IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2009-470-868

	BETWEEN	BRENT GEORGE MACLEAN DEBORAH CAROLE MACLEAN Plaintiffs
	AND	ANNAN & CO Defendant

Hearing: 13-16 and 23 June 2011

Counsel: DW Grove for Plaintiffs
AC Challis and HK Harkess for Defendant

Judgment: 18 November 2011

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 18 November 2011 at4.30 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: .....

Solicitors: *Ellis Law, P O Box 4516, Auckland 1140 for Plaintiffs*
McElroys, P O Box 835, Auckland 1140 for Defendant

TABLE OF CONTENTS

Introduction

[1] Mr and Mrs MacLean entered into agreements to participate in one of the so-called Blue Chip schemes which offered attractive benefits to potential investors. They have been exposed as fraudulent and worthless following the collapse of the Blue Chip group of companies. The MacLeans agreed to buy a section in a subdivision at Papakura and entered into a joint venture for its development. When the scheme collapsed, they lost everything they had put into it.

[2] The principal of the defendant, Mr Philip Annan, was the MacLeans' solicitor and a friend of long standing. They sought his advice and assistance in relation to the transaction. They say he negligently failed to draw their attention to serious deficiencies in the scheme and flaws in the documentation and, after they had entered into an agreement to buy the land, to advise them of the options available to them to cancel the agreement or to refuse to proceed with it. They claim general damages and special damages of $239,103.23 and interest until the judgment is satisfied.

Factual background

[3] By the time Mr Annan became aware that Mr and Mrs MacLean were contemplating a Blue Chip investment, they had already had considerable dealings with Blue Chip personnel. In November 2005, Mr MacLean responded to an advertisement in The New Zealand Herald. An investment adviser, named Quinton de Bruin, came to the MacLeans' home, met briefly with them and left them with some brochures. A week or so later they were contacted by Mr Peter Nielsen who informed them that he was taking over from Mr de Bruin as their advisor. He also visited them at their home and extolled the virtues of Blue Chip investments. He told them he himself owned two "joint venture" properties with Blue Chip.

[4] The Blue Chip proposal involved the purchase of a residential property in a new subdivision. Finance would be arranged by Blue Chip. The touted benefits of

the investment included a regular income by way of a procurement fee and the prospect of capital gains when, in approximately four to seven years time, Blue Chip would exercise its option to purchase the property from them. Mr Nielsen advised the MacLeans to invest in a subdivision at Papakura known as the Addison subdivision. They provided him with particulars of their financial position and a detailed proposal was put to them. At a meeting in February 2006, the MacLeans completed an application for the necessary funding. The loan was sufficient to refinance the existing mortgage on their house. The loan application was made by Blue Chip on their behalf.

[5] In early April, the MacLeans advised Mr Nielsen that they wanted to proceed with the investment, subject to discussing the matter with their lawyer. On 18 April, he presented them with a detailed proposal and had a two-hour meeting with them at their home. He said he showed them the documentation, which included a sale and purchase agreement. The MacLeans told him they would not sign the agreement until they had discussed it with their lawyer, Philip Annan. Mr Nielsen took the documents back to the Blue Chip office in Hamilton.

[6] Mr Annan had spoken informally to Mr MacLean on several occasions but he did not become involved in his professional capacity until 1 May 2006 when Blue Chip wrote to him. He subsequently met with Blue Chip representatives on two occasions and had several brief conversations with Mr MacLean before the MacLeans signed it on 19 May.

[7] Documentation was sent to Annan & Co by Blue Chip and its solicitors over the ensuing two weeks and on 4 June, after discussions with Mr Annan, the MacLeans signed the additional documents required to give effect to the transaction. Four days later Mr Annan drew down loan finance and paid the deposit and fees totalling $204,108.

[8] Blue Chip met its obligations under the arrangement until September 2007 when it defaulted on payments. The Blue Chip group of companies were liquidated in February 2008.

[9] The investment promoted to Mr and Mrs MacLean had features common to those which have already been the subject of claims by disaffected purchasers against solicitors.[1] In simple terms, the investor purchased real estate (in this case, a section in a subdivision and a residence to be built) from a Blue Chip company and entered into a joint venture to carry out the development. Under the joint venture the investor was to receive an income stream which would cover borrowing costs and also offered the promise of capital gain when an option to purchase was exercised in the future.

[10] The sale and purchase agreement in this case had many unusual features, among them:

- The vendor was not the registered proprietor of the property.
- The deposit payable under the agreement was 30 per cent of the purchase price.
- The clause of the agreement providing that the deposit would be held by a stakeholder was deleted.
- The purchase was "off the plans" but there were no copies of plans and specifications for the proposed development.

[11] The transaction as a whole involved high risks for the purchasers. They were completely exposed if Blue Chip failed.

The claim and the issues

[12] The MacLeans claim that Mr Annan was negligent in failing to advise them of the unsatisfactory features of the sale and purchase agreement and other documents before they signed them. Alternatively, they say that, if his retainer did

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[1] Among them *Bartle v GE Custodians* [2010] 1 NZLR 802 (HC), reversed in *Bartle v GE Custodians* [2010] NZCA 174, [2010] 3 NZLR 601, but restored in *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31; *Bilbe v Unkovich* [2011] DCR 285 upheld on appeal in *Unkovich v Bilbe* HC Auckland CIV-2010-404-5098, 16 November 2010.

not require him to advise them before they entered into the sale and purchase agreement, he was negligent in failing to advise them subsequently that they had a right to cancel the agreement and in proceeding to pay the deposit and make other payments to Blue Chip.

[13] For Annan & Co, it is said that Mr Annan had not been retained to advise the MacLeans at the time they signed the sale and purchase agreement and they entered into it relying on their own judgment. When Mr Annan was in a position to advise the MacLeans in relation to the transaction, the defence says he did so competently. The defence says it was impracticable to exercise the right which existed under the agreement to cancel and there were no other available grounds. If, however, there were other grounds of cancellation available, it is said there is insufficient evidence to enable the Court to determine whether the right could have been successfully exercised. If, contrary to the defence position, Mr Annan did breach his duty of care leading to loss to the MacLeans, the defence says damages should be reduced to take account of the contributory negligence of Mr and Mrs MacLean.

[14] The issues which arise for consideration in order to determine whether and on what basis the plaintiffs are entitled to recover accordingly are:

(a) The timing and scope of Mr Annan's retainer and the nature of the services he provided.

(b) Whether he was in breach of his duty of care.

(c) Whether any acts of negligence caused loss.

(d) Whether the plaintiffs were guilty of contributory negligence.

The retainer and services provided

[15] The plaintiffs' case is that Annan & Co's contract of retainer commenced on 1 May. The defence position is that it did not commence until over a month later, on 2 June. I am satisfied from the way events unfolded that the plaintiffs are correct

and that Annan & Co were retained at the earlier date. From that point Mr Annan owed them a duty of care.

[16] On 1 May, Neisha Comins, the Account Manager at Blue Chip in Hamilton, sent a letter by facsimile to Mr Annan which read as follows:

> Hi Philip,
>
> Brent and Deborah are currently in the process of purchasing an investment property through Blue Chip New Zealand. They are using a Blue Chip Joint Venture structure to purchase this property.
>
> I would like to arrange an appointment between our Business Manager, Jack Brabant, and yourself to go over this structure to ensure that you are happy with it before the clients proceed any further.
>
> If you could contact Jack on 029 202 2123 to arrange this, that would be much appreciated.
>
> Kind regards
>
> Neisha Comins
> Accounts Manager

[17] Mr Brabant was the Business Manager at Blue Chip's head office in Auckland. He and Mr Annan met at Mr Annan's offices in Tauranga on 10 May. Mr Brabant could not remember much about the meeting. He said that when he met with a lawyer, it was for the purpose of providing an overview of Blue Chip and the way its investments worked, mainly directed to the joint venture aspect of the investment. He said he did not discuss the agreement for sale and purchase with Mr Annan, although he acknowledged that it is possible that he would have taken with him a bundle of documents produced by Blue Chip on 1 May which included the agreement for sale and purchase.

[18] Mr Annan's account was generally in line with Mr Brabant's evidence. He said it was a short meeting in which Mr Brabant gave him an overview of Blue Chip's joint venture structure. He said at the time of the meeting he had not been instructed by the MacLeans. All he knew was that they were interested in Blue Chip and "wanted me to go over the joint venture structure". He said he was not given any documents to review and at no time did he and Mr Brabant discuss any contract

documentation. In cross-examination he said, "the whole thing was just an exercise in finding out about Blue Chip, it wasn't specific to any client".

[19] I have considerable difficulty with Mr Annan's characterisation of the meeting. I accept that Mr Brabant's role was to explain the structure of the investment, with particular reference to the joint venture component, but I do not accept that the MacLeans' transaction was not addressed. Subsequent events show that, for Mr Annan, the meeting was a first step to his advising the MacLeans in relation to the investment.

[20] He met with Mr MacLean after the meeting and discussed the proposal with him. Mr Annan denied that such a meeting took place but the following email he sent to Mr Brabant on 17 May shows that he was mistaken:

> Thank you for coming to see me last Wednesday 10 May. I have met briefly with Brent Maclean and discussed the proposal with him. I anticipate that Brent will proceed with the proposal. Perhaps I could leave it with you to follow up directly with him.
>
> I am meeting today with Mark Hannan of your office. I anticipate that I will glean a little more information out of that meeting. I mentioned this to Brent. I will report back to him again later this week and let him have any further comment I might have arising out of the meeting with Mark Hannan.
>
> Perhaps in the meantime you would be able to comment on the following points:
>
> 1. Please let me know what the legal expenses relate to under the heading Conveyancing Expenses on the Anzac Joint Venture Analysis. The legal expenses show as a guide $2,700.00 plus $750.00 for each additional property.
>
> 2. Under the section headed Joint Venture Guidelines there are guideline warnings noting that firstly additional working capital required and secondly guaranteed party year 4 accumulative cash deficit required.
>
> Would you please let me have some explanation of these points and whether they give the investor reason to be concerned.

[21] In the second paragraph of the email, Mr Annan refers to a meeting on the same day (17 May) with Mark Hannan of Blue Chip. Mr Annan asked for that meeting so that he and his staff could find out more about Blue Chip's operation. It was attended by Mr Annan and three members of his staff. It involved a Powerpoint

presentation with a training pack. It was described by one staff member as a "well rehearsed sales patter for the Blue Chip product". As a result of the meeting, Blue Chip began referring clients to Mr Annan. He said there were twelve referrals in total. Apart from three of four, for whom he had previously acted, the others were new clients.

[22] The following morning (18 May) Mr Annan dictated another email to Mr Brabant. His dictation (of which I was provided with a verbatim record) begins, "Another email to Jack Brabant on the Brent MacLean file". The email read as follows:

> Hi Jack,
>
> Thanks for your call last night. Just a couple of further minor points for your further comment:
>
> 1. Is it likely that the joint venture parties will be required to contribute further capital or contributions to operating shortfalls during the period of the venture as provided in clause 6.5 and 6.7 of the joint venture agreement.
>
> 2. The joint venture agreement imposes obligations on the bare trustee (the company) should the company be a party to the joint venture agreement.
>
> 3. I take it that there is no restriction on Brent and Debby as party A of the joint venture agreement further encumbering or borrowing on their own or their trust's house. This is likely to depend on the priority sum that is incorporated into any first mortgage that the trust gives to the lender. That priority sum should be close to the percentage represented by the amount borrowed in relation to the value of the property at the time of entering into the joint venture.
>
> The joint venture agreement under clause 8.6 the quorum is the joint venturers who hold not less than 51% of the units. It would appear that Brent and Debby will own the 75A units. Would it not be better to ensure that a quorum of such the holder of the B unit must be present.
>
> By the termination of the venture. I understood that the election to terminate belonged to party B (Blue Chip). The termination provisions in the joint venture agreement refer to termination after a special resolution by the parties. I understood that party A (Brent and Debby or their trust) did not have the option of early termination but rather they were at the best of party B and that party B could termination at the 4, 6 and 8 year period. Can you point me to these provisions?
>
> I appreciate that some of these points might be made more clear once I receive the final documents completed in relation the parties however any comment you are able to make in the meantime would be useful.

The email was sent at 2.05 p.m. that day. Mr Brabant did not reply until 9 June.

[23] Just before the email was sent, according to phone records at 1.49 p.m., Mr Annan phoned Mr MacLean. This appears to be the "report back" to Mr MacLean following the meeting with Mr Hannan which Mr Annan refers to in the second paragraph of his email to Mr Brabant of 17 May.[2] He and Mr MacLean spoke for three minutes. What was said is very much in contention.

[24] Mr MacLean said that Mr Annan told him that he had met with Blue Chip representatives; that he was happy with everything; and the agreement looked very good. Mr MacLean said Mr Annan commented that he would love to invest in Blue Chip himself but was financially committed elsewhere.

[25] Mr Annan denied Mr MacLean's account of the conversation in all material particulars. While he did not have a clear recollection, he said he would not have told him that the agreement looked very good. He said it is "beyond belief" that he would say that when he had not been instructed by the MacLeans to review the contract documentation and had not received any documents, apart from a sample joint venture agreement. Furthermore, he was still waiting for responses to the two emails he had sent to Mr Brabant. He denied saying that he would invest with Blue Chip himself. Mr Annan said that the gist of his comments to Mr MacLean would have been that he had met with Blue Chip and was still trying to obtain more information and understand the structures.

[26] While I cannot be sure of exactly what was said, both men relying on their unaided memory of the conversation, I am satisfied that Mr Annan gave Mr MacLean a favourable account of what he had learned about Blue Chip in terms which left Mr MacLean with the impression that it was all right for him and his wife to proceed with the next step. I cannot, however, say that he was told that the agreement looked very good as there is nothing to show that Mr Annan had seen the agreement at this point.

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2 See [20] above

[27] Mrs MacLean said that when her husband returned from work later that day, he told her that Mr Annan had called him and said it was all right to sign the agreement for sale and purchase. He also mentioned that Mr Annan had said that, as a result of this introduction, further Blue Chip clients were going to be referred to him. She said her husband joked with her that they should be receiving a commission on these referrals.

[28] I found both Mr and Mrs MacLean to be truthful witnesses, not always accurate as to matters of detail, but able to provide a reliable account of the thrust of critical events. Mrs MacLean was cautious about the proposal. I accept that she would not have proceeded further without reassurance that Mr Annan was happy with it. This was a significant investment for the MacLeans. They had good reason to remember the events of that day.

[29] I have less confidence in Mr Annan's recollection of events. While I am left in doubt whether he had seen the agreement for sale and purchase at this stage, it is clear that he had been impressed by what he had heard about the Blue Chip product and I believe he enthusiastically endorsed it to Mr MacLean. It is regrettable that he did not keep notes of this conversation (or his earlier discussion with Mr MacLean) or of his meetings with Blue Chip representatives. His recordkeeping and file management generally was poor and has added to the difficulty of resolving disputed issues of fact.

[30] Mr MacLean rang Mr Nielsen on 18 May to tell him that they were happy to proceed with the transaction. Mr Nielsen was passing their way the following evening and brought two documents for them to sign. They were the agreement for sale and purchase and a document entitled "joint venture addendum agreement". They were signed in the course of a short meeting. There was no discussion about the detail of the transaction. Mr Nielsen recalled that Mrs MacLean asked whether their house would be at risk but he did not attempt to explain the risks involved. The MacLeans said they simply signed the documents where indicated and without reading them.

[31] On 29 May, Blue Chip emailed mortgage documentation to Annan & Co. It was received by Krythia Scott, a legal executive employed by Annan & Co. She does most of the conveyancing in the office. She phoned Mrs MacLean after the documents were received to tell her they were ready to be signed. She remembers Mrs MacLean saying that she did not want to buy the property but was going along with it because her husband wanted to do it. Ms Scott said that she would have printed the documents and either given them to Mr Annan or left them in his office on the day she received them. Mr Annan said he could not recall seeing the loan documentation at that time. I consider it unlikely that he was unaware of them.

[32] On the same day, 29 May, which was a Monday, Blue Chip sent further documents to Annan & Co. They included the signed agreement for sale and purchase and joint venture addendum agreement. Mr Annan said he did not receive these until Friday, 2 June 2006. He said he was surprised to receive the letter and agreement as he was still making enquiries about the joint venture structure and, until they arrived, he was unaware that the MacLeans had signed an agreement. Mr Annan attributed the delay in delivery to the fact that the letter was addressed to Annan & Co's physical address and not to their DX or box number. Mr Annan said, after receiving the documents, he arranged to meet with the MacLeans on Sunday, 4 June to go through the documents. He agreed to take the documents to their home.

[33] Further documents were sent by Blue Chip's lawyers, Walters Law, on 1 June 2006. They included the joint venture agreement. They were addressed to Annan & Co's DX. Mr MacLean thought that he collected the DX mail over the weekend but before his meeting with the MacLeans. Accordingly, he had all remaining documents in his possession when, on Sunday 4 June, he went to the MacLeans' house. The documents still requiring execution by the MacLeans were signed then. They comprised the joint venture agreement, the loan agreement and mortgage, and a deed of nomination and deed of trust to enable the trustee of the MacLean Family Trust to become the purchaser and joint venture partner.

Contract of retainer

[34] The defence contends that Annan & Co's retainer did not commence until he received the signed documents on 2 June. As I have already said, I am satisfied it commenced when he received the letter from Blue Chip on 1 May.

[35] The person asserting a contract of retainer has the onus of establishing both its existence and its terms.[3] Like other contracts, retainers need not be created by express words; their existence can be inferred or implied from the circumstances.[4] An implied retainer will only arise where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties.[5]

[36] Ms Challis' argument that the contract of retainer did not commence until later was supported by Mr Robert Eades, a senior and experienced solicitor, who gave evidence for the defence. Their position was that the fax of 1 May did not contain any specific proposal and the purpose of the suggested meeting was to explain the structure that would be employed if a transaction did result. In Mr Eades' view, in circumstances where the promoter (not the clients) contacts the lawyer, he would not regard himself as having instructions to act. I am unable to accept that proposition in the circumstances of this case.

[37] Mr and Mrs MacLean had both a professional and personal relationship with Mr Annan. He had been their solicitor for about ten years. He advised them on the formation of their family trust and on a number of conveyancing transactions. As a result of these dealings and an interest in surfing shared with Mr MacLean, they became friends and saw one another socially.

[38] During April 2006, Mr MacLean had several discussions with Mr Annan about the Blue Chip proposal. These took place on social occasions and it is not suggested that legal advice was sought or given at that stage. However, it would

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3 *Hansen v Young* [2004] 1 NZLR 37 (CA) at [37].

4 GE Dal Pont *Lawyers' Professional Responsibility* (4th ed, Lawbook Co. Sydney, 2010) at [3.50].

5 *Dean v Allan and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249 at [22]; *Burke v Lfot Pty Ltd* [2000] FCA 1155, (2000) 178 ALR 161 at [85].

have come as no surprise to Mr Annan when the letter of 1 May arrived from Blue Chip. While the fact that the instructions had come from the promoter might count against the implication of a retainer, the pre-existing relationship between Mr Annan and the MacLeans[6] and the terms of the letter support the inference that a contract of retainer commenced at that time. It is clear that Blue Chip had been advised by the MacLeans that they wanted Mr Annan to become involved in a professional capacity.

[39] Mr Annan said he did not take from the letter that he was being instructed to "get involved" and to "look at documents on behalf of a client". He said he saw it as an opportunity to find out more about Blue Chip and that is what the subsequent meeting with Mr Brabant was intended to achieve.

[40] I find Mr Annan's view of his role at this stage to be quite implausible in the circumstances. The letter advised him that the MacLeans were "currently in the process of purchasing an investment property through Blue Chip New Zealand" and asked him to go over the structure to ensure that he was "happy with it before the clients proceed any further".[7] The letter conveyed clearly that the proposed investment was being taken to the next stage and Mr Annan's advice was being sought. His actions after receipt of the letter are consistent with the existence of a retainer. The meeting with Mr Brabant was a first step to Mr Annan advising the MacLeans in relation to the investment.[8] He then met with Mr MacLean,[9] discussed the proposal with him and felt able to advise Mr Brabant that he anticipated that "Brent will proceed with the proposal".[10]

[41] The next meeting (with Mr Hannan) was undoubtedly for the primary purpose of educating Annan & Co personnel generally in relation to Blue Chip investments but Mr Annan continued to direct enquiries to Mr Brabant, specifically in relation to the MacLean transaction.[11]

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6 See *Dean v Allan and Watts*, above n 5, at [22].
7 See [16] above.
8 See [19] above.
9 See [20] above.
10 See [20] above.
11 See [22] above.

[42] As an aside, it is interesting to note that when dictating the email to Mr Brabant of 18 May, Mr Annan referred to it as "another email to Jack Brabant on the Brent MacLean file".[12] Ms Challis made something of the fact that Mr Annan did not open a file until 6 June. She relied on *Simmons v Story*[13] where the fact that a file had not been opened was held to count against the implication of a retainer. It is also the case that no time was recorded for Annan & Co attendances until 5 June. I put these matters to one side as they clearly did not reflect the reality of what was going on. Over the period 1 May to 5 June, it is clear that a number of documents were received and time spent specifically on the MacLean transaction. They included loan documents sent electronically on 29 May. It is surprising that no file was opened or time recorded over this period.

[43] I am satisfied that at all relevant times Mr Annan was under a duty of care by virtue of his retainer. However, even if a retainer had not come into existence until later, I consider a duty of care in tort would have arisen by virtue of a voluntary or deemed assumption of responsibility for the performance of a task discussed in *Bartle.*[14] On the very different facts of that case, a duty of care was found to arise in tort as no retainer had come into existence.

[44] The basic term of a retainer implied by law, requires the lawyer to use his or her best endeavours to protect the client's interest and to exercise reasonable care and skill and largely replicates the lawyer's duty of care in tort.[15] The relevant standard of care is that of the reasonably competent practitioner.[16] A breach of duty of care will be established only if the action taken or advice given by the lawyer is not to the standard expected of a reasonably competent practitioner.

Breach of duty

[45] The amended statement of claim alleges the defendant breached its duty of care in failing to advise the MacLeans of numerous unsatisfactory features of the

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12 See [22] above.
13 *Simmons v Story* [2001] VSCA 187 at [25].
14 *Bartle v GE Custodians,* above n 1, at [136] – [144].
15 Dal Pont, above n 4, at [3.20].
16 *Lai v Chamberlains* [2005] 3 NZLR 291 (CA) at [184]; *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp (a firm)* [1979] Ch 384 (Ch) at 403.

principal documents which gave effect to the transaction – the agreement for sale and purchase, joint venture agreement and deed of lease – and of their right to cancel the sale and purchase agreement under s 225 of the Resource Management Act 1991. In closing submissions Mr Grove sought to rely on acts and omissions which went beyond the scope of the pleading. They included allegations that Mr Annan was negligent in not contacting the MacLeans after receiving the facsimile of 1 May and failing to obtain a title search and take other steps after receipt of documentation during the week of 29 May 2006. He also relied on the advice given to the MacLeans on 18 May that they could proceed with the transaction. Although I have found Mr Annan encouraged them to do so, his advice at that point did not relate to the unsatisfactory features of the documents. I take the view that the pleaded breaches could not have occurred until after Mr Annan received the contract documents. On Mr Annan's account (and there is no evidence to contradict it), that was on Friday 2 June when the signed agreement for sale and purchase was received. The first opportunity he had to consider all the documents was when he cleared the firm's DX box over the weekend.

Cancellation under s 225 of the Resource Management Act

[46] The first available act of negligence relied on is Mr Annan's failure to advise the MacLeans to exercise their right to cancel the sale and purchase agreement. As the agreement related to the sale of a lot in a proposed new subdivision that was made before the appropriate survey plan had been approved under s 223 of the Resource Management Act 1991, the MacLeans had the right, pursuant to s 225, to cancel the agreement within 14 days. As the agreement was signed on 19 May, their right to cancel under s 225 expired on 2 June.

[47] That is the day when Mr Annan says he received the agreement. I am sceptical of his evidence on this issue. Even accepting that delay may have arisen because the documents were posted to Annan & Co's street address, the elapse of five days between posting and delivery seems inordinate. Mr Annan said that if he had received the documents before 2 June, he would have opened a file but, as I have said earlier, I place little reliance on the fact that no file was opened until 6 June. However, there is nothing to contradict Mr Annan's evidence that the documents

were received in the afternoon of 2 June 2006 and that is the basis on which I proceed.

[48] In the circumstances, I do not think a competent solicitor in Mr Annan's position could reasonably be expected to have advised the MacLeans to cancel the agreement. Time constraints alone would have made it impracticable for him to review the documents and advise the MacLeans of his conclusions. There is also the difficulty that at the time he did not have all the documentation accepting, as I must, Mr Annan's evidence that the other documents were not received until he cleared his DX box over the weekend.

[49] Mr Peter Nolan, a solicitor with specialist expertise in property law and practice, gave evidence for the plaintiffs. He took the view that a solicitor in Mr Annan's position should have at least quickly perused the agreement and noted that the right to cancel under s 225 was about to expire. But he acknowledged that it would be dangerous to advise cancellation without seeing all the documents. In the circumstances, I am satisfied there is nothing Mr Annan could have done at this point to enable the MacLeans to exercise the right to cancel.

Advice on 4 June

[50] Before examining the steps subsequently taken by Mr Annan, in particular, the advice he gave to Mr and Mrs MacLean on 4 June, it will be helpful if I briefly describe the nature and key terms of the principal documents.

Agreement for sale and purchase

[51] The agreement was in the standard form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society (7th ed, 2 July 1999). The vendor was Strowan Ltd (Strowan). The purchasers were Mr and Mrs MacLean and/or nominee. The purchase price was $485,000. The deposit was $149,000, payable upon execution of the agreement by both parties. The balance of the purchase price was payable on the possession date which was defined as being the later of five working days after the issue of title or of a final code compliance

certificate. The special conditions of sale provided that the estimated settlement date was about March 2007.

[52] Under the special conditions, general condition of sale 2.4 was deleted. It provided as follows:

> Where this agreement is entered into subject to a condition expressed in this agreement, the person to whom the deposit is paid shall hold it as a stakeholder until this agreement becomes unconditional or is avoided for non-fulfilment of any condition under subclause 8.7(5).

Accordingly, Blue Chip was not required to hold the deposit as a stakeholder pending settlement. I refer to other unusual features of the agreement a little later.[17]

Joint venture addendum agreement

[53] The joint venture addendum agreement was a brief agreement between Blue Chip, Strowan and the MacLeans whereby the MacLeans agreed to enter into the sale and purchase agreement and pay the deposit to Blue Chip in consideration of Strowan procuring Blue Sky Holdings Ltd (Blue Sky) to enter into a joint venture agreement with them to complete settlement of the sale and purchase agreement. The addendum agreement made no reference to the terms and conditions of the joint venture agreement. However, Strowan undertook that it would procure Blue Sky to pay to the MacLeans interest on the loan taken out by them to pay the deposit under the agreement and an annual procurement fee by 26 equal payments made fortnightly in advance. The procurement fee is said to be described in the "Equity Party and Guarantee Party Joint Venture Analysis" which was said to be annexed to the agreement but was not.

Joint venture agreement

[54] The joint venture agreement provided that the assets and liabilities of the joint venture would be held in one hundred joint venture units, of which 75 "A" units would be held by the MacLeans and 25 "B" units by Blue Sky. The joint venture provided for an initial contribution by each party. That of the MacLeans was

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[17] At [57].

specified as taking responsibility for repayment of all borrowings on the property; payment of sums needed to pay for the land, buildings and improvements; and payment of the costs and disbursements associated with the joint venture. The initial contribution of Blue Sky required it to take responsibility for arranging loans to be made to the joint venture; contributing to any cash shortfall; assuming management responsibility; and paying a share of costs and disbursements associated with the joint venture.

Deed of lease

[55] There was a deed of lease dated 1 May from the Strowan as lessor in favour of Auckland Residential Tenancies Ltd as lessee, guaranteed by Blue Chip. It contained an option to purchase by the lessee at the end of the initial term, although the initial term was not specified.

[56] Mr Nolan identified a number of issues and risks arising out of the documentation which, in his opinion, would have resulted in a reasonably competent practitioner advising the MacLeans that they would be most unwise to proceed with the purchase and that they should not sign the documents.

[57] Mr Nolan referred to the following issues arising from the agreement for sale and purchase as disadvantageous to the purchasers and which should have been the subject of advice by Mr Annan:

(a) The vendor was not the owner of the property and there was no evidence of any agreement between the owner and the vendor.

(b) The property formed part of a subdivision that had not yet been completed and there was a building to be erected on the land. In the absence of agreement between the owner and vendor, it was impossible to tell what obligations the owner had to complete the subdivision or construct the building. There was no obligation on the vendor to complete the subdivision or the construction of the building or to compel the owner to do so.

(c) The deposit payable under the agreement was much higher than the usual 10 per cent of the purchase price.

(d) The deletion of cl 2.4, removing the obligation of the vendor to hold the deposit as stakeholder, was unusual and irregular. It would have been desirable for the deposit to be held by the vendor's solicitors in their trust account pending final settlement. There were serious risks for the purchaser if the deposit were released immediately to the vendor or at any time before settlement.

(e) The provision entitling the vendor to substitute another property altogether without the approval of the purchaser was most unusual and irregular.

(f) The agreement contained no conditions for the benefit of the purchaser such as a finance condition, a LIM report condition, a due diligence condition or a solicitor's approval condition. The purchaser would be obliged to complete the purchase even if finance could not be arranged.

(g) The agreement did not include numerous terms and conditions normally included for the purchase of dwelling units "off the plans". Even if such provisions had been included, additional special provisions would have been required to address the fact that the vendor was not the developer but a purchaser from the developer.

(h) The vendor was not Blue Chip New Zealand Ltd but an unlisted company which could be worthless.

[58] Mr Nolan said the agreement was so unusual, so risky and so defective, that taking all factors into account Mr Annan should have advised the MacLeans not to proceed with it without, at least, addressing some of the issues and obtaining appropriate protection.

[59] The joint venture addendum agreement gave little indication of the terms and conditions of the proposed joint venture and Mr Nolan said a reasonably competent practitioner would have advised the MacLeans that it was wholly inadequate. Further, it provided for the refund of the deposit if the joint venture agreement were not delivered to the purchaser's solicitor within 90 days from the payment of the deposit. As the deposit excluded Blue Chip fees of $55,108 payable when the deposit was paid, the MacLeans would have been left out of pocket if the joint venture agreement had not been delivered.

[60] Mr Nolan said that a reasonably competent practitioner would have raised a number of issues in relation to the joint venture agreement, particularly as to the way in which the "Initial Contributions" of the parties were defined. He described the agreement as complex, confusing and ambiguous. A number of provisions conflict with each other. Mr Nolan said that in the absence of a financial analysis showing the proposed workings of the joint venture, it was impossible to glean how it was intended to operate, how much each party was obliged to contribute and how the value of the joint venture units attributed to each party was assessed. It makes no mention of the purchase price of the property, the amount of the borrowings or of the "working capital" facility, and the Blue Chip fees and expenses which the MacLeans were required to pay. Mr Nolan said it appears that instead of Blue Sky making the MacLeans' loan payments from its own resources, they were being paid from the "working capital" facility paid on an unsecured basis to Blue Chip which was not even the joint venture partner and had no obligation to use the money for that purpose.

[61] In relation to the deed of lease, Mr Nolan identified as issues of concern which would be raised by a reasonably competent practitioner:

(a) The lease did not state the period of the initial term.

(b) It contained an option to purchase and rights of renewal but not a guaranteed buy-back. If the option were exercised, the lessee was entitled to compensation equivalent to 7.95 per cent of the purchase price.

(c) The lease was exempt from the provisions of the Residential Tenancies Act 1986 and contained provisions that would be likely to lead to a rent well below the market rental that would be payable by a residential tenant.

(d) The guarantee by Blue Chip could not be enforced until the lessor had exhausted all remedies against the lessee.

[62] By and large, Mr Eades accepted that the matters identified by Mr Nolan were disadvantageous to the purchasers. He agreed that the transaction involved significant risks for the MacLeans. He accepted that a competent solicitor in Mr Annan's situation would take reasonable steps to ensure that his clients understood what the risks of the transaction were. However, he disagreed with Mr Nolan's evidence that Mr Annan should have advised the MacLeans against proceeding with the transaction and counselled them against signing the further documents. He said that course was not warranted in all the circumstances. He referred in particular to the business experience of the MacLeans and their enthusiasm for the proposal; the time they had had to consider the Blue Chip information and their decision to sign the sale and purchase agreement without referring back to Mr Annan; the apparent strength of Blue Chip; and the fact that the MacLeans had not at any stage expressed concern about proceeding.

[63] Mr Annan said that at the meeting he talked to Mr and Mrs MacLean about the sale and purchase agreement and joint venture addendum agreement they had already signed. He said he identified some of the unusual terms of the agreement and made particular reference to them. He said he drew attention to some of the risks of the transaction, including a decrease in property values, the possibility that Blue Chip would fail to purchase the property back or go into liquidation and the possible need to contribute additional capital. He said he explained the overall structure of the deal by way of a flow chart which he sketched by hand as they talked.

[64] In forming a view of what occurred at the meeting, I am again disadvantaged by the absence of any reliable contemporary record. In their evidence, all present

were largely relying on their unaided memory of what appears to have been a semi-social occasion.

[65] Mr and Mrs MacLean said the meeting took place at the dining table in their kitchen with children in attendance and the television on. Mrs MacLean thought she would not have been present all the time and was likely to have been answering the phone and fetching refreshments. Both denied being made aware of any significant risks associated with the investment. They said that, had they been appraised of the risks of the transaction, they would not have proceeded.

[66] The MacLeans denied that the transaction was explained to them by reference to the flow chart which Mr Annan said he drew at the time. It is dated 4 June but I am not persuaded that is when it was created or that all the writing on it was done on the same occasion.

[67] The flow chart and seven numbered notes which are written below it appear on the back of a page from a joint venture training pack given to Mr Annan at (he thought) the 17 May meeting he had with Mr Hannan. At least two different pens have been used, one blue, one black. Some of the individual notes are written with one pen, with an additional note written with another pen. Mr Annan said he must have taken the training pack with him to the meeting and said it was not unusual for him to use more than one pen – he would have had "an array" of pens with him.

[68] The training pack is a substantial document. I find it most odd that Mr Annan should have used it to draw a flow chart and make notes at the meeting. I incline to the view that the document was in fact created before the 4 June meeting, probably at or soon after the 17 May meeting with Mr Hannan. Mr Annan acknowledged that the flow chart was incorrect in at least one respect. Either he did not understand the structure on 4 June or the flow chart was made while he was still coming to grips with the way the transaction worked. The contents of the notes also indicate that they were made at an early stage. For example, notes numbered 4 and 5 read as follows:

> 4 Copy of loan docs & all other docs to client.

5 Terri to decide who docs [or does] what. [indecipherable] new loans.

I have difficulty understanding why, on 4 June, Mr Annan would have wanted to note to send documents to his clients. The reference in note 5 to "Terri" is to Terri Gregory who was a legal executive and the practice manager of Annan & Co at the time. It makes no sense that on 4 June, when the documentation was complete, she should be asked to decide who documents or who does what.

[69] The only contemporary document that could throw light on what was said at the meeting is a note which Mr Annan made the following day, which was the Monday of Queen's Birthday weekend. It records some of the risks Mr Annan said he mentioned at the meeting with the MacLeans and a number of queries, most of which Mr Annan noted he would take up with Mr Brabant. The risks noted were:

- The property might drop in value and Blue Chip might not purchase it in four years.
- Blue Chip might fail.
- A tax opinion [supporting the investment] might be wrong.
- More capital might be required.

[70] Mr Annan said his file note recorded some only of the risks he mentioned to the MacLeans. He said he "would also" have told them the property was not yet subdivided and that it was not owned by the vendor. He also maintained in cross-examination that he mentioned other risks such as the ability of the vendor to substitute another property, the size of the deposit and the fact that it would be released by the recipient. He was asked:

> Did you say to them because of these basic factors that a very large deposit, Strowan not owning, deposit release, no other protection for you, this is a very risky transaction?

His answer was:

> "No I don't believe I would have said that."

[71] When pressed by Mr Grove, the following exchange took place:

> Q Just if you look at those key points, it was a risky transaction?
>
> A There was some risks involved with it, yes.
>
> Q There were also some benefits, like any contract?
>
> A I didn't think that that was my job, to really go into the financial side of it, and I'd already observed to them the risks that were involved.

[72] I do not believe Mr Annan explained the risks of the transaction with anything like the care, precision and clarity that the unusual and risky nature of the transaction required. Indeed, I have real doubts that he properly appreciated the risks himself. I have the impression that he was beguiled by the slick promotion of the scheme by Blue Chip personnel (and the prospect of business they offered). In my view, Mr Annan allowed his confidence in the Blue Chip organisation and its product to distract him from making the detached and critical evaluation required for a scheme of such novelty and complexity. That lack of detachment and analysis necessarily affected the way he advised his clients.

[73] In his evidence Mr Eades rightly emphasised that all of the circumstances must be considered in determining what Mr Annan's duty of care demanded. The nature of the duty depends both on the express or implied terms of the retainer and all of the circumstances in which the solicitor is called upon to act.[18] The circumstances include, as Ms Challis submitted, the nature of services sought by the MacLeans and rendered by Mr Annan in the past. On a number of previous occasions the MacLeans had signed agreements or entered into investments before seeking Mr Annan's advice. They had had experience running a small business and had engaged in a number of property transactions.

[74] But the Blue Chip transaction was quite unlike anything the MacLeans had previously undertaken or, for that matter, of which Mr Annan had any previous experience. The 1 May fax from Blue Chip to Mr Annan was explicit that the MacLeans were relying on him for advice on a transaction which had unusual features, as his meeting with Mr Brabant revealed. The fact that a client is an

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[18] See, for example, the comments of Salmon LJ in *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113(CA) at 125.

experienced commercial operator is not by itself a reason to skimp on explanations of unusual terms, or even the salient features of the transaction. Lawyers are consulted precisely because of their legal expertise and foresight, which even experienced commercial clients may lack.[19]

[75] The investment carried with it unusual and significant risks. Mr Annan was not required to advise his clients on the wisdom of the transaction[20] or to carry out some sort of commercial assessment of the deal. But what he was obliged to do was to take reasonable steps to ensure that Mr and Mrs MacLean were sufficiently well informed to make that assessment for themselves. As *Dal Pont* says:[21]

> Lawyers retained to carry out a transaction that is improvident from the client's point of view should consider whether the client needs to be warned against pursuing the transaction, or at least advised explicitly of the risks to which he or she may be exposed. As a general principle, if the client is fully informed of the risks attendant on a transaction, and does not lack capacity, the lawyer has fulfilled her or his duty, and may act in the transaction.

[76] Mr Annan's duty of care required him to explain the key terms and the implications of the principal documents and the way they inter-related. It was clearly important for Mr Annan to ensure that the MacLeans understood the overall scheme of the investment as well as its key provisions. Special mention should have been made of any deficiencies in the documentation which adversely affected the clients' interests. That includes deficiencies in the documents already signed. Ms Challis referred me to *Bartle*[22] where Randerson J found that there was no obligation on the solicitor to draw to the attention of his clients the plain deficiencies in the agreement for sale and purchase which they had signed. But in *Bartle*, there was no contract of retainer until after the agreement for sale and purchase was completed. That is not the position here. Mr Annan had been retained since 1 May. The meeting was his first opportunity to talk to his clients since receiving the documents. His duty to explain and advise on the transaction was unaffected by the fact that some of the documents had already been executed.

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19 Dal Pont, above n 4, at [5.55].
20 *Clark Boyce v Mouat* [1994] 1 AC 428 at 437D (PC).
21 Dal Pont, above n 4, at [5.65].
22 *Bartle v GE Custodians*, above n 1 at [160].

[77] Mr Eades made the point that a lawyer must be careful not to overwhelm clients with information but should rather guide them through the essentials of a transaction in a way which will enable them to appreciate its overall effect and implications and the risks involved. I accept that is what Mr Annan should have been striving to achieve in advising the MacLeans on 4 June.

[78] The deficiencies in the documentation, including the shortcomings in the joint venture highlighted by Mr Nolan and the risks to which they exposed the MacLeans, called for careful explanation by Mr Annan, preferably recorded, at least in summary form, in writing. He should have given an intelligible but comprehensive rundown of how the deal was structured, its unusual features and the risks to which the MacLeans would be exposed. Had he done so, the MacLeans would have understood that they were totally exposed if Blue Chip failed or defaulted. Mr Annan may have mentioned some of the unusual features of the arrangement but he utterly failed to provide his clients with the advice they needed in order to evaluate the wisdom of proceeding.

Events after 4 June

[79] Mr Annan's careless indifference to the risks to which his clients were exposed continued as he prepared during the days that followed to uplift the loan monies and pay the deposit and fees. When he did so he had still to search the title, had not received responses to requests for information regarding the joint venture and was awaiting information from the MacLeans' accountant regarding significant tax issues.

[80] When his office reopened on 6 June, after the long weekend, Mr Annan sought information on a number of issues from Blue Chip. He sent an email later that day (which he said he had dictated prior to his meeting with the MacLeans) asking six questions, including when the deposit was payable under the agreement. He had telephone conversations with the mortgagee and Mr Brabant in the course of the week. On 8 June, he drew down the funds and paid the deposit of $149,000 payable under the agreement for sale and purchase and $55,108 which covered Blue

Chip's fees and a payment of $32,000 for "working capital".[23] At the time the deposit was paid, Mr Annan's questions to Blue Chip in his email of 4 June remained unanswered. The reply by Mr Brabant to Mr Annan's email of 18 May did not arrive until 9 June. Queries raised with the MacLeans' accountant in an email sent at 10.30 a.m. on 8 June were answered that afternoon. The reply sent at 2.20 p.m. raised a number of concerns about the investment. The transaction was nevertheless settled later that day.

[81] In his written brief of evidence Mr Annan said that in telephone conversations with Mr MacLean between 5 and 8 June he told him that he had not received a proper response to his queries regarding the joint venture and that his instructions were to proceed with the transaction nevertheless. In cross-examination he was less categorical. He said, "it would have been good" to have received a response to the emails and that he believed he made it known to the MacLeans. He acknowledged there was nothing on the file but thought he would have "dropped correspondence off" or at least discussed it with Mr MacLean. He acknowledged that it would have been prudent to have discussed the email from the accountant with the MacLeans before paying out the deposit but could not recall doing so.

[82] Mr MacLean adamantly denied that Mr Annan told him there were outstanding queries regarding the joint venture and that he instructed him to proceed regardless. I have no hesitation in accepting his evidence on this issue. I do not believe that the MacLeans were aware of either matter and Mr Annan went ahead and paid the deposit regardless.

[83] I am satisfied that a competent solicitor in Mr Annan's position would not have made the payments while important queries remained outstanding in relation to the joint venture and his clients had still to be advised on important tax issues affecting the investment. Indeed, Mr Eades said that while the queries regarding the joint venture were outstanding, the joint venture agreement should not have been signed or should have been signed subject to the queries being satisfactorily answered. Mr Annan could and should have deferred making the payments until all outstanding issues had been addressed and discussed with the MacLeans.

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[23] There was in fact no contractual obligation to pay the working capital.

Causation

[84] The deposits and other payments made on 8 June were funded by the borrowings arranged as part of the overall transaction. Damages claimed by the MacLeans mainly comprise the indebtedness they incurred and interest, less the procurement fees they received while Blue Chip remained afloat.

[85] When Mr Annan's negligent acts occurred, the MacLeans were already bound to pay the deposit under the sale and purchase agreement (although not the other payments made by Mr Annan on their behalf). However, the MacLeans say they would have been entitled to cancel the agreement (on grounds other than the right to cancel under s 225 of the Resource Management Act 1991) and, if properly advised, could have avoided all their losses. Ms Challis countered that the question of whether the contract could have been cancelled requires a hypothetical determination of what the vendor (Strowan) might have done and there is insufficient evidence to enable the Court to do that.

[86] In *Benton v Miller & Poulgrain (a firm)*[24] the Court of Appeal discussed the approach to be taken when the determination of loss requires an assessment of what may have occurred if a solicitor had not given negligent advice. The Court noted[25] that uncertainty can be addressed in two ways: either on what is often described as an "all or nothing" basis by reference to the balance of probabilities standard of proof, or, alternatively, on a proportionate (or loss of a chance) basis according to the Judge's assessment of the probability. Following the analysis of the English Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)*[26] it was held[27] that uncertainties as to how a client would act had proper advice been given are to be dealt with on an all or nothing basis and decided on the balance of probabilities while uncertainties as to a third party's conduct fall to be determined on loss of a chance principles. The Court went on to say:[28]

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24 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).
25 Ibid, at [44].
26 *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 (CA).
27 *Benton v Miller,* above n 24, at [48] – [49].
28 Ibid, at [50].

> In making a "loss of chance" assessment, broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather than fix damages at ten per cent of the cost to the plaintiff associated with those adverse events. At the other end of the spectrum that approach is sometimes, but not always, adopted. So a 90 per cent chance of avoiding an adverse event may result either in complete recovery of all losses associated with that adverse event (on the theory that the chance of not avoiding those losses was sufficiently speculative to be able to be ignored) or alternatively a discount of ten per cent for contingencies.

[87] I am in no doubt that had the MacLeans been properly advised they would have instructed Mr Annan to extricate them from the contract, if need be by cancellation, and to refuse to pay the deposit. The issue then, as Ms Challis said, is to consider how the third party – Strowan – would have responded, applying loss of a chance principles. Ms Challis submitted that, in the absence of direct evidence on what Blue Chip might have done had the MacLeans asked to be released from the contract, no useful conclusion can be drawn as to what might have happened.

[88] I disagree. I consider it possible to hypothesise with some confidence what Strown would have done. For two reasons, I consider it unlikely that Strowan would have resisted steps taken to cancel the contract or taken action to recover the deposit. First, there appear to be good grounds for cancellation. One is misrepresentation. Mr Nolan pointed to an important misrepresentation in a letter from Blue Chip to the MacLeans which represented that the agreement is on the Auckland District Law Society standard form which is approved for use by all lawyers in New Zealand. While literally true, it was quite misleading because of the highly unusual special conditions of sale and the deletion of standard terms such as cl 2.4 (providing that the deposit would be held by the recipient as a stakeholder). A second ground for cancellation suggested by Mr Nolan is that the contract would be void for uncertainty. Annan & Co, while still acting for the MacLeans after the collapse of Blue Chip, also relied on uncertainty as a ground for voiding the contract.

[89] While I did not hear detailed argument on the issue, I consider there would have been strong grounds for arguing that both the agreement for sale and purchase and the associated joint venture addendum agreement were void for uncertainty. For there to be an enforceable contract, the parties must have reached consensus on all

essential terms or at least upon objective means of sufficient certainty by which those terms may be determined.[29] There appears not to have been a consensus on terms essential to both agreements signed by the MacLeans on 19 May. The failure to include particulars of the building to be constructed and the substitution clause meant that there was no meaningful identification of what was being sold. The joint venture addendum agreement bound the MacLeans to enter into a joint venture agreement which was not attached or identified and omitted the joint venture analysis referred to in the preamble.

[90] The second reason why I would not have expected Blue Chip to seek to enforce the contract in the face of a clearly stated intention not to proceed is the damage that would be caused by Court action against a disaffected purchaser. It appears that there were hundreds of Blue Chip contracts sharing the objectionable features highlighted in Mr Nolan's evidence. [30] Blue Chip was reliant on a marketing strategy which minimised the risk that potential purchasers would become aware of these features. It would not have wanted to risk unfavourable publicity simply in order to preserve one deal.

[91] In making the broad judgment called for, I conclude that there is little risk that the MacLeans would not have been able to bring the contract to an end without incurring any significant costs.

Contributory negligence

[92] For the defence, it was submitted that the MacLeans were guilty of contributory negligence in two respects:

(a) They failed to read the agreement for sale and purchase with sufficient care or, in the case of Mr MacLean, at all. Had they done so they would have been deterred from signing the agreement and proceeding with the investment.

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29 *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at 495.

30 See *Bartel v GE Custodians* at [13] where it is said that the proceeding was a test case for over 300 Blue Chip investors who entered similar transactions.

(b) They failed to take sufficient care to instruct Annan & Co to review the documents before they became committed. They did not instruct Annan & Co to review the contract or ensure that Mr Annan had copies of the relevant documents.

[93] I am not convinced that the MacLeans were negligent in either of the respects alleged. The MacLeans had good reason to assume that Mr Annan had seen the agreement for sale and purchase at the time Mr Annan advised them on 18 May to proceed. I accept Mr MacLean's evidence that he believed Mr Nielson to have sent Annan & Co the documents. The bullish tone of Mr Annan's advice would have tended to confirm to Mr MacLean that he was in possession of the relevant documents. Mr Annan's endorsement (and the belief that he had read the agreement) plainly also affected Mr and Mrs MacLeans' approach to the signing of the documents. The tenor of Mr Annan's advice, later of course confirmed when he had actually studied the document, gave them the confidence to proceed.

[94] Even if the MacLeans had been negligent in either or both of the ways alleged, I am not persuaded that their acts would have been the cause of loss. There is no reason to think that Mr Annan's advice would have been any different if he had reviewed the agreement before it was signed. I cannot accept Ms Challis' submission that it is "highly likely" that Mr Annan's advice would have been more robust had he had the opportunity to advise on the contract at an earlier stage and, even if the MacLeans had read the agreement, there is nothing to indicate that they would not have signed it.

[95] The operative act of negligence was Mr Annan's failure to give the MacLeans proper advice on 4 June, compounded by his decision to pay the deposit and fees while important queries remained outstanding. Had he advised them properly on and after 4 June, they would not have proceeded with the deal and no loss would have eventuated. Any antecedent negligence of the MacLeans did not affect Mr Annan's ability to discharge his duty when he had full opportunity to do so or impact on the consequences of his default. At most their prior acts helped to create the conditions

necessary for the damage to happen.[31] This is essentially the view taken in analogous circumstances in *Bilbe v Unkovich.*[32]

Special damages

[96] The plaintiffs claim to recover losses totalling $239,103.23 made up as follows:

Initial loan (for deposit and Blue Chip fees)	$204,108.00
Less Reasonable legal fees	$ 1,000.00
	$203,108.00
Interest payments on initial loan	72,156.42
Interest on interest paid by the plaintiffs	3,390.89
	$278,655.31
Less Payments received from Blue Chip	39,552.08
	$239,103.23

[97] The defence accepts that the initial loan is recoverable but challenges the adjustment for legal costs, whether the plaintiffs are entitled to recover interest paid on the loan and the way in which interest has been computed.

[98] Both parties made supplementary submissions by way of memoranda to address issues which arose in the course of closing submissions.

Legal costs

[99] It is accepted that, if Mr Annan had advised the MacLeans properly, they would have incurred legal costs which should be deducted. Mr Grove contended for a fee of $1,000 to cover a review of the sale and purchase agreement. He said if Mr Annan had done his job properly, the further costs of reviewing the joint venture documentation would not have been incurred.

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31 See Stephen Todd (ed) and others, *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at [21.2.03].

32 *Bilbe v Unkovich,* above n 1.

[100] However, the MacLeans pleaded their case and I have found negligence on the basis that Mr Annan was required to review all documentation and, additionally, would have been involved in further attendances to extricate the MacLeans from the agreement. I accept the defence submission that an allowance of $3,000 – which Mr Nolan acknowledged would be a reasonable fee for a review of all documents – is an appropriate allowance.

Interest

[101] The plaintiffs' claim for interest totalling $72.156.42 is the sum of interest paid to 1 April 2011 on the initial loan and a loan for the same amount after it was refinanced in 2009. The sum of interest and procurement fees paid by Blue Chip to January 2009 is deducted. The additional interest of $3,390.89 is for interest at 7.5 per cent from December 2008 when the plaintiffs stopped receiving interest and procurement payments and were forced to pay interest due under the loan from their own funds.

[102] Ms Challis first submitted that, as the interest payments were made by Omokoroa Plumbing Limited – the company which operates the MacLeans' plumbing business – they had not suffered loss and could not recover. The argument lacks merit and cannot be sustained. The company was making interest payments on behalf of Mr and Mrs MacLean, its shareholders. They are accordingly indebted to the company for payments made on their behalf. Their loss is every bit as real as it would be if they had paid the interest personally.

[103] I consider, contrary to the defence submission, that the plaintiffs are entitled to recover on the basis that interest and fees received would have been used to service debts or earn interest. However, I accept the defence submission that the plaintiffs' calculation does not take into account compound interest of $1,159.43 earned on payments by Blue Chip between June 2006 and January 2008. This would have enabled the plaintiffs to meet interest payments until November 2008 and to contribute $709.67 towards the December 2008 interest payments. From that point until trial the plaintiffs continued to pay interest on the loan and, on my calculations,

are entitled to recover the aggregate payments as set out on page 6 of defence counsel's supplementary memorandum of 8 July.

[104] The interest (on interest) that the MacLeans would have received from that point on is consequently reduced. I adopt the defence calculation of $3,192.95 to the date of trial.

[105] Defence counsel submitted that a deduction should be made to take account of savings achieved by the plaintiffs as a result of borrowing for the Blue Chip investment. Counsel pointed out that when they refinanced existing debt for the purpose of the Blue Chip investment, they obtained a more favourable rate of interest. I do not think I am justified in making the assumptions which would underpin this adjustment. I cannot say what the MacLeans might have done if they had not borrowed for the purpose of the Blue Chip investment.

Conclusion

[106] My conclusion is that the MacLeans are entitled to recover special damages comprising:

The loan	$204,108.00
Less legal costs	$ 3,000.00
	$201,108.00
Interest on loan from December 2008 to the date of trial	31,997.86
	$233,105.86
Interest on interest to the date of trial	3,192.25
Total	$236,298.11

[107] The plaintiffs are also entitled to recover interest on the loan and on the interest from the date of trial to the date of judgment. Thereafter, interest on the judgment sum will accrue under the Judicature Act 1908.

[108] I reserve leave to the parties to request a review of my calculations, though not of the findings which underpin the calculations.

General damages

[109] Mr and Mrs MacLean seek general damages of $10,000 each as recompense for the stress and anxiety the Blue Chip investment caused them. Both spoke of suffering insomnia, depression, irritability and a diminution in their enjoyment of life. I am satisfied that the loss of the investment took a heavy emotional toll on them.

[110] In *Mouat v Clark Boyce*[33] Cooke P made the point[34] that stress is an ordinary incident of commercial or professional life and that ordinarily commercial contracts are not intended to shelter the parties from anxiety. However, he went on to say that one of the purposes of imposing duties on professional persons is to safeguard the interests of their client to enable the clients to have justified faith in them. The Court upheld an award of $25,000.

[111] In my view, a modest award is justified. I assess damages at $5,000 for each of the plaintiffs.[35]

Result

[112] The plaintiffs succeed. They are entitled to judgment for their monetary loss, calculated in accordance with [106] and general damages of $10,000.

[113] The defendant must pay costs on a category 2 band B basis.

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33 *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).
34 Ibid, at 569.