

Yes, yes, and –

McGRATH J:

It's a factor that has to be considered, and looking at the overall oppressive or unconscionable nature of this transaction.

MR MILES QC:

I think the reason that that factor has been overridden is because, at least in the view of the Australian Judges, what is inherently unfair about asset lending is the risk factor, that the lender has transferred all of the risk of the transaction to the borrower, because – not concerned about servicing the loan, because they know that ultimately they'll be protected because they can seize the asset.

McGRATH J:

I understand Justice Basten's well-expressed point that asset lending can be a sale, where there's no prospect of servicing the loan, but at the outset it seems to me that everybody thought there was every prospect of servicing the loan, a certain amount of risk, but every prospect of servicing the loan.

MR MILES QC:

GE had no idea, Your Honour, GE was unaware of the Blue Chip involvement, that's the difference. GE advanced 630,000 without having any idea as to how this could be serviced, other than through the assets that they knew about.

TIPPING J:

Well, there was a servicing gap of 30,000 a year, wasn't there?

MR MILES QC:

Yes.

TIPPING J:

Now, if you look at the assets and liabilities, they actually had about 100,000 free cash –

BLANCHARD J:

Yes, that figure was 50,000, not $50.

TIPPING J:

Yes. Am I right?

BLANCHARD J:

Yes.

TIPPING J:

So, they had 100,000 free cash, so they could keep it going for three years, which is not very far short of the target period –

MR MILES QC:

Where do you get –

TIPPING J:

– for realisation. They'd got the term investment and cash at hand of 98,000. Now –

MR MILES QC:

Well –

TIPPING J:

– what's wrong with that? I mean…

BLANCHARD J:

Well, I suppose that if GE had started to make inquiries, you have to ask what they would have asked and what they would have found out. Would they have had to make inquiries about the Bartles' other income, for example, and whether they could live off their –

TIPPING J:

Well their own self-assessment of that was that they had living expenses of about a half of their combined pension. They may have been living rather frugally –

BLANCHARD J:

So that would perhaps look all right.

TIPPING J:

It's all very well to sort of look at it after the event and say, oh dear there was a terrible crack, but the way to see this looking ahead, not nearly so straightforward.

MR MILES QC:

Well could I take Your Honour to the, to Mr Grant's evidence. Mr Grant was the –

TIPPING J:

Because frankly I think these are the points we should be concentrating on. The collateral material may be able to be fed in but these are the crunch points, I think, the ones you've helped identify.

MR MILES QC:

They're certainly significant, Your Honour.

TIPPING J:

Well I think they are the crunch aren't they? Everything else must feed into this framework.

MR MILES QC:

Well then you go into the agency issue.

TIPPING J:

Yes, sorry, putting the agency issue to one side.

MR MILES QC:

No I accept that, yes. Although it is, it is a crucial factor and I, and I keep going on about this, but it is a crucial factor that this was a form of asset lending.

TIPPING J:

Yes that's part of the framework.

ELIAS CJ:

I still, I think I understand your argument on that, but there is a question about whether the world had moved as to whether it is, or it was, inherently unfair.

MR MILES QC:

Um –

ELIAS CJ:

It's really another aspect of, I think, of what Justice McGrath is putting to you.

MR MILES QC:

Well I can – let's just –

ELIAS CJ:

I don't think you need to go back over it because I will reflect on the submissions you've made on that but I'm not sure that the, I'm not sure that we don't have to take account of the commercial reality at the time this loan was entered into.

MR MILES QC:

Well I don't disagree for a moment with that.

ELIAS CJ:

No. But you say the commercial reality was that asset lending is inherently unconscionable?

MR MILES QC:

It's –

ELIAS CJ:

Well an awful lot of it went on then?

MR MILES QC:

No, no, no. No, Your Honour. If I gave that impression I'm sorry. It's an important distinction. It's inherently unfair. It needs other factors before it becomes

unconscionable, and the other factors are knowledge that the loan cannot be serviced without recourse to the matrimonial home. That's the further factors that turn an asset loan into an unconscionable loan.

TIPPING J:

Did they get an updated statement of assets? This one – sorry, this one was the statement of assets for the second and third time around because it obviously – because it referred to 137 –

MR MILES QC:

Yes.

TIPPING J:

Yes.

BLANCHARD J:

They didn't know about the assets the first time around.

TIPPING J:

The first time round.

BLANCHARD J:

As Justice Tipping has just pointed out to you, there was $98,000 as a source of servicing here plus whatever rental they were going to get from the building.

MR MILES QC:

Well all I can say, Your Honour, is that Grant recognises that had they known what the true position is they would not have lent because it didn't comply.

TIPPING J:

That doesn't make it ipso facto oppressive to have lent because they – you seem to be very hung up on this failing to fulfil internal requirements but that doesn't necessarily demonstrate oppressiveness.

MR MILES QC:

No but what, what I think he was conscious of was that the primary concern all lenders have, including GE, is the servicing of a loan without recourse to the asset,

and he recognised that that was the primary source of servicing and on the Bartles income it was never going to happen.

TIPPING J:

Yes but they had money in the bank. They may have been perfectly entitled to speculate, to risk their $100,000 free cash, in return for some whopping capital gain. That's what they were on –

ELIAS CJ:

And indeed –

TIPPING J:

But they didn't get much of a share of it admittedly, but…

MR DALE:

I'm sorry Your Honour, 100,000 is an error. The Bartles, at various stages, were described as having 48,000, 50,000 and in the judgment the Judge said 65,000. They had a campervan which was valued at about 40,000 which variously appeared in the assets. There was never 100,000 in cash.

TIPPING J:

Well to make this add up you have to have 50,000 cash at hand don't you?

ANDERSON J:

Yes but it's a mistake. It's meant to be 50 but it's been totalled as if it were 50,000.

MR MILES QC:

I can –

BLANCHARD J:

Are you saying that the campervan refers to the 80,000?

MR DALE:

I'm not sure what – I'll find the correct references over lunch but I can tell you that the Bartles' evidence, and it was never in dispute, was they only ever had about 50,000 in cash.

BLANCHARD J:

Yes but what would GE have thought when it saw this document? If we're reading it wrongly maybe they could read it wrongly.

MR DALE:

Well they didn't say so, Your Honour, and the trial proceeded on the basis throughout that they had about that $50,000 figure that was – and I'll take you to that –

ELIAS CJ:

But that's not the answer though.

McGRATH J:

The references we need, Mr Dale, of what GE understood by this document. If you've got evidence of that.

MR DALE:

Yes I'll take you if necessary to the understanding.

McGRATH J:

Thank you.

TIPPING J:

So, well someone's picked the total and if they've got any arithmetical skills at all they could only have picked the total by taking the 50 and one might well think well 50's just such a trivial figure that no one would put that in.

BLANCHARD J:

Well it doesn't add up.

TIPPING J:

Exactly.

BLANCHARD J:

And the campervan looks like a clarification of motor vehicle number 2.

TIPPING J:

That's how I would read it. Furniture and personal effects 80. Cash at hand 50 and term, 48.

MR MILES QC:

Yes. Well we'll sort that out hopefully after lunch. But could I just come back to Mr Grant's evidence at page 815.

BLANCHARD J:

Which volume?

MR MILES QC:

Volume 4, at paragraph 28, the fastdoc 70 product was only available to borrowers who were unable to state their income. It was primarily an asset based loan. "If the borrower did have income, such as wages or salary, they should apply for a verified loan, et cetera. Given the information we now have about Mr and Mrs Bartles' financial position they wouldn't have met GE's serviceability requirements. Their pension was 21,000. Annual rental was said to 33,000 that's 29,500 less GST, combined gross income of 51. Alternatively the fortnightly procurement fee was 11,000. Combined with their pension this gives a total income before tax of 33,400. Applying GE's serviceability criteria we wouldn't have considered that to be sufficient to service the total loans taken by Mr and Mrs Bartle and their company."

So that's, I think, an entirely candid acceptance that this was an asset loan. That it didn't claim with their criteria to serviceability and had they known the true position, which of course was known to the agents, then they would never have lent. So again, Your Honours, depending on which way you ultimately go on the discussion we've just been having. But the issue of agency may well be important.

BLANCHARD J:

Was the GE guarantee, if I can call it that, drawn to Mr Grant's attention?

MR MILES QC:

The Blue Chip.

BLANCHARD J:

Sorry, the Blue Chip guarantee.

MR MILES QC:

I can't answer that, Your Honour, but I'm assuming – I mean, I'm sure at the time he gave his evidence that what he's looking at is, this is how we would have operated at the time with the knowledge we had.

TIPPING J:

What should the law be? With the knowledge they had it wouldn't have been on, but if they had gone on and looked at it fully, it would have been on. You understand what I mean, colloquially? It's unconscionable, if you like, with the knowledge they had, but if they'd actually acquired all the relevant information, it wouldn't have been unconscionable. Now, surely the law has to say, well, in the event this was not an unconscionable loan. The borrower's – sorry, the lender's knowledge, then, surely can't create what objectively is not an unconscionable loan into one that is unconscionable.

MR MILES QC:

If they are able to take advantage of their agent's knowledge, and if, as a result of that, it's clear that it is not unconscionable, then I would have difficulty seeing how the loan could be so declared.

TIPPING J:

I'm only talking hypothetically at the moment, Mr Miles.

MR MILES QC:

I understand, yes.

TIPPING J:

But surely the law can't be that objectively it's all right, not oppressive, but simply looking at it from the point of view of what the lender knew, it was oppressive. That doesn't seem to me to make any sense.

MR MILES QC:

Well, I'm not sure about that, Your Honour, because if, on the knowledge that the – if, on the basis of the knowledge the lender had, it was unconscionable, then on what basis would the lender ever had lent?

TIPPING J:

Well, it's just the lender's good luck, in a sense. When you look more widely, you find that it wasn't oppressive. Because unless it's objectively oppressive, I wouldn't have thought the question of the lender's knowledge comes into it.

MR MILES QC:

Well, I'm not sure that that's how the Judges have looked at it.

TIPPING J:

Well, I'm not too worried about how the Judges have looked at it, Mr Miles, unless there's a very high level of persuasive reasoning there. Surely the first question is whether it is objectively oppressive. If it is, then you look to see whether the lender's mind went with the objective oppression, if you like. If it's not objectively oppressive, how does the lender's mind come into it?

MR MILES QC:

Well, I'm just wondering in what circumstances that could arise. If we've got a loan which is objectively oppressive, for all the reasons I've been advancing, I'm just wondering in what circumstances, apart from the legal advice, which I have discounted, I'm just wondering in what circumstances –

TIPPING J:

Well, I'm not going to debate with you. I'm just putting the proposition out for consideration. You or Mr Dale might like to come back to it, briefly. But it's just the way my mind is presently running. It may not have any application to this case. It may.

MR MILES QC:

Yes. Well, I would say, Your Honour, that it of course doesn't have application here, because if they're fixed with the knowledge of the agent, then they must be taken to know what the actual financial position was, which was not reflected here.

TIPPING J:

Well, your answer is really that this is obviously oppressive objectively.

MR MILES QC:

Yes.

TIPPING J:

Yes, so we may not get to the point on your argument. I'm just guarding myself against the proposition that one might not be with you on that.

MR MILES QC:

Quite. But if one then moves, then, into the agency issue, I accept that the agent was aware of the Blue Chip involvement, but that we would say that ought to be discounted, and would have been discounted by GE because of the lack of any – the very badly drafted joint venture agreement, which gave no support at all to the Bartles, and the inherently unsupportable scheme which Blue Chip was promoting.

TIPPING J:

I understand that.

MR MILES QC:

So what GE would have been considering, if it had all the knowledge of the agent, was the agent is controlled by the developer.

TIPPING J:

I'm awfully sorry. I didn't mean to induce you to go through all the arguments in this case again. I was just asking for your help on what may be an irrelevant hypothetical.

MR MILES QC:

Well, I'll get back to you on that after lunch, Your Honour.

ELIAS CJ:

It may turn on the difference between unconscionability principles and application of section 120, which Mr Dale is going to address us on.

MR MILES QC:

It may, Your Honour, but on my argument, I think it would be –

ELIAS CJ:

Both.

MR MILES QC:

It would be both.

ELIAS CJ:

Yes. Mr Miles, since you kept mentioning "after lunch", can I have some indication of how much longer the respondents expect to be? Because we will have to make some arrangements.

MR MILES QC:

I would certainly go to lunchtime, but I can probably be quite quick when I get on to the legal principles, I suppose, that one can take from the Australian judgments, because Your Honours have already had a look at those. So hopefully I'll be finished, if not by lunchtime, very soon afterwards.

ELIAS CJ:

And Mr Dale? How much time does Mr Dale require?

MR MILES QC:

I'm not entirely sure, Your Honour.

ELIAS CJ:

Mr Dale, how much time do you require, do you think?

MR DALE:

An hour, Your Honour.

BLANCHARD J:

Are we going to be taken to the joint venture document at some stage?

MR DALE:

What I was going to do, Your Honour, if it'll help you, is direct you to Mr Nolan's evidence, because the transaction itself is explained in considerable detail –

BLANCHARD J:

He analyses it?

MR DALE:

He analyses the lease, everything about it.

BLANCHARD J:

Thank you.

ELIAS CJ:

All right, well, just to give counsel warning, we'll look at sitting late and taking an afternoon adjournment at 3.30, if need be.

TIPPING J:

We'll look at it.

ELIAS CJ:

We'll all look at it. We're all making changes to our programmes.

MR MILES QC:

I'm grateful to Your Honour.

ELIAS CJ:

Do counsel have a problem with that, is what my enquiry is.

MR MILES QC:

No, no. Mr Grant was cross-examined on – yes, he was questioned by the Judge at 855 and 856, and it's perhaps worth going to those replies. You'll see halfway down, at about line 23 at page 855, His Honour said, "And a declaration about affordability, but I assume that you currently recognise that if the borrower didn't have the ability to service the loan at $60,000 a year, that you'd be left with having to rely on the security to recover your loan in a default?" "That's correct. But I also said in my evidence that if we were made aware, for one reason or another, of what the income actually was, and it wasn't in line with the declaration on affordability, that we wouldn't proceed with the loan". "And I suppose you also rely on the provisions of the various agreements Mr Dale has taken you through that if TML became aware of some adverse circumstance that might affect the borrowing, they had to tell you?" "Yes". "And if all else failed, you relied on your insurance company. Is that putting it all too simply?" "I think it sums it up well".

TIPPING J:

Well, the insurance company will pay out and then be subrogated to the mortgagee's powers.

MR MILES QC:

Presumably. Whether the – I'm not sure whether the insurance company is –

ANDERSON J:

It would be an unusual insurance company that didn't claim rights of subrogation.

MR MILES QC:

Oh, no doubt about that. I think the issue is whether they paid out at all.

ANDERSON J:

We're talking about hypothetical.

MR MILES QC:

Yes, quite. Now, I think I can return to the – well, I'm not sure I've actually been near my written submissions so far, but if Your Honours have it, in the first few pages, we do refer Your Honours to the article by Dr Paterson, which you'll find in tab 5 of our bundle. It's an article that's published in 2009, and it does discuss a number of the Australian cases. So it really extracts, I suppose, a principle, from those cases based on the phrase "transactional neglect", is the phrase. She actually takes that from an article by Professor Bigwood. But she says that it's that concept which underlies the various judgments in the Australian Courts. But at the heart of it is the views that asset lending is, per se, unfair because of the switch in risk, and that it puts lenders on notice, and the further factors which I have talked about are enough to tip the transaction into the unconscionable level. We also refer to paragraph 13, to the Engel & McCoy article.

ELIAS CJ:

Are you taking us to this article by Paterson? We've all turned it up, but we didn't need to.

MR MILES QC:

Well, I'm just conscious of time, Your Honour. I would love to take you to a number of the paragraphs in it, because it's a helpful and –

TIPPING J:

Name the paragraphs so we don't spend our time looking for them.

McGRATH J:

The second paragraph is quite interesting, isn't it? "Asset-based lending is not necessarily problematic. Even the use of the family home as security may be a way for borrowers with no regular income to access credit for improved lifestyle".

MR MILES QC:

She goes on, however.

McGRATH J:

It does, and it contrasts that situation with vulnerable borrowers who don't understand the nature of the risk and assuming otherwise are unable to look after their own interests.

MR MILES QC:

Well, yes. But that rather very basic distinction is – there's a much more nuanced response to that distinction further on.

ELIAS CJ:

It is not infrequently utilised, though, by, as we discussed yesterday, by elderly people to see out the rest of their lives in comfort. But your submission is that that is inherently unfair.

MR MILES QC:

In those circumstances where the contracts are carefully structured so that you don't lose the family home –

ELIAS CJ:

During your lifetime. Well, you often have to gamble on that, don't you? If you live a long time.

MR MILES QC:

Yes, but no Court is going to interfere with that, and the whole point of that is that you're using – in other words, the risk factors have been balanced. You make the

decision that you'll actually – you'll utilise the equity in the home, but the home is safe for as long as you –

BLANCHARD J:

The lender takes the risk that if you live to 100, there may be no equity.

MR MILES QC:

Quite. So there is risk on both sides. That's fundamentally different from this form of asset lending, where the risk is transferred completely to the borrower.

McGRATH J:

What I think this exchange indicates is that one has to read the whole article, because otherwise it's just picking the currants out of the cake, isn't it?

MR MILES QC:

And that's what I would invite Your Honours to do. The next article, *Turning A Blind Eye: Wall Street Finance Predatory Lending* (2007) 75 Fordham L Rev 101, which is at tab 6. Again, if Your Honours had a spare couple of hours you'd find it interesting. I can refer you to a few paragraphs there, and it's interesting because it picks up the bigger social issues, the impact that this form of lending has had on society generally. You'll see it at –

ELIAS CJ:

What's the date of this article?

BLANCHARD J:

2007.

MR MILES QC:

I think one can say that the concerns expressed in this article were amply borne out by what happened in the next couple of years. Page 105, where they set out characteristics of predatory lending, and we say paragraphs 1, 2 and 3 all have some characteristics of our loan. Page 138, where they look at the harm that this form of lending does to borrowers and communities. At page 147, there's just a discussion on how this form of lending encourages forms of fraud. They talk about whiteout information on loan applications, documents with income and asset information

blacked out, inferences that the borrower's income or assets were too low to qualify for a conventional loan, et cetera. It's just interesting because you get the bigger picture, that you can see that in this form of lending, there are systemic problems, which is why the Courts have reacted the way they have. At 14 in my submissions we set out, just in a broad way, that these features which I was talking about in a previous page are present here. A US lender adopting lo-doc lending practices. The loans were securitised. Grant specifically says that in his evidence. In other words, they were operating a pool of mortgages which they would either on-sell or were intending to on-sell. Lending process structured around so-called independent contractors, et cetera, and the declaration. They relied solely on the asset ratios, the lo-doc declaration, the mortgage insurance. Discuss Paterson. At 46, we set out the significant benefits for Blue Chip. Payment of working capital, that was $50,000. Brokerage fees, $16,000. 89% of the capital gain, and the underwrite fee of $75,000. All the reasons why it was unsatisfactory for the Bartles. The finding of fact that the Bartles' lack of appreciation of risks was understandable, that's at 48.

ELIAS CJ:

Mr Miles, we have read the submissions. You may be wanting to stress some points with the benefit of the argument you've already addressed to us in our minds.

MR MILES QC:

Can I go, then, to the agency issue. That starts at paragraph 62. His Honour Justice Randerson sets out the agency principles in a helpful way. You'll find that at paragraph 251 onwards, where he sets out a series of broad propositions, then discusses *Nathan v Dollars & Sense Ltd* [2008] 2 NZLR 557, discusses *Branwhite*, all of which we rely on. *Branwhite*, you may recall, that was the House of Lords judgment dealing with hire purchase and car dealers, and the finance company just prepared the forms – sorry, the car company prepared the forms and they were sent off to the finance company, and, of course, the finance company ultimately had the say, and the Court split. Lord Wilberforce and Lord Reid provide a pretty formidable minority, with Lord Wilberforce in a quote which we put in here, saying essentially it was the car dealer that did all the work and the finance company essentially rubber-stamped it. The Law Lords all said there's no emphasis one way or the other as to whether you are an agent for the borrower or agent for the lender. That's just an issue of fact. The majority held that there wasn't sufficient agency there established, but if you're looking at it purely from the big picture, we agree it's an issue of fact as to whether you're an agent or not, and ultimately the issue is whether you stand

sufficiently in the shoes of the lender, a proposition that was ultimately picked up in *Dollars and Sense*. Just on that point, Justice Randerson concluded, I think, that part of his judgment on agency, where he ultimately held – wrongly, we would say – that agency hadn't been established, but he said had I found agency, then I would have – I think he went this far. I'll check. But he went so far as to say he would have found the contract to be unconscionable. Now, I'd just need to be sure about that. I'll come to that.

Can I come, then, to the Australian jurisprudence. You will find it helpful because they're a few years ahead of us in the sense that they're dealing with this form of lending. We do have the advantage now, this considerable grouping of cases, both the first instances on appeal. It seems to me, Your Honours, that we can get the principles that one takes from these, and the first I would take from *Schmidt*, and if we just go to that. That's tab 4 of our bundle. If you go to paragraph 194, His Honour started this discussion distinguishing between the two groups, if you like, the two forms of disadvantage. He said, "In recent years, disadvantage has been described as falling into two categories".

BLANCHARD J:

We had this passage read to us by Mr Farmer, and he went through various propositions on the next page as well.

MR MILES QC:

I'm obliged to Your Honour.

ELIAS CJ:

It might be helpful if you'd simply indicate to us the proposition that you want us to take from the case, Mr Miles, because we have been through a few of them.

MR MILES QC:

Well, I was just starting with that distinction. The principles, I think, are these, that asset lending on the security of an asset, rather than relying on a borrower having sufficient income to repay the loan, has the potential to be unconscionable. The unfairness in that form of lending is the imbalance of risk. I've discussed that principle with Your Honours. You find that concept in *Riz v Perpetual Trustee*, which is in the appellant's bundle at tab 2 at paragraph 70. That paragraph is adopted by Justices Arnold and Hammond. You find similar propositions at *Kowalczuk v Accom*

Finance Pty Ltd [2008] NSWCA 343. That's appellant tab 19, between paragraphs 96 and 99. *Khoshaba*, paragraph 1 to 8. *Permanent Trustee Company v O'Donnell* [2009] NSWCA 206, paragraphs 379 to 381. *Perpetual Trustees Australia Limited v Schmidt* [2010] VSC 67 197 to 200. The next step that a lack of regard to the ability of the borrower to repay the loan knowing that it was secured on the matrimonial home, amounting to unjust or unconscionable conduct, you have *Elkofairi v Permanent Trustee Co Limited* (2003) 11 BPR 20, 841, paragraph 225.

ELIAS CJ:

Where do we find it in the casebook?

MR MILES QC:

Well, I'm not sure. It's cited in *Schmidt*.

ELIAS CJ:

Because we weren't taken to that case.

MR MILES QC:

No. But it's referred to in Paterson, and you'll find that Paterson actually discusses three or four of these cases, and there's a relevant analysis in Paterson. That paragraph is cited in *Schmidt* at paragraph 202.

TIPPING J:

Is that where the matrimonial home is known to be involved, and that tips it from presumptive to actual?

MR MILES QC:

Exactly. And *Khoshaba* and *Kowalczuk* and *Schmidt* come to the same conclusion using the same paragraphs that I've already referred to. You'll find similar sorts of transactions as this in *O'Donnell*, and if you look at paragraph 336 to 362, you'll see a similar structure with a lender outsourcing all its functions, and also in *Khoshaba* at paragraphs 102 to 103. There the failure to follow the lender's guidelines was seen as a significant factor. Again, at *Kowalczuk* at paragraph 102. At *Khoshaba*, 80 to 82.

ELIAS CJ:

You have these references on a piece of paper, do you, Mr Miles?

MR MILES QC:

Yes, I do.

ELIAS CJ:

It might be sensible to pass it in. Photocopy it over the luncheon adjournment.

MR MILES QC:

Yes, I'd be delighted to.

ELIAS CJ:

Where do we find *O'Donnell* in the materials?

MR MILES QC:

Tab 16 of the appellant's bundle.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.19 PM

MR MILES QC:

Ma'am, I just want to conclude by, two points, one very quick and the other which will take a couple of minutes.

The first is the reference in the judgment of Justice Randerson to the findings that he would have reached absent agency. The judgment is at paragraph 342 and he says, "The general proposition I accept that a lender who advances money with actual constructive knowledge that the borrower has no means to meet his commitments under the terms of the advance may in some circumstances be taken to have acted unconscionably and a breach of reasonable standards of commercial practice. But the existence of any such knowledge on the part of GE has not been established in this case." And it was essentially his finding that there was no agency, that resulted in that conclusion.

Now, the last point I want to touch on, which I was planning to conclude, on the issue of what was in the AMS file and the significance of it, and I got a little diverted on the topic of that asset analysis. But Your Honours may recall that I was saying that I would conclude that analysis by referring you to the three -or four - page analysis of

what AMS actually did when they were presented with the application for those two further loans – the top-up, you remember, on the first loan, and the second loan of 366,000. And you find that in volume 9 at pages 2006 through to 2010. And you remember, Your Honours, that essentially I said this was a sort of box-ticking exercise and that, I think, is a fair description. You start at page 2007 and you'll see, it's obviously a computer printout, it refers to the Bartles. You'll see on the top right, "Assessment type D-A-O-F-D-C," I assume that's fastdoc, then on the left-hand column you've got who introduced it, you've got the principal amount, 366,291, down the bottom you've got the insurance details, on the right-hand column you've got, about six lines down, the term, "Loan 30 years, first payment due," et cetera. Now down the bottom you'll see that they, in handwriting, they recognise now that the total loan is 629,000, but you'll see they've queried the reference to "self-employed investor" – "Ask what sort of investor" –

McGRATH J:
Sorry, what page are you on?

MR MILES QC:
2007.

McGRATH J:
Yes, thank you.

MR MILES QC:
Unfortunately, GE didn't call the person who approved this loan, so we don't know what this handwriting refers to, but certainly the issue of – they've raised, they've queried the self-employed investor. And the next note, "135 Symonds Street," that was address of the apartment, maybe that's the answer, I don't know. And then, "GST declared," et cetera. So that's the extent of the checking on that page. Over the page, they refer to, "Loan debtors, mortgages and guarantors," and they are set out. You'll see a reference to "Occupation" – nothing, unless that's – no, no, there's nothing there. "Annual income, nil, net worth, nil," and similarly for the guarantor. And then over the page, which is really the third page of this analysis, you'll see that this is discussing Dorothy Bartle, she's described as, "A professional, net worth, nil," "Number of properties, total valuation, 527, 545," then you've got the loan value ratio, "69.43," the limit was 70, so they've managed to slide it in there. "Current valuation, 527, purchase 552," so they're on notice that this is a, that the purchase price

appears to be over the valuation, and of course the loan itself was for 630, so that's significantly over. On the next segment there's the reference to interest, and you'll see the margin remittance there, that's the 0.28%, which was the rebate that went to the agents, and the term of the loan is on the right-hand side of that segment. So, that's it, that's the assessment. No concern about income, other than the references to, "Apparently nil income." The sole reliance is on the valuation of the investment property and a reference to the ratio being 69.43, takes into account the – oh, yes, that's the – I wonder whether that's –

ANDERSON J:

I think one has to make a note though, Mr Miles, that this document was created on the 6th of September, and the 29-page fax came in on the 9th of September – sorry, no, is that wrong – nine five…

MR MILES QC:

It's five –

ANDERSON J:

I've got the months wrong.

MR MILES QC:

Yes, it's five –

ANDERSON J:

Forget about that.

MR MILES QC:

Yes, yes, Your Honour, it's 5 September. So that's it. I think one can legitimately say that all of the essential responsibilities of a lender had been outsourced and, as a consequence, all the lender had to do in these circumstances was simply tick what was supplied.

ANDERSON J:

I don't know whether it's actually significant –

McGRATH J:

Mr Miles, could I just ask you to look back at 2006? I just wondered, if you were treating that as significant, I just see at the bottom, just above the printed name, "Tracy Ziegler" on the left, there's something, the word "approval" appears, and a signature below. So does that have any significance?

MR MILES QC:

I think it just – yes, to the extent, Your Honour, I think it confirmed, well, I think that must be just, that's just the approval, –

McGRATH J:

Yes.

MR MILES QC:

– the formal.

McGRATH J:

Does that mean that this page, which is dated the 6th of September –

MR MILES QC:

It's the 6th.

McGRATH J:

– as opposed to the 5th for what follows, indicates it's the processing of what follows?

MR MILES QC:

It does, it does, Your Honour. Yes, and just looking at that document you see the – yes, the total exposure is at the top left, of 629,540, and then the two security details, the Symonds Street at 527 and the Whangarei property at 405.

ELIAS CJ:

The indication of verification relating to willingness to repay is as to credit checks and repayment history checks, which they cleared?

MR MILES QC:

Yes, Ma'am – well, I'm assuming they certainly took, they would have certainly undertaken a credit check.

ELIAS CJ:

I think Mr Farmer said that to us yesterday.

MR MILES QC:

Yes.

McGRATH J:

And by this time they believe they're self-employed for a year?

MR MILES QC:

Yes. And while that was GE's understanding, of course TML, Tasman was well aware they weren't.

McGRATH J:

Yes.

ELIAS CJ:

What's "Clear CRA"? Oh, that's the credit –

BLANCHARD J:

That's the credit check.

ELIAS CJ:

Yes, it's not a consumer credit contract, is that right?

BLANCHARD J:

Credit rating agency.

ELIAS CJ:

Oh, credit, oh, sorry, I was thinking it was the certificate that had been signed.

BLANCHARD J:

I had earlier asked Mr Miles whether GE knew that the second loan was to be used for the purchase of the apartment. I am raising that again, although now that I see that GE had details of the assets, I think it must have been apparent that at least part of that loan would go for that purpose.

MR MILES QC:

I think and when you look at the approval form, where you've got the, and I'm looking at 2006 where they are linking the new loan with the existing exposure. Now, the existing exposure was the –

BLANCHARD J:

First and second loans?

MR MILES QC:

Yes, well, the first and the top-up, yes and whether you call the 366 the second or the third is by the by, but they are linking that with the, with those two securities. I don't think there is much doubt that GE recognised it was for the same transaction.

TIPPING J:

I see they have a terminology in the box about income, under where it says fastdoc application, they refer to it as a sanity check, which presumably is a self-question as to whether the borrowers are being sane in entering into the transaction.

ELIAS CJ:

And it's not applicable.

TIPPING J:

So there is no necessary sanity check here?

MR MILES QC:

Yes.

ELIAS CJ:

But that's because it is a fastdoc application and they are not verifying the stated income.

MR MILES QC:

Yes, although it is a bit odd because their own, their own requirements oblige them to be satisfied that this could be paid, the loan could be serviced.

ELIAS CJ:

Depending what 4.4 means.

MR MILES QC:

Ah, yes.

TIPPING J:

But it may be some evidence that reasonable commercial practice involves the sanity of the loan, or the sanity of the underlying transaction which the loan is designed for.

MR MILES QC:

Well, and I would agree with that entirely Your Honour that, and there is that sense, of course, coming through too from the Crown's evidence that you have to be, that you know, the asset, when they recognise that this is asset landing, it is paramount that they, that they can be satisfied that it can be paid without hardship.

TIPPING J:

And the whole of that box is under the heading, "Fastdoc."

MR MILES QC:

Yes.

TIPPING J:

So it would suggest that the fact that it is a declaration doesn't exclude a sanity check, I mean, this is getting a bit pedantic like construing oil, but and obviously one mustn't look at it that way, but it is a bit odd.

MR MILES QC:

And you got a hint of that of course when you got their handwritten notes, self-employed investor, "ask what sort of investor". What one assumes they're saying is, are there assets there which would be part of the investment which could enable them to repay the loan, other than the one in which they are building.

TIPPING J:

Because I was wondering about whether there was external evidence about good sound commercial practice in relation to these sorts of transactions, external that is to the parties and I'm not sure that there was much, but anyway.

MR MILES QC:

Mr Dale can –

TIPPING J:

Mr Dale can no doubt advise that.

BLANCHARD J:

What did servicing ratio mean, in about the third or fourth line of the document?

MR MILES QC:

No, I can't help Your Honour, Mr Dale can sort that out.

MCGRATH J:

I take it, did you say that the people who approved the loan did not give evidence?

MR MILES QC:

Correct.

MCGRATH J:

So neither of the two names at the bottom, Tracy Ziegler or Priti Goundar, gave evidence?

MR MILES QC:

No, oh.

MR DALE:

Mrs Ziegler did give evidence Your Honour.

ANDERSON J:

Mr Miles, the notation –

ELIAS CJ:

Who gave evidence? Sorry, who gave evidence?

MR DALE:

Tracy Ziegler, she wasn't the one that actually approved it, but she –

MCGRATH J:

She was the supervisor of the person who approved it.

MR MILES QC:

Oh, team leader, yes.

BLANCHARD J:

Didn't it have to go to her, because once she got to the third line, it was over the approval level of Ms Goundar, I think there was evidence to that effect.

MR MILES QC:

Well, Ma'am if there's nothing else, those were my submissions and Mr Dale will take over.

ELIAS CJ:

Thank you Mr Miles.

ANDERSON J:

I just wanted to mention the nil income references on page 2008. One would take from that, I imagine, that income is irrelevant on a fastdoc 70 application?

MR MILES QC:

Yes.

ANDERSON J:

So that's how they indicate that it's a fastdoc 70 application?

MR MILES QC:

Yes.

ANDERSON J:

But also, this line on the first page, they regard the reasonableness of the income irrelevant on a fastdoc application?

MR MILES QC:

Yes.

TIPPING J:

Well, as Mr Grant said, in this, they rely on the self-certification, they don't regard it as irrelevant, they rely on the self-certification. I think in that passage you read to us just before, but anyway I don't want to prolong the agony Mr Miles.

ANDERSON J:

Not applicable rather than irrelevant.

MR MILES QC:

Yes, yes, yes.

ELIAS CJ:

Thank you Mr Miles. Thank you Mr Dale.

MR DALE:

As Your Honour please, what I propose to do is to, as quickly as I can, correct some errors or clear up some issues of fact, give you an idea about the way the case was presented in the Courts below and the emphasis we had, and then to deal with the legal issues, in particular the Act, and I will do that in order of the volume to go through these reasonably quickly. Firstly, in relation to the Bartles' assets. There is some confusion here and Your Honours have picked that up. Throughout the case the position was that the Bartles had only $65,000 –

TIPPING J:

The actual position, not what GE understood the position to be.

MR DALE:

No, you're right, and there was that confusion. The case was only ever argued on the basis that they had 65,000. No one ever had the foresight to put the case the way Your Honour Justice Tipping is developing it, well, they had $98,000, they can have recourse to capital. That was never argued in the High Court, or the Court of Appeal. It was never put to the Bartles that they had 98,000 and it was never suggested that they could have recourse to that to rely upon the loan. Quickly, the evidence references in relation to their assets. Volume 2, page 282, they said they had $40,000 and at page 295, the amount of $65,000, which was the correct amount and in the judgment, His Honour Justice Randerson made a finding that they had assets of $65,000, and I just lost the page reference, but there was reference in the

documents to this $98,000 figure. Your Honour is quite right and it was referred to in cross-examination, but it wasn't an aspect of the case that ever received any attention of any note until today and was not part of the argument. So, that's the position there.

Now, sorry, I've just mislaid that. The Randerson reference is paragraph 17 of His Honour's judgment at page 79, although he did make reference to that $98,000 figure but never made any finding, he never addressed any argument about it, because it wasn't the way the case was run, it's just one of those aberrations which I think arose out of the fact that someone misread the numbers and of course, right from the start, the Bartles position and on the forms that they ever filled out was that they had 65,000. The second factual issue that I wanted to take you to was in volume 3, which contains the evidence of Messrs Nolan and Mathias.

Dealing firstly with Mathias, because we can deal with that quickly, Your Honour Justice McGrath asked if we had challenged his independence. I tested his independence. At that stage, we didn't have some of the information that we have got now, but the fact of the matter is, we didn't – we weren't able to say he was other than independent. We were certainly able to say he was tame, and that his advice was woefully inadequate, as it was in every –

TIPPING J:

Well, it's hardly independent. It seems to be somewhat conflicting. You can't be both tame and independent, surely.

MR DALE:

Well, you can. You can be entirely independent but not have either the foresight or the wisdom to speak out and mention what you should say. You might be tame in the sense of you've become so used to doing these transactions that you no longer think it necessary to give the kind of advice that ought to be given.

TIPPING J:

Does tame here mean not very smart?

MR DALE:

Yes, it does.

ELIAS CJ:

Are we going to be helped by speculating about this matter? I mean, if you're making a submission, shouldn't you take us to the findings in the evidence?

MR DALE:

No, I'm dealing with it because what the argument is going to be, and I'll take you there when I deal with the Act, is that legal advice is just one of the factors and the adequacy of the advice is one of the factors.

TIPPING J:

So we can proceed on the basis that Mr Mathias was independent, albeit a little –

MR DALE:

Yes. I couldn't properly make a submission in the Courts below, and I didn't.

McGRATH J:

Thank you, Mr Dale. That's helpful. Did you give us a page reference for volume 3?

MR DALE:

For Mr Mathias, no, I didn't. I wasn't planning to take you to any particular passages. I can give you references, if you like, to a number of people that he acted for.

McGRATH J:

If you're really accepting that he was independent, then we needn't go down that road. You're properly saying that's the basis on which the case was run below?

MR DALE:

Yes. I just mention that there are other cases like this, and there may be different arguments later. But what I was wanting to take you to was the evidence of Mr Nolan in volume 3. His brief began at page 541. Given we have little time, what I was going to suggest was that his evidence needs to be read with care, because he gave evidence principally in respect of the claim against Mr Mathias, and as to whether Mr Mathias had breached his duty of care. But the evidence is illuminating in that he analyses every aspect of the transaction. That begins, effectively, at page 543, when he examines the Blue Chip package, the purchase contract, and the commitment, over the page. How much they were paying. Then he deals with the property management agreement, which they signed at page 545, the payment of a deposit.

You'll see on page 546 they paid very substantial fees, a brokerage fee, evaluation, joint venture fee, and working capital. As he points out later, there was no legal obligation to pay any of those fees. They just were invoices that were delivered and paid by Mr Mathias.

He then discusses briefly the joint venture agreement, the narrative, over at page 547, completing the purchase, and then discusses at page 548 the issue of the wisdom of the transaction and the advice that a reasonably competent solicitor should have given. He then listed, at page 549, the risks, and they were significant, that should have been addressed, and you'll see that they run to some three pages, and he concluded at paragraph 42 page 551, having regard to their age, status, limited financial resources, I have no doubt that a reasonably competent solicitor would have advised the first plaintiffs that the risks they faced were so great that they should refrain from entering into the transaction. He then goes on to say there were numerous legal issues. One was they were purchasing off –

TIPPING J:

So that's his punch line? The risks were so great that the advice should have been not to have a bar of it?

MR DALE:

Correct.

ANDERSON J:

Was the apartment a leaseholder state or a freeholder state?

MR DALE:

Freeholder, I think, from memory.

ANDERSON J:

It's just something I saw in an evaluation. It might have just been a comparative comment.

MR DALE:

He then goes on, so you've got, if you like, some standing-back commercial wisdom in terms of their circumstances, but then he goes on to address the legal issues. Every part of the transaction was fraud. Firstly, he addressed the deed of lease, the

fact that it was, for example, unspecified initial term, contained the right of an option to purchase, the right of first refusal, there were issues about the Residential Tenancies Act, and that it was – he said, for example, page 553 paragraph 52 that the lease included breach of a guarantor, it couldn't be referenced to that until all rights and remedies had been exercised against the lessee. Property management agreement with higher fees. You may get the impression from this that Blue Chip and its various entities were clipping the ticket at every turn, which was precisely what was happening. Then on to the joint venture agreement, which is a truly awful document. I won't take you to the agreement itself, because there's a very good summary of it in these paragraphs. Parts of it are irreconcilable, but notably, it contained an obligation on the Bartles to take all of the risk in terms of committing their home and assets, and Blue Chip Joint Ventures Limited, its obligation was to arrange the funding, and yet the Bartles were still paying a brokerage fee. So it made no sense at all. So he lists the very considerable problems with that document.

Page 555 paragraph 68, he mentions that the loan itself at subparagraph a, but secondly, the obligation to pay any operating cash shortfall would only be triggered once the working capital facility had been exhausted, and that working capital was the $55,000. I took Mr Mathias to this, and asked him to show me where their working capital obligation arose, and, of course, he couldn't point to any actual obligation itself. Mr Nolan went on at page 556 to point out further problems with the document, and internal inconsistencies, and dealt with the general scheme at paragraph 77 on page 557, and concluded on the next page, at 78, that it was "complex, confusing and ambiguous". In the last sentence, "It made no mention of the purchase price, the property, the amount of the borrowings, the amount or even the existence of the working capital facility" –

TIPPING J:

What put GE on notice that it was so terrible, as your submissions are suggesting?

MR DALE:

Well, of course, GE's case right from day one was that it wasn't on notice. Just as an aside, when we began this case, we assumed that GE's position would be rather as Your Honour had put it, well, although we lent to people who were on a modest income and in modest circumstances, we relied throughout on their having the support of a public company which looked like it was all right. On that basis, it would

be difficult to have made out a case for oppression or remedy. So that's very much how we saw it at the beginning. What changed the case, and what is central to this case, was the existence of the correspondent and operation deed. That took us to the ground upon which this case was fought, because Mr Stewart, in both of the Courts below, relied strongly –

ELIAS CJ:

Do we really need to have the history of the – I'm just really trying to understand the submission that you're making on this.

TIPPING J:

I thought I'd asked a relatively simple question, yes.

MR DALE:

I'm sorry.

TIPPING J:

What factors put GE, either personally or via their alleged agent, on notice that this transaction was as terrible as you're suggesting it was?

MR DALE:

Well, I'm about to take Your Honours to the relationship between TML and Blue Chip, and then I'm going to give you some law –

TIPPING J:

Are you not able to answer that question in a more direct way?

MR DALE:

The answer is agency, the answer is agency.

TIPPING J:

You say the answer is that TML –

MR DALE:

Yes.

TIPPING J:

– either knew or ought to have known –

MR DALE:

And that is, that is –

TIPPING J:

– that this transaction was so terrible?

MR DALE:

Yes.

TIPPING J:

Thank you.

ELIAS CJ:

Is it in contention that TML knew the Blue Chip arrangement?

MR DALE:

No, and have not known.

ELIAS CJ:

So we don't really need to go to that do we?

MR DALE:

Well no, but what I was trying to illustrate was that what TML knows about the transaction is that it's truly awful. It's awful because it's – contains no –

ELIAS CJ:

Well I hadn't understood that anyone thought that it was other than awful.

MR DALE:

No the question, the question's been posed in various ways as to what is wrong with the transaction, whether GE could have stood back and said, it's all right.

TIPPING J:

But you fail on this point if there is no agency. In other words GE itself was not on notice that the transaction was awful. But that TML was or – so unless you can link the two, you're down on the proposition aren't you that there was knowledge of the awfulness?

MR DALE:

Well we certainly ran the case on that the agency's to the forefront. I also argued in the Court of Appeal that –

TIPPING J:

Well Mr Dale look if it's not possible for you to give me a simple answer please say so, but that doesn't answer my question.

MR DALE:

The answer is, the answer is that agency is our primary ground. The second, the alternative –

TIPPING J:

What is your ground absent agency – on this particular point?

MR DALE:

That GE had no objective grounds for believing the Bartles could pay.

ELIAS CJ:

That's the argument that Mr Miles has put to us. So yours is the fallback position if it's necessary to go the agency route?

MR DALE:

Yes. Yes, agency though is the answer, that's the forefront of our case, it always has been, and I was just trying to illustrate that in the Courts below, Mr Stuart's argument was that it's a presumption in favour of agency being between broker and borrower and that the importance of the *Branwhite* case and even *Credit Investments* is that there is no presumption, it's a question of fact, it's driven by the contract documents and that the contract documents create an agency relationship. If that's so, then this material in front of you is relevant to what the agent knows and that knowledge is attributed to the principal. That's it in a nutshell.

So in terms of what was wrong with the transaction, Mr Nolan's evidence comprehensively is just about everything, because from the outset Mr and Mrs Bartle were completely at risk. And one of the problems – just one of the many problems was that the only company that was providing any support to this transaction was not Blue Chip the group, it was Blue Chip Joint Ventures Limited which is a $100 company.

The next document, document 4, sorry volume 4.

McGRATH J:
Was that referred to by Justice Randerson?

MR DALE:
Pardon?

McGRATH J:
Was the low capitalisation of the Blue Chip company referred to be Justice Randerson?

MR DALE:
Yes, yes. It mentioned that all of His Honour's findings were against the backdrop of there being no agency.

McGRATH J:
Yes.

MR DALE:
So what he was saying was GE didn't know about these things because there wasn't an agency relationship.

Just I wanted to draw your attention to something Mr Grant had to say, if Your Honours would be kind enough to turn to volume 4, page 787. When we come to what GE expected TML to do, you'll see at paragraph 31 that he's discussing the correspondent and what he's saying is that AMS required that the correspondent TML would interview the loan applicants and ascertain the accuracy of the loan, so they were actually supposed to sit down with them and talk to them about what it was

about and you'll see at 34(a), initially assessed and interviewed the loan applicant, employment history and so forth. Rather surprisingly, if I may say, in the course of cross-examination Mr Grant adopted a different stance and if Your Honours will be kind enough to go to page 855, I – after there was lengthy cross-examination, His Honour intervened and asked some questions there about what it was exactly that GE relied upon, and it came down to insurance, the loan to value ratio and the declaration. Over the page 6 – 856, I asked the witness just to tidy this up. Question line is 15, "So you're expecting Tasman will have checked income and employment history," and the answer was, "No," and question line 24, "But does Tasman before it asks the borrower to sign the fastdoc have to go further and ask the applicant to provide proof of income whether self employed or otherwise?". "Not on a fastdoc". So they weren't even expecting that there would be questioning along those lines.

TIPPING J:

Well wasn't that the whole point of fastdoc?

MR DALE:

Well except – yes it is, except that if you back to what Mr Grant said in his evidence-in-chief, the very sensible process of interviewing the applicant at base level to find out what kind of investor they were and find out something about them is why this transaction should never have happened. In this same volume –

ELIAS CJ:

I'm just struggling to understand how this helps the case that you're advancing?

MR DALE:

Well there's been a good deal of exchange about what information was available. Here in a nutshell, is what the agent was supposed to have done, they were supposed to have spoken to the applicant and so they would have know and should have known everything about the Bartles. The next –

ELIAS CJ:

Well isn't he saying that –

MR DALE:

There's an inconsistency in this.

ELIAS CJ:

– he's not checking the income?

MR DALE:

He says in the evidence-in-chief that Tasman should and then in cross-examination –

ELIAS CJ:

Yes, but it seemed to me that you were further ahead on the brief than – or in-chief than you are with the cross-examination?

MR DALE:

Yes I've just, I'm just illustrating that TML – because TML couldn't have cared less about what these people earned or didn't earn, because they were just trying to sell the apartments and I'll take you to that link in a moment. But the process, GE ought to have been safe here if its process had been followed, but it engaged a broker and to whose conduct it's responsible that wasn't doing what it was supposed to do.

ANDERSON J:

Well isn't the answer really that GE's reliance on a certificate by Tasman that they knew of nothing, adverse shall we say, implies that they will have expected them to have satisfied themselves to some extent about the borrowers' declaration and they don't want detail themselves because it's a fast loan?

MR DALE:

No. That's right and that's what the evidence-in-chief was directed at – was to say you sit down, interview them, then get the declaration done and we'll process it on the basis that it's a fastdoc.

The next passage of evidence, and there hasn't been much reference to this, is the evidence of Mr Philpott, which is at page 978. He was a New South Wales auditor for GE. I won't go into this in any great detail except to say that it became evident in 2006 that there were spikes in volume of lending through TML and you'll find it discussed at page 987 and 991. They undertook audits and the initial audit disclosed there was an attempt to lend to a 97-year-old, page 990. And the second audit they looked at 37 files and they found 37 irregularities, page 992 and curiously, although there was supposed to be further audits, they weren't able to undertake them because there was a travel embargo between New Zealand and Australia.

BLANCHARD J:

I'm sorry, what's this got to do with agency?

MR DALE:

What I – again the question of knowledge. All I was trying to illustrate was that when it came to reliance upon the forms and upon the safeguards that the system was supposed to build in, GE was on notice that its forms and its procedures were not being followed by its agent. No more than that.

ANDERSON J:

That seems more a question of what might have, perhaps arguably, put them on inquiry, rather than addressing the issue of where does the agency exist, what facts define the status of agent.

MR DALE:

Well, they certainly – I was just trying to think how to answer that. They certainly understood that TML was there to protect their interest, they required it to insure and they had all those obligations. What I put to them, put to this man in cross-examination and to Mr Grant, is that once they saw these processes were not being followed, they should have made some further enquiries about TML, and they would have discovered its link with GE. They didn't speak to the Board or do anything to find out what TML was all about.

Just again, going as quickly as I can through the factual issues. There's been discussion about a solicitor's certificate, Your Honour, Justice Tipping, asked about the solicitor certifying. Volume 7, page 1567, has a draft certificate and –

TIPPING J:

Sorry, 7, 1567?

MR DALE:

Yes, Sir. And you see it says, "To be copied on to letterhead," at the top there, and there's an actual certificate, an example, and I think there's others for each part of the loan, at page 1670, and perhaps 1670 because it's an actual certificate, is the better document. There's nothing there containing any kind of certification of an explanation of the risks involved in the transaction.

BLANCHARD J:

Sorry, what's this got to do with agency?

MR DALE:

It has – what I was doing, Your Honour, was just addressing factual issues that arose in the course of the argument, because my learned friend, Mr Miles, wouldn't have been familiar with these, and there was an exchange about a solicitor certifying, I'm just wanting to take the Court to the certification to show you what that certification was.

TIPPING J:

The *Bank of Baroda*, which I've always understood to be accepted as good authority, is that in these sort of circumstances the lender is entitled to assume that the solicitor, his role is not just confined to a ministerial role, anyone would think that he would be advising the borrowers.

MR DALE:

That's quite right, Your Honour.

TIPPING J:

Do you challenge that?

MR DALE:

No, I just felt obliged to bring Your Honours' – I don't challenge –

TIPPING J:

No, I'm very grateful to be referred to the form.

MR DALE:

No, no, I don't –

TIPPING J:

But I don't quite know where it takes us.

MR DALE:

It's just completing the narrative. Your Honour referred to there being a certificate, I was just illustrating there wasn't the kind of certificate –

TIPPING J:

But he didn't actually –

MR DALE:

No.

TIPPING J:

– expressly state that he'd –

MR DALE:

No.

TIPPING J:

No.

MR DALE:

And what GE did not say at any stage will be relied upon in having independent legal advice, which is something they might have said, but they didn't.

TIPPING J:

Well, isn't that sort of self-evident, Mr Dale? I mean, surely, we've got to have a little bit of robust knowledge of what goes on in the market place. Of course they would – if he didn't have legal advice that would be wholly different, everyone knows that.

MR DALE:

Yes, I can understand there being perhaps a reasonably robust approach to it, but I should have thought that if GE was wanting to say, "Well, this is one of the things that gave us comfort" – I don't want to get into a big discussion about it.

TIPPING J:

All right.

ELIAS CJ:

Is this – I'm now confused. Was this on the – whose file was this on?

MR DALE:

It's on GE's file and Mr Mathias' folder, it's the certificate he gave –

ELIAS CJ:

Right, so that's what went with this, "Heading to be photocopied onto letterhead," on Mathias Law?

MR DALE:

Mmm.

ELIAS CJ:

Okay.

TIPPING J:

It's really rough and ready, isn't it?

MR DALE:

Of course, the certificate wasn't in existence when the loan was approved, that was something that just was required in the course of the conveyancing aspect.

ELIAS CJ:

Yes.

MR DALE:

Now, I'm going to move forward to the legal issues, because I am conscious of time. Just on the question of agency generally. There's been, there was discussion both in this Court and in the Court below about there being an agent for some purposes. Our case has always been that the knowledge that TML acquired in the course of its agency was information that should have been provided to GE. Now, the best discussion of it is in a chapter written by Professor Watts in a recent text by Degeling. I've got copies of it. It discusses cases like *Jessett Properties Limited v UDC Finance Limited* [1992] 1 NZLR 138, which is an important case, where a knowledge outside mandate was imputed. I think that the article itself contains powerful arguments for the attribution of knowledge in these circumstances. On ordinary principles and on the basis of *Nathan v Dollars & Sense*, we say that the information

about the Bartles and their circumstances was information which ought to have been conveyed to GE, either whether on duty or whether it falls within the scope of the agency.

TIPPING J:

But Mr Dale you're – I think you're overcomplicating this. If there was an agency relationship in the relevant context, it's the law that the agent's knowledge is imputed to the principal –

MR DALE:

Yes.

TIPPING J:

– I mean why are we over-egging it in this way?

MR DALE:

It's just because of the suggestion that there might be some lesser obligation given, this was an agency only to some purposes and I'm just making the point –

TIPPING J:

Well if it was an agency for the relevant purposes then you impute, if it wasn't you don't.

BLANCHARD J:

I thought there was actually a contractual obligation –

MR DALE:

I agree, I'm just – I just wanted to bring that to your attention, it's a helpful article and I wasn't going to take Your Honours –

TIPPING J:

A breach of contract wouldn't necessarily lead to imputation.

MR DALE:

Pardon, Sir?

TIPPING J:

A breach of contract wouldn't necessarily lead to imputation of knowledge?

MR DALE:

No, no it's the, it's this test in *Nathan* about whether it falls within the scope of the agency. That article though is of some interest and I'll leave it with Your Honours.

Now the issue now is – I think I've –

ELIAS CJ:

Don't feel pressed Mr Dale –

TIPPING J:

This is very important and I don't want you to feel I'm trying to press you time wise, I'm just trying to explore your argument.

MR DALE:

Yes.

ELIAS CJ:

If we don't get through it we'll have to address that. So just develop your argument as you wish.

MR DALE:

Now what I want to talk about now is the credit contracts people, credit – the Credit Contracts and Consumer Finance Act. And you'll find the relevant parts of it at tab 21 of volume 2 of the appellant's bundle. I don't think we need to go to it but just about every Commonwealth and former Commonwealth country has legislation which is designed to deal with the kind of problems we have. Legislation in United Kingdom, United States, every province in Canada, different states of Australia and of course our own very broadly-based, widely-worded legislation. Of course it had as its genesis, as His Honour Justice Tipping pointed out, the Money Lenders, it came from the Money Lenders Act – just worth noting, and the Money Lenders Act is at tab 22, that that made express reference to the old equitable remedies under section 3, where it referred to the amount lent, interest on the amount lent being excessive, charges and then or otherwise that a Court of Equity would give relief and that's the genesis – it's different now of course because if we go back to the Act itself at tab 21,

the phrase that's used in the Act is, "opppressive means oppressive, harsh, unjustly burdensome, unconscionable" and so forth and we've been through those. The Act goes onto say that if you find that there is a breach, that the Act falls within those that criteria, you go to section 124. Section 124 is worded in extraordinarily wide terms because the Court when deciding whether or not to reopen a credit contract, must have regard to all of the circumstances relating to the making of the contract, the lease or transaction, or the exercise of any right and power. (b) the following matters if they are applicable, and then it refers to whether the amount payable is oppressive. Time to pay and remedy. Expenses and costs. Refusal to release securities but most significantly subparagraph c, any other matter that the Court thinks fit. Now that could not, of course, be more widely worded and the way it was put in the Court below was to use by way of example an analogy, the Australian legislation in New South Wales, the Contracts Review Act, which is at tab 28 and there section 9 set out the kind of things that the Court could take into account.

The point of this part of the argument is that when it says "such other circumstances that the Court deems just", this is the kind of thing that the Court can take into account. Firstly subsection (1), it refers to the public interest and all of the circumstances of the case. Compliance with the provisions of the contract or non-compliance. Subsection (2), without affecting the generality of subsection (1), a whole list of factors. Whether there was any material inequality in bargaining power between the parties. Whether or not the terms were the subject of negotiation. Whether it was reasonably practicable to alter or reject any of the terms. (d) Whether there was imposition of conditions difficult to comply with or not reasonably necessary. (e) Whether a party was able to protect his or her interests or whether their representative was able to protect their interests. (f) The relative economic circumstances, educational background of the parties or their representative.

ELIAS CJ:

What's the submission in relation to this because this is a very different provision.

MR DALE:

Well it is in the sense that it gives specific reference to specific criteria. The point I make about our Act is that it –

ELIAS CJ:

Different scope too, Mr Dale.

TIPPING J:
It's all contracts isn't it?

ELIAS CJ:
Yes, it's all contracts.

MR DALE:
It is. It is all contracts. All I'm doing is using this as a kind of a road map to the very broad discretion that might be taken into account and one of them, for example, is whether the transaction was actually accurately explained. That, in my submission, is the way our Act should operate and that's what the Court meant – what the draftsmen meant when they said "any other circumstances the Court deems just" –

ELIAS CJ:
Well you don't need to go there because you've got all of the circumstances relating to the making of the contract.

MR DALE:
Right, right.

ELIAS CJ:
In (a).

MR DALE:
And there's nothing in our Act which says that the criteria is the same as with unconscionability or undue influence and –

ELIAS CJ:
Well what is the contract? That's the question I asked Mr Miles yesterday because this is the credit contract.

MR DALE:
Yes.

ELIAS CJ:

And associated with that, although you might want to come to it when it suits you, associated with that is if this contract is reopened, what's the remedy you're seeking in the end? Avoidance of the security, or you haven't decided yet?

MR DALE:

Well –

ELIAS CJ:

Because you haven't really got to that point have you?

MR DALE:

No we haven't, and our wish was that you grapple with it but it's complicated. Mr Mathias is insured but as you know there are many other claims and there won't be enough insurance so –

ELIAS CJ:

I don't need to know that. I just need to know –

MR DALE:

Right.

ELIAS CJ:

– I just need to know –

MR DALE:

The relief that we are seeking is to set aside the mortgage over the home. What we see –

ELIAS CJ:

So that the money has been advanced –

MR DALE:

Mhm, to buy an apartment.

ELIAS CJ:

– by the lender and it goes.

MR DALE:

The money – of course the lender gets the proceeds of sale.

TIPPING J:

But it is as if the home was not within the security?

MR DALE:

Yes.

TIPPING J:

The personal covenant remains the same presumably?

MR DALE:

We're seeking to have them discharged from any liability in respect of the mortgage.

TIPPING J:

So it's more than just the security. You want the mortgage set aside?

MR DALE:

Yes, against, in respect, yes I do.

ELIAS CJ:

And the guarantee set aside?

MR DALE:

The Bartles, of course, are secure because they've got a remedy against a lawyer. Where the issues are going to –

ELIAS CJ:

You mean that GE has a remedy do you say?

MR DALE:

No, the Bartles have succeeded against the lawyer for negligence and if they suffer any loss as a consequences of his poor advice they will have a remedy. The reason that this case is important is because there are many downstream in similar

circumstances who will not have the luxury of a claim against the lawyer because there's no insurance. And so –

ELIAS CJ:

I'm not sure that this really is a submission we should be hearing.

MR DALE:

No, no it's what – when Your Honour asked about what relief we're seeking, I'm just signalling that that's downstream.

ELIAS CJ:

No Mr Dale I'm not really asking – I just really want the concepts in terms of this because on one view there is a very broad remedial discretion under this legislation in which the Court can come to what is a fair solution between the parties.

MR DALE:

Sure.

ELIAS CJ:

You're saying, are you, that a fair solution has to be really the equitable solution of avoidance of the transaction?

MR DALE:

Yes. In effect a rescission of the –

TIPPING J:

Well that would mean that the principal culprit Mr Mathias gets off scot free, if we're going to start going into these –

ELIAS CJ:

Because you've got no loss.

MR DALE:

Well what's going to be argued Your Honour by Mr Mathias's indemnifiers is that there's only a liability if we don't get relief and –

TIPPING J:

Well of course, and they probably want you to try and get relief. I mean we've all been there. But I'm not sure, with the Chief Justice, that we can really go into it.

MR DALE:

No we – it wasn't – it's not part of the grounds that I sought to bring it up and – but I'm just signalling what is ahead.

ELIAS CJ:

Well you see if you're putting it as highly as that then I imagine you can expect push back from the notion that this a broadly remedial discretion to adjust the position between the parties.

MR DALE:

The question is whether this transaction falls within section 118, whether it is oppressive in terms of being below reasonable standards. The question of what relief is granted is for Justice Randerson. He's going to have to decide on a weighting of the factors in section 124, and the role of the solicitor, what relief he gives. He may say in this case I don't need to grant relief because you've had a remedy against the lawyer.

ANDERSON J:

Well hypothetical relief will very much be informed by a hypothetical result.

MR DALE:

Well that's the difficulty –

ANDERSON J:

Because of the flexibility of the remedies.

MR DALE:

Yes. That's the difficulty in dealing with this in a vacuum because I'm sure, Your Honours, when you ask about, when you're being asked to conclude that it's oppressive and the question immediately arises, so what, that question is yet to be squarely answered because we haven't had that exchange and we haven't had that debate. What I am saying is you are going to, well, someone is going to have to deal with a case at some point where there is no recovery from the lawyer and there is a

transaction of this kind and it will be argued it's oppressive and then the issue will be what relief should be granted. It's not for today.

ELIAS CJ:

Yes it's just that it does bear on the interpretation and the application of this legislation, because it's one thing to obtain avoidance of a transaction when the standard of unconscionability in equity is reached. It's another to say that there's some sort of breach of reasonable standards of commercial practice and that the same effect applies. That does push you back from taking a, taking this as a broad discretionary power to adjust, to achieve what is fair between the parties. Because it may be, for example, that if the outcome is simply that the liability of the Bartles should, you know, there's some sort of assessment as between them and GE or what is fair for them to carry in it, it would push you to a more expansive view of the statutory power.

MR DALE:

I can see Your Honour's point. What we're trying to do is say that we can open the door to relief here but what that relief will be remains to be seen. I know GE are going to argue, well, the Bartles admitted they had some risk. They were borrowing 157, that's what they thought they were borrowing, and that's what the Judge concluded. GE are going to argue, well, they should bear some responsibility. You're not being asked to determine that question today, nor to determine whether GE are entitled to say well you've got a recovery from your lawyer you don't need us, that question doesn't arise. All you're being asked to determine is whether this transaction falls below those standards and in doing that, I say, that you are entitled to take into account all of the circumstances. We do not contend that the fact of legal advice cannot be taken into account. What we say is it's not determinative. What we say is a lender can't just say well, actually it turned out they got legal advice, or to put it more robustly, they were entitled to assume they got legal advice, and therefore we're safe. It's got to be more than that. You've got to look at all of the circumstances.

TIPPING J:

There would have to be something pretty compelling though, wouldn't there, if it were a case that the advice was independent, as is conceded here and competent, unless ostensibly competent? Mr Miles said that it's not ostensibly competent here because

ex facia the transaction, no rational lawyer could have put the client into it but subject to that, surely, it has to be a very strong start.

MR DALE:

Well of course, it's slightly – when you get to agency, I agree with Your Honour that if this were entirely arms length and any lender knew nothing about the underlying transactions and the relationship of the parties, that's so. TML of course is in a different position because TML knows that Mr Mathias is regularly doing these things and, more importantly, TML knows how awful these transactions are.

You see, it's one thing to say I can rely on a lawyer but if it's advice that no lawyer could sensibly have given, or that there's no objective foundation for believing they'd given proper advice, then it's no advice at all. Some of the old cases, in the area of undue influence –

BLANCHARD J:

I don't think you need to labour that point.

TIPPING J:

No.

MR DALE:

Well that's what we're saying here, that TML, in these circumstances, knew everything about this transaction and couldn't have thought for a moment that Mr Mathias had given it the tick because nobody could. That, of course, is as far as we need to go because the agency argument is so compelling.

BLANCHARD J:

Well it seems to all turn on the agency point, on that argument.

MR DALE:

It does, it does and I don't want to get into the alternative, the way we put the case because there was an alternative argument absent, a just much harder argument, to say well, what did GE know, and we took GE as we found it which was to say the only transaction with which it was concerned was the loan transaction, nothing to do with Blue Chip, and so we said that, on what it knew objectively, it couldn't have thought this worked.

When we got into that discussion earlier, when Your Honours raised the question of what was the credit contract and Mr Miles said it was a little complicated. What he had in mind was section 119 which I should just take Your Honours to at tab 21. What I originally pleaded was that the transaction, the loan transaction and the joint venture were related transactions. It's not an argument that I think could be sustained and eventually I –

TIPPING J:

But here, the security interest was inherent in the loan because it was a secured loan.

MR DALE:

Yes, yes, it – what I was trying to argue was that if you can take the good, which is to say you've got a transaction with security, and you can rely upon the fact that someone else is paying the mortgage, which is the point I think Your Honours made throughout, that what's wrong with relying on a company like Blue Chip? I was trying to say, well if you take the good, you've got to take the bad and –

TIPPING J:

Well that comes more under all the relevant circumstances, doesn't it, rather than security interests?

MR DALE:

Yes, it does. Yes and that's why I abandoned the argument but when –

ELIAS CJ:

So the credit contract in this case, because you cannot link everything in under section 119 because it's too limited, the credit contract in this case is simply the loan transaction and mortgage, is that right?

MR DALE:

Yes, that is right. What I was going to say was, normally when a lender lends to a –

ELIAS CJ:

But hang on, the damage that's been done here – oh, I see.

MR DALE:

In an ordinary transaction –

TIPPING J:

The argument has to be, I would have thought Mr Dale, that it is an oppressive loan if you lend on a transaction that is known to be, or ought to have been known to be, sufficiently improvident as to make it commercially irresponsible to undertake it.

MR DALE:

Right, right.

TIPPING J:

That is how I would think you would link the loan per se with the associated transactions.

MR DALE:

Yes, yes –

ANDERSON J:

It's tainted by its context, that's the argument, isn't it, which can be taken into account theoretically under section 124.

MR DALE:

Where the linking comes, it normally is if you lend money, as banks do day in, day out, to $100 companies, they always support them with a guarantee, and in this transaction, if that's what GE was thinking, we're lending to a couple that don't have any means of support, you would have expected them to have looked for the support.

One of the things about this transaction is that if GE had asked any question about it, any question, it would have immediately realised it was unworkable. A question for example, what kind of investor, which it asked but didn't get an answer to, what kind of –

TIPPING J:

We're talking about the law now. We keep moving from the law to the facts. I find it quite confusing. We're trying to get the legal principles established.

MR DALE:

I'm sorry, Your Honour. What I was trying to articulate was why we put the case on the alternative basis and just to demonstrate –

TIPPING J:

Well forget it because you, quite rightly I would have thought, abandoned it.

MR DALE:

Yes –

BLANCHARD J:

So a credit contract can be oppressive if there's some matter that makes it unconscionable falling in one of these epithets and the lender either knows that or ought to know of it, or you would say the lender has used an agent and the agent knows that or ought to know of it. Is that the argument?

MR DALE:

Yes, yes.

BLANCHARD J:

But you're not putting it on any other basis?

MR DALE:

No, I won't pursue any other argument. The way – well, it's very tempting for me to want to do that but I don't see that there's anything to be gained by it at the moment.

BLANCHARD J:

So we're not having to look at questions of attribution which the Court of Appeal seems to have flirted with?

MR DALE:

Well, we put the case in the Court of Appeal fairly and squarely on the correspondent deed and the operations manual, as my learned friend has done today and we see –

BLANCHARD J:

Yes, but –

MR DALE:

– that creates agency. We –

BLANCHARD J:

– okay, so you didn't really –

MR DALE:

– didn't do it on policy –

BLANCHARD J:

– do it on an attribution basis, that was the Court of Appeal's invention?

MR DALE:

Yes. I mean, you may have seen when we put in our memorandum on the grounds for appeal, I said we had, we'd rested it on an agency and the Court of Appeal had come up with a kind of a hybrid which said we didn't rely on *Meridian*. They said well, it's kind of an agency and you can't shelter, and did it on policy basis. That wasn't how we put our case –

TIPPING J:

But with the greatest of respect to the Court of Appeal, that leaves it on a pretty slippery basis in law. You've either got to have it on agency or you've got to have it on some clearly defined and otherwise principled basis, otherwise you're just sort of stirring the entrails.

MR DALE:

Mmm. Yes, I think that's probably right. They seem to be approaching it from the wrong end really. We said it's a simple case because there is a contractual relationship, GE has delegated everything to its agent –

BLANCHARD J:

You're arguing agency, that's it, not attribution?

MR DALE:

Correct.

BLANCHARD J:

Okay.

TIPPING J:

Nor are you arguing, and I think I had better put this to you directly but I don't think you can, that you can use TML's knowledge as GE's knowledge on some other basis than agency?

MR DALE:

No, no.

BLANCHARD J:

That's what I meant by attribution –

MR DALE:

Yes, no, no, I, no –

TIPPING J:

Well, there could be other bases and then it's pseudo-*Meridian*.

MR DALE:

The other reason that I balked at, the other reason that I balked on –

ELIAS CJ:

It is pseudo-*Meridian*, yes.

TIPPING J:

Yes.

BLANCHARD J:

Yes.

MR DALE:

Well, we never put it that way and the only reason I balked on attribution points was this question of there being a partial agency. Justice William Young was very interested in the agency for the purposes of the insurance and we said it's a very simple case. The obligations contained in those contract documents –

TIPPING J:

All right, I've muddied the water as I often do. Agency –

ELIAS CJ:

No, I think you've clarified it.

MR DALE:

No, no, Your Honour is quite right and I wasn't, we weren't putting it on any other basis and we didn't, in the Court below.

ELIAS CJ:

Where do you want to go now, Mr Dale?

MR DALE:

I wanted to just take you to one other document if I may please, which is a, it's some useful background, it's in volume 8, page 1815 and it's the Price Waterhouse Report. Does Your Honour – was Your Honour thinking of a break – I'm sorry – this will be five minutes?

ELIAS CJ:

Well – so this will finish will it?

MR DALE:

Yes I'm not –

ELIAS CJ:

All right, well let's carry on and finish this part of the argument.

MR DALE:

This was a report prepared by Blue Chip to, in relation to the acquisition of EML and Tasman. EML and Tasman by the way, are for all intents and purposes, one and the same.

ELIAS CJ:

Now you said this is background –

MR DALE:

Yes, this explains, this gives you some idea of how Blue Chip works and in the context of how the broker was –

TIPPING J:

Was this available to GE or to Tasman? I mean as background –

ELIAS CJ:

It's a knowledge of the –

TIPPING J:

There's background and background.

MR DALE:

Well, we were endeavouring to show, and I won't spend much time on this, that this brokerage business was established to take advantage of lending, from what we've described as non-conforming borrowers, you'll find that at page 820, 1820. This is activity on the part of GE's agent, this is how its agent was operating, that's what it's about. It obviously could have obtained it but no evidence that it did. So the first page was just setting out the background, the reference to Mr Briars at paragraph 2 –

BLANCHARD J:

Are you worried that it's going to be said that even TML didn't have knowledge of enough about Blue Chip?

MR DALE:

No, no I'm not Your Honour. I just thought –

BLANCHARD J:

Well what's the relevance of this then?

MR DALE:

Well I'll leave it there if you wish, it's just that the Court doesn't have a great deal of background knowledge of what Blue Chip was all about and how it worked and this –

BLANCHARD J:

Well I think we've probably got sufficient knowledge just by being taken through this particular transaction.

MR DALE:

The only point I was trying to make –

TIPPING J:

How does it matter how it worked generally, surely it's this transaction that really matters?

BLANCHARD J:

Yes.

MR DALE:

The only point I was trying to make is that the whole underpinning of the Blue Chip operation was all about relying upon blind lenders like GE, that's what it was about. And they say as much here and they describe how, at page 820, how that worked. You'll see the reference to EML at page 1819, there was some discussion about that earlier on, but there's the background if Your Honours choose to – if you wish to have a look at it.

This one, one last issue. We put in some supplementary submissions on the question of legal advice and there are a number of cases, again I don't think you need to spend much time on them, the most closest in time is the *Elia* case but there of course the lawyer wasn't independent, he was the director of one of the companies –

ELIAS CJ:

But on the legal advice, the two strands of the argument are, one they had actual knowledge of –

MR DALE:

Correct.

ELIAS CJ:

– which is the burden of the argument taken by Mr Miles and on your point, the agent's knowledge is sheeted home to the principal, and so the fact that there was, even if it was independent, competent advice wouldn't affect that.

MR DALE:

And those cases say that the advice should be competent and there are some old cases where the advice was plainly not competent and the Court was able to step round it. Now all I'm saying in relation to this Act, is that it is broadly worded enough for you to do the same. You can't be right if there is a transaction which is otherwise awful in every sense, to say it's saved just because an incompetent lawyer happens to be engaged, it's just a weighting and no more than that, something to be taken into account but it's not, as GE would have it, fatal, end of story, which is what its case is. That's the argument on legal advice. I just mention of course, even in cases like *Eteridge* when they talk about legal advice, it's always based on the assumption that the advice is competent, but against the rider that Your Honour Justice Tipping has, the point you've made – that you're entitled ordinarily to assume that the advice is competent and we can't have it otherwise.

McGRATH J:

This is where you want us to pick up on Professor Bigwood's writings I think?

MR DALE:

Yes. Could I just finish by saying that we've been conscious throughout in this case about the dangers of overstating an attack on a legitimate lender where they feel they have sufficient safeguards. Our experience is that there are no major banks that have got involved in this transaction and in Blue Chip there are almost none. It was the blind lending that is the problem, and what we say is unique about this case is the fact that they have taken TML on board as their agent and that's the poison which is going pervade these loans, we say. All I'm trying to say here in conclusion is that this isn't going to change the landscape for lenders, it's not going to make things more difficult for lenders if you are to make a finding in this case, because this is a complete departure from the separation between lender and broker and between broker and borrower, where those obligations exist. So there's nothing dangerous about a finding of oppression in this case in terms of precedent value. It doesn't disturb traditional lending practices because traditional lenders would never have been involved in a transaction of this kind.

ELIAS CJ:

Thank you, Mr Dale. Mr Farmer, I don't want to hold you to any time limit. If you –

MR FARMER QC:

Fifteen to 20 minutes.

ELIAS CJ:

Well then, we should perhaps just keep normal hours and carry on, unless you would prefer it.

MR FARMER QC:

Yes.

ELIAS CJ:

Mr Dale, you've left your debris behind.

MR FARMER QC:

If Your Honours please, if I could just deal first with the point that was dealt with a few minutes ago as to the question and the extent of TML's knowledge of the Blue Chip operation, and I did want to point you to Justice Randerson's Judgment, paragraph 282, which makes it plain that, in fact TML, although it had knowledge of the fact that this was a Blue Chip investment that the Bartles were engaging on, they did not have knowledge and there was no evidence that TML had any knowledge either of the terms of the joint venture agreement or of any representations that had been made to the Bartles by Mr Davis, so if I could just read 282. If refers first of all to the amended statement of claim and His Honour says, "The amended statement of claim also sought to attribute to GE knowledge of the representations said to have been made by Mr Davis and Mr Mathias about the Blue Chip investment, as well as knowledge that the investment was a high-risk venture for the Bartles, heavily weighted in favour of Blue Chip. Given my findings on the agency and sub-agency issues there can be no basis for the imputation of any such knowledge, nor is there any evidence that TML had any knowledge of any representations made by Mr David and Mr Mathias. Mr Stuart accepted that TML knew the loans raised by the Bartles were for the purpose of a Blue Chip investment, but there is no evidence of any greater knowledge on its part of the details of the investment such as the terms of the critical joint venture agreement," and I am told that the concession was carefully recorded in

a bench note by Justice Randerson which is not in the records, it's bench note number 4 and again I think number 7, but if need be – if you wanted to go beyond or behind that paragraph in His Honour's Judgment, we can give you those bench notes.

ELIAS CJ:

Yes I think we should have those – if you can arrange to have them put in through the Registrar.

MR FARMER QC:

Will do. Now by way of reply, could I take you back to the loan application document in volume 9. That was at page 2037 and first of all, dealing with one issue relating to – this was part of the AMS file on the so-called mortgage purchase application. It's actually reproduced, the same document is to be found in the AMS file, which is in volume 7. You can stay at volume 9 I think but I'll just give you the reference, that you'll find this document in the AMS file in volume 7 at page 1640. You'll also find, as part of that file, it's both again in volume 9 and in volume 7.

Just looking still at volume 9 as you have it there, at 2137 you'll find that what was also sent to AMS at the time was the valuation of the apartment that was being purchased, showing current market value of $527,000. So that it's plain that AMS knew that there were two properties obviously, one the home and secondly the apartment that was being acquired, which is a factor that immediately of course distinguishes it from all the Australian cases that we looked at, where the asset lending problem is being dealt with in a context of the home only, money is being borrowed against the home only with no other asset being received and security taken over it.

ANDERSON J:

That particular valuation Mr Farmer, is actually one of the 29 documents faxed through?

MR FARMER QC:

Yes, yes, that's right. Now, the valuation in volume 7 is part of the AMS file which is volume 7, is at 1626. Interestingly also, in volume 7 is part of what AMS received at 1621 is a statement of purpose of the loan which is for the purchase of an investment property. So there can be absolutely no doubt that everyone was aware that this

loan was for the purchase of an investment property. Now, going back to 2037 then, in volume 9, the loan application –

ELIAS CJ:

In fact, that appears on the authorisation, where there was the questioning as to the purpose of the loan and a reference to Symonds Street, and I think I says "under S and P" or something?

MR FARMER QC:

Yes, I'm going to come back to that because that was a query about –

ELIAS CJ:

Yes, yes –

MR FARMER QC:

– the investors, are they investors, more details and my learned friend said there was no response to that, in fact there was and I'll take you to that in due course. Just looking at the loan application, there was, before lunch, a lot of discussion around the 50,000 and the 48,000, making a total of 90,000 and my learned friend Mr Dale pointed to paragraph 17 of His Honour's judgment, where His Honour identified as a figure, I think it was 65,000, savings of 65,000, but His Honour did return, my learned friend referred to it but never gave you the reference and I'd like to do that if I could. At paragraph 225 he does deal with the 98,000 –

TIPPING J:

Two hundred and ?

MR FARMER QC:

Twenty five. There he says, and this is picking up also on the point of the query about the self-employed investors, and I'll deal with that shortly too, "the documents also show that Ms Goundar queried the reference in the documents to the Bartles being described as self-employed investors. On that point, Ms Foo confirmed to Ms Goundar on 6 September 2007 by email that the Bartles had previously had some investment properties now sold and also had some term investments which they were still managing." So there were two, that's the 40 and the 50, 50 and the 48. "This was a reference," His Honour says, "to a sum of 98,000 which the Bartles had advised that they had made up partly from cash and partly from a term deposit."

Just to look then at that email response. You'll find that, the query is in volume 7, so you will need to pick up volume 7 I'm afraid, at page 1650. There's the query, "Self-employed investor? Ask what sort of investor" and then there's the identification of the apartment as being at Symonds Street. If you go over a few pages then to 1657, you'll see the response which came from Ms Foo back to Ms Goundar, "Clients have had some investment properties before" and that's, of course you'll recall this in evidence, they were a rental property they bought in Queensland I think, "but have now been sold. Also, clients have some term investment which they are still managing."

So that completes the picture. There was some explanation of those emails given. I won't take you to it but in Ms Ziegler's brief, she was the supervisor I think, at volume 4, pages 1015 to 1016, paragraphs 19 to 24 and you can look at that if you like but it doesn't really take the matter any further from what you can see already from the face of these documents.

McGRATH J:

Are you able to help us with how that $98,000 reference in paragraph 225 relates to Mr Dale's reference as part of the judgment that was speaking of $65,000?

MR FARMER QC:

No, I can't really help you on that, I –

McGRATH J:

I mean, is it just one of those things, a discrepancy?

MR FARMER QC:

Well, whether it is a discrepancy – 65,000 and I think there was some evidence from Mr and Mrs Bartle that they'd gone on an overseas trip at some point, so that may explain the 65 reducing down to 48. Whether the 50 relates to what they got over from Queensland, I don't know, I just don't know but –

ANDERSON J:

Rather it looks to me as though it's been written down as 5000 but it's been added up as 50,000?

MR FARMER QC:

Well, I, I wouldn't want to concede that Your Honour because – this was filled out by the Bartles by the way, this form.

TIPPING J:

This is a Bartle handwriting?

MR FARMER QC:

It is a Bartle handwriting form and I don't want to make any assumptions or concessions beyond the fact that that's how it's written and how it's added up and beyond what is said in those emails I've just shown you and what is said by Justice Randerson.

TIPPING J:

Well it would be a remarkable coincidence if it was meant to be five but the total was wrong?

MR FARMER QC:

Yes, yes.

BLANCHARD J:

It would be a remarkable coincidence if it was meant to be $50 and the total didn't finish with a 50.

TIPPING J:

Exactly. Well, you'd hardly put a mere 50 in there.

BLANCHARD J:

Anyway, it's a question of what GE would reasonably have understood from it.

ANDERSON J:

Mhm.

MR FARMER QC:

Yes, yes, that's right, that's right. One point we do make around this is that, I think the way my learned friend Mr Miles put it, was to say well, in effect here you have a loan application form which on its face indicates that the only way that the loan can

be serviced and repaid is by selling the home, and we would say, not at all. First of all because you've got the other property, the investment property that they're buying. Secondly because, at least on its face, to GE, that's what it's showing, total assets of $657,000 and then none of that, of course, is without reference to the Blue Chip underwrite.

If we're just looking at it on its face and if we're asking the question, was there some kind of – was it immediately obvious to GE that this was an asset sale in that nasty Australian way of putting it, well then we would say well, no it wasn't. It could not be said that on its face the only way this loan could be dealt with was by selling the matrimonial home.

TIPPING J:

You'd have to be pretty desperate wouldn't you, to take out a loan – the only way of serving it is to sell your own home –

MR FARMER QC:

Yes.

TIPPING J:

I mean that's really desperate stuff.

MR FARMER QC:

Yes so that's to – *Khoshaba* situation where he was up against –

TIPPING J:

But these people were nowhere near in that situation.

MR FARMER QC:

No, no, and he was already servicing his previous loan out of his capital account because he had no other way of doing it. And he had to refinance and so on. I think it was *Khoshaba*, I may have the wrong case. So we do say this is certainly not an asset sale in any, in the objectionable sense, at least it wasn't apparent, certainly wasn't apparent that it was to GE and that immediately distinguishes and also particularly with that second asset that's in there, from the Australian cases where we're dealing with one asset only which is the home. Now of course then add to that, if we now do an objective assessment and our submissions are that the correct legal

framework just goes back to yesterday, when I think I discussed with Your Honour Justice Tipping, that if you start with the question is the transaction objectively oppressive, well then when you do that you add to what I've just taken you through – on an objective assessment, leaving aside now what GE saw at the time, then on an objective assessment in our submission the Blue Chip underwrite, which meets all the outgoings including the mortgage payments, maintenance, repairs et cetera and the end costs of the resale of the property in due course on any objective assessment, then we would say it was not an asset sale in that objectionable sense because it's not inevitable that the family loan has to be, family home has to be sold.

Now can I just next – and then we move on of course to the legal advice issue, and I'll come back to that in a moment. Just on – related to this perhaps is, or at least looking at GE's conduct, my learned friend Mr Miles had a wonderful phrase, "ticking the boxes," and he used it many, many times and can I just say about that, that what I've just shown you – the query, is certainly – at least one indication where the box wasn't being ticked but a question was being asked and responded to. In addition can I give you a reference to Mr Grant's evidence and I needn't take you to it but in volume 4, paragraph, page 813, paragraphs 17 to 90, he did say that GE did decline loan applications and had done so on numerous occasions, so we would certainly contest the proposition that this was just a rubber stamping exercise and nothing more.

Now the Blue Chip model being flawed, again what is said by my learned friends as well, if you do get to the point of having to take into account the Blue Chip underwrite and the Blue Chip obligations to make the mortgage payments and with that, therefore, the existence of a source of income for the Bartles that would be expected to meet their mortgage obligations and therefore would not lead to a situation where the family home inevitably had to be sold, my learned friend's response to that is to say, "Ha, but the Blue Chip model is fundamentally flawed," they took you to Mr Nolan's brief, lawyer, carefully gone through it, found all sorts of defective drafting problems with it, inconsistencies – well of course the bar we make our living out of – finding such drafting difficulties and inconsistencies in commercial contracts, it – the real flaw, if there was one, was really the fact of course that it was dependent on the property market continuing to strengthen, and with it the Blue Chip continued to attract new investors. We would not accept that this was a Ponzi scheme in the sense that that phrase is used, but it's clear on any view that Blue Chip certainly

would have a cashflow situation that had to be addressed. They did market the property, market the scheme on the basis that there would be a win-win situation both for them and for the investors because property prices in Auckland, in the Auckland residential market, had climbed. I took you to the graph that showed that and in fact if you went back and had another look at it, and I don't suggest we do that now, and just look at 1980 onwards, in other words the 15-year period covered from that point, what it does show is a exponential widening in the strength of the market as between Auckland residential and the rest of the country, it shows that and it shows continuing growth right through that whole 15-year period. Now that, the fact that that one day might come into an end, that the bubble might burst, is exactly the sort of thing, of course, that any competent lawyer would point out, competent lawyer being cautious and conservative, which lawyers should be. And that's in fact the very basis of the finding by Justice Randerson of negligence by Mr Mathias that in fact he didn't do that, he didn't take the conservative approach and point that out to the Bartles. But nevertheless the scheme was one that both Blue Chip itself and the investors operated on that assumption based on historical fact, that the property market would continue to be strong and would continue to grow in the Auckland area and that was the underlying assumption of the whole thing. Now if that be a fundamental flaw, so be it, but it's as I say, it was in fact the basis on which everybody involved with this invested on. Now none of that can be attributed to GE in our submission and if TML – and then we have the restriction contained in that paragraph that I've just read to you from Justice Randerson's judgment, the restriction on the extent of TML's knowledge of the whole underlying basis of the Blue Chip scheme and that really prevents, in our submission, any notion of being able somehow attribute to GE knowledge that this scheme had this inherent flaw in it that might lead or that could very easily lead to the whole thing collapsing around Blue Chip's head and around, and taking down with it the investors because the Blue Chip contractual obligations would come to an end.

TIPPING J:

So you have two answers to the TML point, one – they weren't your agent and even if they were they didn't have enough knowledge?

MR FARMER QC:

Yes. And three, what follows on from that is that in terms of the fundamental flaw of the scheme, that what if you knew exactly what it was you would see there is risk, the risk is the risk of the bubble collapsing and that's the very risk that should have been

addressed by the lawyer if he was being totally competent and careful. And that takes you back into the legal proposition that's been addressed many times in the last two days of the entitlement, we would say, of GE being entitled to rely on the solicitor's certificate. Just on the certificate and I'll just give you these references too. Mr Jonathon Flaws who was AMS's lawyer, his brief is in volume 4 beginning at 900, and I should say his brief was not cross-examined on at all. He gave evidence first of all that he left Bell Gully in whatever year and set up his own firm, that he'd acted consistently thereafter for AMS, he may even have taken AMS with him, that he therefore was the solicitor acting for AMS on all these transactions and he sets out the certificates that he got from Mr Mathias and he sets out his acceptance of those certificates as being exactly what you'd expect them to be, that Mr Mathias had done his job and had correctly, and had done it competently and correctly. Now –

ELIAS CJ:

Can I just – the concepts being used move around, have been moving around. You're talking about inherent flaws and you're contrasting that with a transaction that may have been improvident because too risky, which is something that you say the solicitor should have advised on, but if one is looking simply at the Credit Contracts Act, are you going so far as to say that an obligation which is or a contract which is too risky, which is improvident can never be oppressive, does it have to have an inherent flaw?

MR FARMER QC:

We – our basic submission is that this contract was not oppressive because yes there was an element of risk in it but it was an element of risk that is present in any number of contracts where people borrowed money to invest in the hope that the investment will make money for them, that there will be a capital gain or whatever and where there is in fact always a risk, that the investment doesn't turn out as they hope, indeed the investment turns out to be poorer than they think and they may well lose money. Perhaps that the type of investment where you're more likely to lose money is not so much the Auckland residential property market but is more likely to be an investment in some business or other where the profits that are hoped for don't, simply don't materialise and indeed where the capital is invested is ultimately lost or diminished. Now in that situation we would submit there can be nothing inherently oppressive about that, so long as the risk is perceived and accepted, then that's the end of the matter because as – even Justice Hammond said, sorry I shouldn't say, "even," as Justice Hammond said, "At the end of the day the borrower

appreciates the risk and takes it, then it cannot be said the contract is oppressive". So the only issue then that arises here is whether the Bartles understood the full extent of the risk and that's where we say the lawyer representation deals with that situation. Even if, which we don't accept, the view was taken that the risk in this case was so extensive, so bad that it was, that even if it had said that this investment was doomed to failure, if Mr Miles' worst fears were in fact realises, if his prognoses was in fact correct that this was inevitably going to collapse, even if you accepted all of that then we would say, which we don't, then we would say that the existence of the lawyer advising and of the certificate given is an answer.

ELIAS CJ:

Well I don't know, inevitability may just pitch it too high in terms of oppression and that's why I think there is a continuum here perhaps.

MR FARMER QC:

Well Your Honour I'd say to that, if you look at the New South Wales cases where the asset lending is found to be objectionable, the reason it's found to objectionable is because there is no ability to service the loan other than –

ELIAS CJ:

Yes I understand that.

MR FARMER QC:

– by recourse to the home.

ELIAS CJ:

Yes.

MR FARMER QC:

And this is not this case.

ELIAS CJ:

No, but you have a very broadly-worded statute, and whether one could say that risk if appreciated, although the Judge of course held that it wasn't, could never be an oppressive contract, it may go too far, it may depend on the degree of risk.

MR FARMER QC:

Well, just off the top of my head, I can't think of a case where –

ELIAS CJ:

Where that has been held.

MR FARMER QC:

Yes, yes.

TIPPING J:

If the credit contract to be oppressive, if the loan is made to support another transaction as will usually be the case, surely can only be oppressive – ignoring legal advice for the moment – if the loan is known to be or ought to be known to be so oppressive, so improvident that no responsible commercial lender should support it.

MR FARMER QC:

Yes.

TIPPING J:

But you say even if it's at that level, if there's an independent solicitor interposed –

MR FARMER QC:

Yes, yes.

TIPPING J:

– then it's not oppressive to lend, is that basically the scenario?

MR FARMER QC:

That's right and example of the, good case – it's good to compare this case with, I think it's *Khoshaba*, where the loan, monies were raised and then given to the con man, so which is completely different from here where the monies that were raised were used to actually buy bricks and mortar, which a mortgage was taken over. So everyone in a sense was being protected, both the lender and borrower because the borrower was actually buying something, not just handing a cheque to a con man who could do anything he liked with it.

TIPPING J:

If ex facie the transaction, by transaction I mean the loan plus the known surrounding circumstances, no one could rationally think it was a provident transaction, it was ex facie ridiculous, would then the interposition of a lawyer save it, I would suspect not – as a matter of policy?

MR FARMER QC:

Well I think that's, yes I mean –

TIPPING J:

I'm not suggesting it's at that level.

MR FARMER QC:

No, no I understand but there is – certainly I think if one takes – Lord Justice Hearst and Lord Justice Hoffmann's approach in that English Court of Appeal decision *Bank of Baroda* I think, they would simply say look if the lawyer's there and he gives his certificate, the end of the story, no need to go further. There are suggestions perhaps in one or two of the other cases where it's worded slightly differently, that it's – the way my learned friend's put it is it's a factor, maybe a very strong factor but it's a factor and perhaps in that situation, in that very extreme situation that Your Honour's put it, maybe it could be said that perhaps that's where you get into the position where –

TIPPING J:

You're on notice in that situation that the lawyer can't be contacted?

MR FARMER QC:

That's right, that's right.

ELIAS CJ:

It might really almost shade into a situational duty of care on the part of the lender too, it might have to be of that level.

MR FARMER QC:

Well then that's, yes and that's opening up that whole finding that's been made, and not just in this case but in other cases, that there is no duty of care by the lender to the borrower.

ANDERSON J:

What if the alleged oppressive quality is a departure from reasonable business practice, could that be saved by a solicitor's certificate?

MR FARMER QC:

Yes, I would submit it could.

ANDERSON J:

But maybe sometimes, maybe not?

MR FARMER QC:

I mean that's a very difficult leg of the Act because how does, I mean how does, how do you judge reasonable standards of commercial practice? If the solicitor certifies in effect and if there's nothing that's so obviously crazy about what's being done, then to give rise to the sort of situation that Justice Tipping has suggested –

ANDERSON J:

I suppose it's difficult to think of a hypothetical case, it just depends on that aspect of the –

MR FARMER QC:

No, it – yes it does.

ANDERSON J:

– and nothing else.

ELIAS CJ:

But is it through this edge of improvident transactions and inherently flawed lending arrangements that the reasonable commercial practice is related, is related to the reasonable commercial practice of a lender, perhaps it is the case that the lender doesn't have an obligation to save people from improvident transactions?

MR FARMER QC:

The lender doesn't have, but is Your Honour suggesting that perhaps the, if the lender is –

ELIAS CJ:

As opposed to inherently flawed lending transactions – yes it's a matter of degree perhaps, but there's nothing on the face of the loan itself that is improvident, it's the purpose really for which the –

MR FARMER QC:

Investment's being made.

ELIAS CJ:

– the investment is being made and on the advisability of that –

MR FARMER QC:

Yes.

ELIAS CJ:

– the lender doesn't have an obligation and the interposition, the fact of independent advice, whether from a lawyer or from a commercial adviser, is an answer.

MR FARMER QC:

Mmm, yes.

McGRATH J:

Mr Farmer could I just say, is the key factor that we should focus on this case in relation to the lawyer being present, that the finding of Justice Randerson that the Bartles did not appreciate that their home was vulnerable for the second and third tranches of the loan, that the presence of the lawyer is an answer to that –

MR FARMER QC:

Yes.

McGRATH J:

– it's the, it's an answer to the sort of broad claim "we didn't appreciate there was a risk and you should have ensured we did", and your answer to that is that to which the presence of the lawyer is crucial in answering?

MR FARMER QC:

Yes, that's right, but I answer that question in the context of also saying we don't accept that the loan was oppressive.

McGRATH J:

Of course, I understand that argument but I think that's – I just want to make sure that I understand the key, what your submission is in particular in relation to the presence of the lawyer and it goes to the claim that we didn't appreciate there was this risk?

MR FARMER QC:

Right, that's right.

BLANCHARD J:

Mr Farmer, I just wanted to clarify a question of fact, you've said that TML didn't have knowledge of the Blue Chip scheme and you've pointed to what the High –

MR FARMER QC:

They knew this was a Blue Chip investment –

BLANCHARD J:

Yes, no, but they didn't have knowledge of the details –

MR FARMER QC:

Of the details, of the terms of the JV.

BLANCHARD J:

Can I just clarify whether Blue, TML had knowledge of the existence of the lease and of the Blue Chip guarantee?

MR FARMER QC:

Whether TML had that knowledge?

BLANCHARD J:

Yes. Take the lease first.

MR FARMER QC:

Well there's no – in the documents that were on the AMS file, and on the TML file, there was no detail of the lease because of course they'd just got to the point of settling the purchase of the apartment which had only just been finished being built, so that all they had was a valuation of 500 and whatever 30,000.

BLANCHARD J:

But that didn't have any figures in it about what you could lease the apartment for?

MR FARMER QC:

No it didn't, but it wouldn't be too hard to make an assessment of that. I mean if you know that's what it's, I mean you would –

ELIAS CJ:

What it's valued at.

MR FARMER QC:

And yes, it would not be too hard at all and you'd know that there would be an income from it.

BLANCHARD J:

So you would accept that TML had a fair idea what income could be obtained from those premises?

MR FARMER QC:

Yes, absolutely, and that was an important piece of going to the question of affordability, that there was going to be a source of income from that property.

BLANCHARD J:

But they didn't know that there was a lease in place?

MR FARMER QC:

No, I don't believe there's any evidence of a lease being specifically in place as at the time of the loan application and approval, the second and third.

BLANCHARD J:

Well I don't know whether one was in place at that time or not but the question I was really concerned with was what TML's knowledge was, and you're saying they didn't know?

MR FARMER QC:

I haven't seen any evidence of any rental figures at that time, subsequently we know it was 30,000 per annum or whatever but, which is what 600 a week, it's what you would expect from a $530,000 property in Auckland, central Auckland.

BLANCHARD J:

And presumably GE could have figured that out too –

MR FARMER QC:

Yes.

BLANCHARD J:

– in the same way?

MR FARMER QC:

Yes. I don't know if I've got anything further I really need to address, I'll just check.

ELIAS CJ:

Yes.

MR FARMER QC:

Thos are our submissions and apply if the Court pleases.

MR MILES QC:

Ma'am, and meanwhile you'll remember I was going to give you copies of those, that analysis that I –

ELIAS CJ:

Oh yes, thank you, the references.

MR FARMER QC:

And we'll hand up the minute, the minutes, the bench notes.

ELIAS CJ:

Thank you, if those can be handed in to the Registrar. Mr Miles did you have something else that you wanted to –

MR MILES QC:

Well Mr Dale's anxious to give you that article by Peter Watts, but I'm in your hands.

ELIAS CJ:

I'd like to read it.

TIPPING J:

I think we should have it in view of its provenance.

BLANCHARD J:

We don't want to be on record as refusing to look at something from Professor Watts.

MR MILES QC:

Well I was planning to tell him that was the reaction, had you been so bold.

BLANCHARD J:

A sort of blackmail.

ELIAS CJ:

But that's all right, did you need to address this further Mr Miles –

MR MILES QC:

No, no.

ELIAS CJ:

Well you can give those to the Registrar who will get them to us. We will take time to consider our decision in this matter and thank you very much counsel for your submissions.

COURT ADJOURNS: 4.15 PM