IN THE COURT OF APPEAL OF NEW ZEALAND C.A.78/88

BETWEEN SIMON LYNDALL SAVILL and LUCINDA MARY SAVILL

Appellants

A N D CHASE HOLDINGS (WELLINGTON) LIMITED

First Respondent

A N D CHASE CORPORATION LIMITED

Second Respondent

BK548B

BETWEEN SIMON LYNDALL SAVILL and LUCINDA MARY SAVILL

Appellants

A N D CONCEPT INVESTMENTS LIMITED

Respondent

Coram: McMullin J (presiding)
Casey J
Bisson J

Hearing: 18 May 1988

Counsel: J F Burn and W G G A Young for Appellants
M R Camp and J S O'Sullivan for First Respondent
M S Cole and A C Cook for Second Respondent

Judgment: 28 July 1988

JUDGMENT OF CASEY J

Background

The Appellants negotiated with Chase Corporation Ltd. and its subsidiary Chase Holdings (Wellington) Ltd. for the

sale of shares and exchange of properties in Christchurch, with a cash adjustment. Chase Holdings was interested in acquiring a block of land for development in that city owned by the Savills' company, Skyline Construction Ltd., and there were preliminary discussions in early 1987 between Mr Savill and a land agent (Mr Taylor) who introduced himself as acting on behalf of Chase Corporation. They were followed by a cash offer to purchase all the shares in the company conveyed in a letter dated 6 March 1987 under the heading of Chase Corporation Ltd., but signed on behalf of Chase Holdings by Mr Savage, later described as its project manager.

This offer was not acceptable, but Mr Savill attended a meeting at Chase offices in Wellington on 1 April, at which Mr Savage was introduced to him as the person involved in the transaction. Mr Savill had expressed interest in acquiring three Christchurch Chase properties in part exchange and Mr Walker from Chase Corporation Ltd. of Auckland was at the meeting to talk about these. They had been bought by that company along with many other properties (known as the Grose portfolio) and Mr Walker was in overall charge of their disposal. There was general agreement about the proposals and in particular about the price to be credited for the exchange properties. Chase Holdings' solicitor, Mr May, was present and settled the method of carrying out the deal. He decided that two contracts were necessary, one between the Savills and Chase

Holdings for the sale of the 10 million shares in their property owning company, and the other between them and Chase Corporation Ltd. for the purchase of the three Christchurch properties owned by the latter. He undertook preparation of the first (the share contract), and suggested to Mr Walker that Chase Corporation's Auckland solcitors prepare the other (the property contract) because they were familiar with the titles and the tenancies of the buildings.

The share contract was duly prepared by Mr May and sent to Mr Savill. There were various amendments including the provision of one of the three Chase properties (87 Cashel Street) as part of the deposit of $1.5 million payable when the contract became unconditional, the total consideration being $10.5 million. It was signed by the Savills and by Mr Savage on behalf of Chase Holdings and dated 8 May 1987. Under clause 12.1 thereof this contract was made conditional upon (a) the approval of the Chase Corporation Board to the share purchase within 7 days; (b) Commerce Commission approval within one month; and (c) the Savills and Chase Holdings entering into an unconditional agreement within one month for the sale by Chase Corporation of the remaining two Christchurch properties at Gloucester Street and Papanui Road for $2,900,000. There was also provision for $3,050,000 of the share purchase price to be deferred to 30 March 1988 by way of advance from the vendors secured by Bills of Exchange drawn on Chase Corporation.

Mr May informed Mr Savill within the 7 days that the approval of the Chase Corporation Board had been given, satisfying condition (a) above. In fact the Board had not even considered the proposition, and Mr May passed on in good faith advice emanating from Mr Savage, who had apparently decided to waive that requirement. The second condition relating to Commerce Commission approval was also satisfied by 11 June, within the time limit extended by agreement to 18 June. However, difficulties arose over clause 12.1(c), the parties and Mr May being apparently under the impression that it called for a direct contract between Chase Corporation and the Savills for the sale of the two properties within the month.

Mr Savill sought information about rents from Mr May, who replied on 19 May that he was attempting to get this from Mr Walker, and was taking steps to ensure that the agreement to transfer the three properties would be completed in time. On receipt of this letter Mr Savill had his solicitor prepare a contract for the sale by Chase Corporation to his wife and himself of the two Christchurch properties at Gloucester Street and Papanui Road. They signed it and he sent it to Mr May, who in turn forwarded it to Mr Walker in Auckland with the comment that it should be made conditional upon the collateral share contract. A clause drafted by him to this effect was added by Mr Walker. Mr May then wrote to Mr Savill telling him the agreement had been sent to Chase's Auckland office for signing.

Mr Savill was committed to add another property to his company's land and to clear all encumbrances. He negotiated a loan of $4.5 million for these purposes and to buy another building in which he was interested. The lender's legal advisers wanted to be sure the Chase transaction would be carried out before completing this advance. Mr Savill sought written confirmation from Mr Savage, who replied on 29 May, signing on behalf of Chase Holdings, but on the now familiar letterhead of Chase Corporation Ltd. It read :

"Dear Sir

Re: Purchase of Assets of Skyline Construction (Christchurch) Ltd.

This letter serves to confirm our intention to execute the documentation for the purchase of the assets of Skyline Construction (Christchurch) Ltd.

The said assets are freehold property known as 171 Hereford Street and 205-209 Manchester Street, Christchurch,

We acknowledge that the delay in executing the documents has been caused by a Chase executive's absence from the office and accordingly his inability to forward to you the necessary leasing details of the properties currently owned by this company which form part of the above transaction.,

Execution of the requested documentation is expected within the next few days."

Yours faithfully
Chase Holdings (Wellington) Limited

signed

D A Savage"

This was not good enough for the lender's solicitors and Mr Savill asked Mr Savage for an undertaking in the specific terms they requested, setting them out in a fax message addressed to "Chase Corporation Ltd., Wellington, Attention Dion Savage," and requesting, if he approved the wording, "a simple handwritten facsimile by return." The latter replied as follows :

" Chase Corporation Ltd.
Property & Business Investors, Developers & Managers

29 May 1987

Mr S L Savill
Skyline Construction (Christchurch) Limited
PO Box 1881
Christchurch

Dear Sir

I undertake that the contract prepared pursuant to clause 12.1(c)(i) and (ii) that has been signed by you and forwarded to our Solicitors, Messrs Philips Shayle-George will be executed by Chase and returned to you as provided for in the agreement for sale and purchase of the shares in your company.

Yours faithfully
Chase Holdings (Wellington) Limited

signed

D A Savage

P O Box 883, Wellington, New Zealand
7th Floor, 150-154 Willis Street, Wellington"

Sub-clauses (i) and (ii) described the Gloucester Street and Papanui Road land. That property contract was never signed by Chase Corporation and the meaning and effect of this letter is at the centre of the dispute between the parties.

In his evidence Mr Savill said he thought the share contract had become unconditional when he was notified of the Board's approval of the share purchase on 15 May. In that he was clearly mistaken, although he may well have assumed this would be the practical consequence of that approval. As a result of Mr Savage's undertaking, he was able to obtain the advance and used it in the transactions for which it was intended, but he says Chase's failure to complete the deal has left him without the financial resources to service that loan.

Senior Chase executives knew nothing about the advice Mr Savage had given about the Board's approval of the share purchase, nor of the undertaking set out above. At a meeting of Chase Holdings management of 10 June Mr Savage's immediate superior (Mr Stott, Manager of that company) concluded that the planned Christchurch development did not meet the Group's policy requirement that there be a tenancy commitment in advance. Mr May was instructed to seek an extension of time from Mr Savill to investigate that possibility further, and spoke to him on 11 June, but the latter would not agree unless he was told the reason for the delay in signing the contract. He was not given this, and

on 16 June his solicitors sent Mr May a Memorandum of Transfer in respect of the Cashel Street property for execution by Chase Corporation. It will be recalled this was to satisfy $1.4 million of the deposit, and they also requested payment of the balance of $100,000.

Mr May's firm replied pointing out that although condition 12.1 (a) and (b) of the contract had been satisfied, Chase Holdings (as purchaser) had not been able to secure a sale by Chase Corporation of the other two properties to satisfy condition (c); nor had they obtained the Corporation's consent to the transfer of the Cashel Street property. Accordingly the share contract had not become unconditional by the stipulated date of 8 June and was at an end. They suggested an alternative transaction, but in the meantime the Savills had registered caveats against the titles to the three Christchurch properties. To add to the confusion, these had been taken in the name of Concept Investments Ltd., which was a Chase property-owning subsidiary nominated as the purchaser when they were acquired as part of the Grose portfolio. Under the impression that the dealings with the Savills were at an end, and being unaware of the caveats, Mr Walker signed a contract to sell the Cashel Street property to a Mr Wilson on 26 June 1987 for $1,050,000.

The Claim and Judgment

Mr and Mrs Savill issued proceedings in the High Court

against Chase Holdings and Chase Corporation seeking specific performance of the contract for the sale of shares and damages of $100,000 in a Statement of Claim dated 30 June 1987. On 16 July 1987 Concept Investments Ltd. issued proceedings against them for removal of the caveat and damages of $690.41 per day being interest on the overdue settlement for which it was liable under the contract with Mr Wilson for the sale of Cashel Street. That company also sought an enquiry into other losses and expenses. Both actions were tried together, the hearing extending over 8 days and on 22 April 1988 Tipping J gave judgment for the respondents in the Savills' action, and in Concept's action he ordered removal of the caveats. However he held that its claim for damages could not succeed because the Savills had reasonable cause under s.146 of the Land Transfer Act 1952 for lodging the caveats, and there was no other basis apart from that section under which damages could be awarded.

After the hearing had concluded, the Judge received an application from the Savills for the admission of further evidence in the form of four documents. He dealt with that also in his final judgment, refusing to admit them. The Savills appeal from the whole of that judgment; Concept Investments Ltd. appeals against the refusal of damages, but argument on this was deferred pending the outcome of the Savills' appeals. The caveats have also been extended accordingly.

In their claim for specific performance the critical question was whether condition 12.1(c) of the share contract had been complied with. It reads :

> "12.1 This agreement is conditional upon the following :
>
> (a) .....
>
> (b) .....
>
> (c) The Vendors and the Purchaser entering into an unconditional Agreement within one calendar month from the date of execution of this Agreement ("the Property Agreement") for the sale by CHASE CORPORATION LIMITED of the properties situated at the following addresses to the Vendors or their nominee :
>
> (i) 166 Gloucester Street (legal description)
>
> (ii) Corner Papanui Road and Bealey Avenue (legal description)"
>
> (Then follow provisions to be included in the property agreement).

This was pleaded in the Statement of Claim in these terms :

> "4. THE Agreement was by clause 12.1(c) thereof further conditional upon the parties thereto entering into an agreement within one calendar month thereof for the sale of two Christchurch properties by the Second Defendant [Chase Corporation] to the Plaintiffs or their nominee for the sum of TWO MILLION NINE HUNDRED THOUSAND DOLLARS ($2,900,000).
>
> On 29 May 1987 the First Defendant [Chase Holdings] acting as agent for and on behalf of the Second Defendant confirmed and undertook that such further agreement would be executed by the Second Defendant.
>
> 5. THE agreement became on 11 June 1987 (being the date of approval by the commerce Commission) wholly unconditional and of full effect."

As I have noted, those associated with the transaction seem to have understood this clause in different ways. Mr May, who drafted it, said in cross-examination he thought the share contract could not proceed until the Savills and Chase Corporation also had an agreement, and his correspondence and dealings with the property contract show that he was acting in accordance with this view. On the other hand, Mr Savill thought it was enough to be told that the Chase Corporation board had approved of the share purchase. Later, at the insistence of his lender's solicitors, he sought confirmation that the property contract would be executed. Mr Savage died before the hearing so one can only infer his attitude towards this condition from other evidence which included his affidavit in earlier summary judgment proceedings. Mr Savill's account of his remarks indicates that he thought the deal was going through and the signing of the property contract submitted to the Corporation was a foregone conclusion. The letters he wrote on 29 May clearly confirm this attitude; they are set out earlier in this judgment.

At p.10 of his judgment Tipping J commented that the first part of clause 12.1(c) was not well expressed in speaking of the Savills and Chase Holdings entering into an unconditional agreement for the sale by the Corporation of the Grose properties. He said that made little sense literally, and thought it meant that the share agreement was conditional upon Chase Holdings procuring the entry by the

Corporation into a contract with the Savills for the sale and purchase of the two properties. His judgment proceeded on the basis that compliance with the condition required the actual completion of such a contract.

It was accepted by Mr Camp for Chase Holdings that if the 29 May undertaking bound Chase Corporation to sell the two properties, then condition 12.1(c) was satisfied and the share contract became unconditiona. I am satisfied this concession was rightly made. The parties made it very clear by their conduct that such a contract would be accepted as compliance; moreover, even on a literal interpretation of the clause, that contract would constitute presumptive evidence of the required preliminary agreement between the Savills and Chase Holdings. It is clear that Mr Savage could bind Chase Holdings in this transaction as its agent.

The argument on this aspect before Tipping J seems to have concentrated on whether Mr Savage or Chase Holdings Ltd., as its actual or apparent agent, bound the Corporation to sell the two properties by the letter of undertaking of 29 May. The Judge decided there was no actual agency. He correctly applied the test of apparent agency in his proposition that the Savills "must be able to point to conduct on the part of Chase Corporation Ltd. at the requisite level of authority within that company, which amounts to a representation upon which it was reasonable for the Savills to rely that either Chase Holdings (Wellington) Ltd. or Mr Savage personally had

authority to bind it, Chase Corporation Ltd., to sell the Grose properties to them, the Savills."

Tipping J found that at the meeting of 1 April Mr Savill must have become aware that neither Mr Savage nor Chase Holdings was able to deal with the Christchurch properties, because of the special presence of Mr Walker from Auckland at that meeting, and the fact that matters relating to them - and especially price - were decided by him; and that he was the only one able to supply information about tenancies and rentals. Mr Savill was also aware that these two companies in the group were involved and that a separate contract was necessary for the transfer of the properties. I make the comment that if he was in any doubt after the meeting, those matters were made clear in Mr May's letter to him of 7 April enclosing the first draft of the share contract, containing virtually the same clause 12.1(c) and provision for approval by the Corporation's Board.

In summary, the Judge concluded that notwithstanding the central position of Mr Savage in the transaction and evidence suggesting apparent authority to bind the Corporation, the knowledge Mr Savill obtained about control and disposal of the properties before the contract of 8 May was signed remained with him throughout his later dealings. He knew then that neither Mr Savage nor his particular company could sign the property contract on behalf of Chase Corporation Ltd., and nothing emanating afterwards from the

latter amounted to a representation that they could bind it. Accordingly Tipping J found there was no apparent authority, and he also rejected an alternative submission that this was an appropriate case for lifting the veil of incorporation.

The Appeal

In this Court the appellants' Counsel not only challenged the Judge's conclusions on agency and lifting the corporate veil, but also through Mr Young launched an entirely different case based on a literal interpretation of clause 12.1(c).

Lifting the Corporate Veil

The evidence indicated that within the overall Chase Group, property development companies such as Chase Holdings operated independently as profit centres. Their management (including project managers in the position of Mr Savage) had wide authority to bind their company in the particular developments for which they were responsible, subject however to the overall control of their superiors who in this case were Mr Stott and Mr Hindle, the manager and managing director respectively of Chase Holdings. The latter also held executive directorships in other Chase companies.

I am satisfied that the Judge was correct in his conclusion that each respondent, in spite of their

parent/subsidiary relationship, operated genuinely on its own behalf and within its own reasonably well defined sphere. In Woolfson v Strathclyde Regional Council [1978] SC.(H.L.)90, Lord Keith said it was appropriate to pierce the corporate veil "only where special circumstances exist indicating that it is a mere facade concealing the true facts." (ibid p.95) This accords with the view expressed by Richmond P in re Security Bank Ltd.(No.2) [1978] 2 NZLR 136, 158. Although the public identity of the subsidiaries may have been merged in the Group name of Chase Corporation, Mr Savill had been made aware of the existence of the first two respondents and their different responsibilities in relation to the share purchase and the property sale. To the extent there was a facade, he had been invited to look behind it and did so. I therefore agree that this was not a case for lifting the corporate veil. However, different considerations might have applied on the question of the caveat. Mr Savill's attention was never drawn to the relationship between Chase Corporation and Concept Investments Ltd.; indeed, it is doubtful whether the Chase representatives at the meeting turned their minds to the existence of the latter company.

Actual Agency

Evidence denying the existence of actual agency between Chase Corporation and Chase Holdings/Mr Savage came from the latter in his affidavit prepared for the earlier summary

judgment proceedings, and from Chase executives at Auckland and Wellington. There may be reason for treating Mr Savage's disclaimers of actual authority with some reserve, since Mr Stott described growing doubts about his frahkness, leading him to terminate his services in September 1987. He felt that the latter had not dealt fairly with Mr Savill in failing to inform him of Chase's tenancy and financial requirements before undertaking such a development project. This witness said that when he took over management of Chase Holdings in December 1986 he implemented a firm policy that all contracts had to be entered into in the name of that company and all correspondence signed in the same way. This points to a looser style of business dealings before then, without distinction between the Corporation and its subsidiaries, and would also account for the fact that letters were still being sent under the Corporation's name, and that the executives of subsidiary companies still used the Corporation's business cards. However, even leaving aside Mr Savage's affidavit, the evidence from Mr Stott and Mr Hindle and from Mr Walker of Chase Corporation fully support the Judge's conclusion that there was no express authority enabling Chase Holdings or Mr Savage to bind the latter in a property contract of this nature.

The Judge also rejected the submission that actual authority could be implied. The plaintiffs sought the admission of the further evidence referred to in order to demonstrate that, contrary to the assertions of the Chase

witnesses, Mr Savage had signed contractual documents on behalf of the Corporation in other property transactions before 8 May. Tipping J inspected the documents and thought they had no bearing in the particular circumstances of this case; the question was whether Mr Savage or Chase Holdings had any authority to commit Chase Corporation to the sale of assets in the Grose portfolio, which were clearly of a special character. The evidence suggested its purchase was a very big deal in which the Corporation had to buy all the holdings of that major investor in order to acquire one of his properties in mid-city Auckland essential for a major development.

It is not surprising, therefore, that the orderly disposal of this large portfolio should be kept specially under the Corporation's direct control; this was the reason for Mr Walker's trip to Wellington and for the provisions made in the share contract recognising its interest. Although Mr Anderson (Mr Savage's predecessor) gave evidence that he had signed contracts on behalf of Chase Corporation and other subsidiaries where necessary for the development of a project under his control; and although Mr Savage may have done the same in similar cases, there is no suggestion that either had ever assumed authority to sell any Grose property. Indeed it is clear that Mr Savage recognised control and authority for their disposal rested with the Corporation, from the way he dealt with the sale contract submitted to him and with Mr Savill's later enquiries.

The Judge also considered the new documents could not support a claim that the witnesses for Chase had given false evidence about Mr Savage's authority; at most they might demonstrate he acted in such a way as to put a questionmark over the proposition that he had never purported to bind the Corporation. I am satisfied Tipping J was right to refuse admission of this new material which could have had no practical effect on the outcome of the case. I am therefore in general agreement with the conclusion that there was no actual authority, whether express or implied, given to Mr Savage to bind the Corporation to the sale of the two Christchurch properties mentioned in clause 12.1(c).

Apparent Agency

I have mentioned the test the Judge applied in the circumstances of this case. Appellants' Counsel had no criticism to make of his careful review of the authorities. They submitted that Mr Savill was led to the reasonable belief Chase Holdings and Mr Savage could act for the Corporation on the sale of the two Christchurch properties, or in any event could speak on its behalf when giving the letter of undertaking of 29 May. There are undoubtedly many features which could have led Mr Savill to this understanding, not the least of which were the continued use by Mr Savage of Chase Corporation Ltd. letterhead and business cards. Mr Savill also said the phone was invariably answered "Chase Corporation" when he rang the

Wellington office and all this was in spite of Mr Stott's firm instructions to ensure that the name of Chase Holdings was used. However, it should be added that Mr Savage always signed his letters under that name.

Mr Savill said that when he attended the meeting at the Wellington office on 1 April, there was nothing displayed which indicated any separate identity of Chase Holdings and the well known Corporation logo was at the entrance. At the outset Mr Taylor had introduced himself as a land agent acting on behalf of Chase Corporation and it is common knowledge this name was known throughout New Zealand as the title of a spectacularly successful property development group. The Judge found that events up to 8 May clearly signalled to Mr Savill that he was in fact dealing with two separate centres of control within the Chase organisation. Had it not been for this development, I believe apparent authority in Chase Holdings or Mr Savage to bind the Corporation could well have been established. But in my view the Judge correctly assesed the situation and was right to conclude that there was no apparent agency up to the time the contract of 8 May was signed. He was also correct in emphasising that any alteration thereafter in Mr Savill's understanding of the position had to be the result of representations emanating from Chase Corporation itself. Mr Savage could not establish an apparent authority to bind it simply by his own assertion or conduct to that effect. And, as Tipping J pointed out, nothing that the Corporation did after that date amounted to such a representation.

It follows that neither Chase Holdings nor Mr Savage had authority to give the undertaking of 29 May on the Corporation's behalf. A similar situation arose in Armagas Ltd. v Mundogas S.A. [1986] 1 AC 717. It had been suggested that an agent, having no ostensible authority to make a contract, had such authority to notify approval by his company's board. At p.733 Robert Goff LJ said :

> "[The] submission suffers, in my judgment, from the same defect as the resoning of the judge, in that it confuses reliance by a third party on a representation by the principal that the agent had authority with an assumption by the third party that it would in the circumstances be safe to rely on the agent's representation that he had authority."

I think the same comments can be applied to the reaction of Mr Savill and his financier to the undertaking of 29 May. They knew a contract signed by the Corporation in Auckland was needed, but thought it safe to rely on Mr Savage's word that it would be done, as the next best thing. Unfortunately (as Mr Stott observed) the latter seems to have acted with a lack of frankness or responsibility to wards Mr Savill. He must have known the project did not meet the criteria for tenancy commitment and finance which had been spelt out very clearly to all managers at a special conference in early April.

In spite of the careful submissions on this point by Mr Burns, I am not persuaded that the trial Judge was wrong in the conclusion he reached about agency. Accordingly I

agree that the appellants cannot point to the entry of Chase Corporation Ltd. into a contract to sell the two Christchurch properties which, had it occurred, would have amounted to compliance with condition 21.1(c) of the contract.

Literal Interpretation

Under the share contract there were two ways in which Chase Corporation Ltd. was to be involved. Clause 2.1(a) envisaged its property at 87 Cashel Street being transferred to the Savills in part payment of the deposit. Appropriate financial adjustments would no doubt be made overall between the two Chase companies. Clause 12.1(c) imposed a condition for the sale by it of the other two Christchurch properties.

Contrary to Mr May's (and presumably Mr Savage's) assumption, neither clause 2.1(a) nor 12.1(c) required a direct contract between the Savills and the Corporation. I have already discussed the unusual wording of the latter clause and I agree with the Judge that it was a curious way of setting out to achieve the result envisaged at the meeting of 1 April. One might conclude (as Mr Savill did) that the interest of the Corporation was amply protected by the condition in 12.1(a) for Board approval of the sale. It may have been done this way to give Chase Holdings the ultimate power of deciding whether the transaction would proceed, but nothing in the evidence suggests anyone had

this purpose in mind. Mr Anderson (a former project manager in Wellington) said it was not unusual to buy time under contracts by imposing conditions. If this had been the reason, the stipulation in clause 12.1(c) for á further agreement between the Savills and Chase Holdings within a month might conceivably make some kind of commercial sense. The Judge concluded that it did not. The literal interpretation does not appear to have been argued, because the appellants' case proceeded on the basis that Chase Holdings or Mr Savage had bound the Corporation to transfer the two properties as its agent, in line with their pleadings.

The reference to the further agreement between the Savills and Chase Holdings is explicit and unambiguous, and Mr Young submitted the meaning should be adopted and that Mr Savage's letter of 29 May amounted to an agreement by Chase Holdings Ltd. in terms of clause 12.1(c). As he acknowledged, this submission was not made in the High Court, but he contended there is no bar to it being raised on appeal as a question of interpretation which can be adequately dealt with on the evidence and pleadings.

On behalf of Chase Holdings Mr Camp adopted the view of the clause favoured by Tipping J, and objected to this new interpretation being raised at this late stage. He submitted that had the appellants' case been pleaded or put forward at the trial in this way it would have caused further evidence to be called and different questions to be asked, and issues of estoppel and rectification would also

have been explored. He emphasised that Mr Savill's conduct was quite inconsistent with the proposition that there was to be another contract with Chase Holdings. Indeed, the latter thought the contract became unconditional when he was notified on 15 May that the Board had approved the share transfer. He said his purpose in getting the letter from Mr Savage was to confirm execution by the Corporation of the contract he had sent. However, the Judge saw it as simply an undertaking given by Mr Savage to help Mr Savill with his finances, and the former said as much in his affidavit.

It is significant that he reached this conclusion despite Mr Savil's lengthy evidence affirming his view of the letter, which suggests that he did not impress as a satisfactory witness on this aspect. The specific terms of that document, formulated by the lender's solicitors and passed on by Mr Savill, support the Judge's assessment of its purpose and character. I think he was entitled to reach that conclusion, which would effectively dispose of Mr Young's submission that it constituted the required agreement under clause 12.1(c) between Chase Holdings and the Savills. But in any event I believe more attention would have been given by the respondents to the contractual significance Mr Young now seeks to place upon the letter, if that issue had been effectively raised in the pleadings or by the appellants at trial. The alternative submission he now makes is a radical departure from the position then taken.

There is also another area in which further evidence could have been relevant. It may have covered in more detail surrounding circumstances tending to show the absence of any sensible reason for the curious wording of condition 12.1(c), thereby supporting either the meaning placed on it by the Judge and Mr May, or an application to have it rectified to accord with that meaning. This Court said in Palmerston North - Kairanga River Board v Frost [1916] NZLR 1110, adopting the comments in ex parte Firth 19 Ch.D.419 - "....if a point is not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards." (p.1120)

If there were any prospect of Mr Young's new point succeeding, there could well be an injustice to Chase Holdings in allowing it to be put forward at this late stage and decided on evidence which was directed at other targets, in a case shaped to meet a different pleading. Accordingly I would not allow it to be raised and as I have decided the other issues against the appellants, I would dismiss their appeal. It follows that the orders for removal of the caveats in Concept's claim would be upheld, and that company's appeal against the dismissal of its claim for damages against Mr and Mrs Savill will have to be dealt with at a suitable fixture. In the meantime I would reserve all

questions of costs.

Solicitors: Hill Lee & Scott, Christchurch, for Appellants

Phillips Shayle-George, Wellington, for First Respondent

Simpson Grierson Butler White, Auckland, for Second Respondent and Concept Investments Ltd.

IN THE COURT OF APPEAL OF NEW ZEALAND CA 78/88

BETWEEN: SIMON LYDALL SAVILL and LUCINDA MARY SAVILL

Appellants

AND: CHASE HOLDINGS (WELLINGTON) LIMITED

First Respondent

AND: CHASE CORPORATION LIMITED

Second Respondent

Coram: McMullin J (presiding)
Casey J
Bisson J

Hearing: 18, 19, 20 May 1988

Counsel: J F Burn and W G G A Young for appellants
M R Camp and J S O'Sullivan for first respondent
M S Cole and A C Cook for second respondent

Judgment: 28 July 1988

JUDGMENT OF BISSON J

The facts of the case and terms of the contract are fully covered in the judgments of McMullin and Casey JJ. I am satisfied that condition 12.1(c) of the contract was not complied with in the manner alleged, namely, that Chase Holdings (Wellington) Ltd acted through its project manager, Mr Savage, so as to bind Chase Corporation Ltd. Just as agency in the parent/subsidiary relationship between these

two companies was not proved to exist in this case, so also their independent spheres of operation should not be merged by the device of lifting the corporate veil. I agree with the reasons of McMullin and Casey JJ for the appeal being dismissed and costs reserved.

Gault J.

Solicitors

Hill Lee & Scott, Christchurch for appellants
Phillips Shayle-George, Wellington for first respondent
Simpson Grierson Butler White, Auckland for second respondent