IN THE SUPREME COURT OF NEW ZEALAND SC 96/2006

IN THE MATTER of a Civil Appeal

BETWEEN **SOUTHBORNE INVESTMENTS LMITED**

Appellant

AND

GREENMOUNT MANUFACTURING LIMITED

Respondent

Hearing: 28 June 2007

Court: Blanchard J
Tipping J
McGrath J
Anderson J

Counsel: J G Miles QC and S Grant for Appellant
P David and J Long for Respondent

CIVIL APPEAL

10.01am

Miles May it please Your Honours I appear with Miss Grant for the appellant.

Blanchard J Yes Mr Miles.

David May it please the Court Mr David and Mr Long for the respondent.

Blanchard J Yes Mr David. Well as counsel will have observed we're sitting as a Court of four. The Chief Justice didn't feel able to sit in view of the fact that it was her father's funeral yesterday. Mr Miles.

Miles Your Honours just three obvious preliminary points. The first of course is that this is an appeal from a summary judgment and all that my client has to do is establish a tenable defence. Secondly that the primary issue today estoppel argument of course is fact-intensive. It is a surprising proposition on the fact of it that you can even consider an estoppel argument in a summary judgment application, which leads me to the few paragraphs in the Court of Appeal judgment which we are concerned about which you find I think at pages 56 and 57 of the case at tab 9 Your Honours. The payment of deposit argument is dealt with literally in three paragraphs at pages 56 and 57. They cite the relevant paragraph from *Otago Estates*, making the point that a cheque has to be in legal tender, which is a bank check or cash, and secondly that the vendor takes a personal cheque or knowingly allows his or her agent to do so without objecting specifically to the form of the tender as soon as they are aware of it, must expect to have taken to have dispensed with the need for payment through legal tender. Now on the basis of that and the next paragraph, they simply say well there was eight days they say from the time that the solicitors for my client received the agreement and from the time that they advised the solicitors for the purchaser that the option didn't comply for various reasons; the most relevant one today of course being that it wasn't a legal tender. And on the basis of that they say that we are in no doubt that Southbourne's actions estopped from asserting that the mode of payment didn't comply, and it's perfectly clear Your Honours that before estoppel can be shown particularly on a summary judgment application that there has to be a more analytical approach that was adopted by the Court of Appeal, and it will be clear from the submissions that we are far within the discussion that we had before Your Honours when we got leave, that the facts in fact indicate that there were only two or three relevant days where this issue really came to a head, and the explanation for the delay in pointing out that the legal tender, that the cheque was not acceptable was through one of those exigencies of business where the father of my client had a severe heart attack and instead of being able to meet his solicitors the day after the solicitors received the agreement, which is what they all anticipated would take place – that was the Friday afternoon – Mr Dickey, the Managing Director and the primary shareholder in my client's company was engaged in looking after his father who had that severe heart attack, and it wasn't until late on Monday after the weekend that he was able to meet with his solicitors – the issue of the cheque was discussed at that meeting and the following day they were advised, the purchaser's solicitors were advised that there was some doubt as to the issue of the cheque and that they were seeking advice from counsel. And that was the Tuesday morning and they got advice on the Friday making the point that

the option hadn't been exercised properly. So it's perfectly clear Your Honours that the issue of waiver of estoppel is fact-intensive. It is our primary argument that the solicitors for the vendor who received the agreement and the cheque, sometime on the Thursday morning did exactly what solicitors do in those circumstances, they wait until they get instructions from their client as to how they treat the documents, and specifically how they treat the cheque and that if a vendor purporting to accept an option chooses to do so, accompanying it with a personal cheque, then the purchaser runs the risk of being met with the proposition that is not legal tender and that the option hasn't been exercised properly. And if you choose not to exercise an option that you've been able to exercise for 18 months until literally the last two days then you run the risk that if you fail to comply with the formalities of the option, then you run the risk that time will slip by and you lose the opportunity to be able to deal with it in a binding manner.

Tipping J Mr Miles when the document and the money or the cheque was received on the Thursday morning, am I right in thinking Mr Foley then telephoned Mr Dickey is it?

Miles Mr Doughty.

Tipping J No, no, your clients, the lay clients so to speak?

Miles Oh Mr Dickey, yes.

Tipping J Mr Dickey. Is there evidence as to whether he told him that there had been this personal cheque?

Miles No Sir.

Tipping J There's not evidence on that at all?

Miles No, no. I'm not sure whether Mr Foley says that he did anything more than just literally see that there was an agreement and a cheque. He acknowledged receipt of those late Thursday evening about 6.40pm odd; must have contacted Mr Dickey because he arranged to see Mr Dickey the following day.

Tipping J Yes, so there's no evidence as to whether he did or did not in the course of what conversation he had with Mr Dickey, mention this personal cheque dimension?

Miles No, no indication at all Sir.

Tipping J One way or the other from anybody?

Miles It would be an unusual who didn't ask whether the deposit had been paid. Intuitively one would say yes, but

Tipping J But under *Otago* didn't he have an obligation to point out to the client that there was this personal cheque and that the client had to make up his mind pretty smartish?

Miles Well there's an obligation as soon as reasonably practicable and the obligation would have had to have taken place when he met the client.

Tipping J But I'm not sure, this is why I'm putting it to you, why couldn't he just say to him on the telephone 'there's a personal cheque here – the law is that if we don't reject it promptly we'll be deemed to have accepted it, and will you please let me know in the morning for example whether you're willing to accept a personal cheque and if you're not I'll have to tell them and if you don't well we may well be treated to have accepted it. That's the law, sorry mate, never mind your father's heart attack'.

Miles And that's exactly the sort of inquiry Your Honour that would take place if this matter went to trial.

Tipping J Well yes, undoubtedly, but it is extremely troublesome that there is absolutely no apparent attempt to comply with the *Otago* by Mr Foley.

Miles Well *Otago* doesn't say that in so many terms Your Honour. *Otago* says that you have an obligation on receipt of the cheque, if it is not a bank cheque, to make up your mind. Now *Otago* is quite clear that the agent doesn't have that authority. It has to be in this case, the vendor that's quite clear

McGrath J I appreciate that the agent does not of course have any authority to accept a personal cheque; in other words to take the solvency risk for his client, but which part of *Otago* are you relying for saying that an agent may not have the duty to raise the question?

Miles Well I don't think it's put in those terms Your Honour

McGrath J You're just saying it in the terms that a solicitor doesn't have an agency that extends to in the normal course actually accepting a personal cheque?

Miles Yes. I suppose the most relevant paragraph

McGrath J Yes, 27, yes.

Miles Yes 27, exactly.

Tipping J I suppose Mr Miles your client can say as vendor we didn't take a personal cheque, nor did we knowingly allow our agent to do so.

Miles Exactly Sir.

Tipping J But there is a twist in that isn't there, in that your client constituted the solicitor, their agent, for the purpose of receiving payment, and is it not distinctly possible to say that having created that express agency there was a general agency in relation to, or an implied agency, in relation to all matters pertaining to payment? That I think is a point that has to be faced.

Miles Is Your Honour going so far as to say that general authority would authorise the solicitor to make the decision in the absence of instructions?

Tipping J Well I'm just tossing that around in my mind Mr Miles because was it purely ministerial this agency - in other words simply to be the hands that received, or was there something more substantive in it?

Miles Well the law Your Honour, and I'm relying on, is it Morland or McMorland?

Tipping J I have heard of him Mr Miles.

Miles Well I can't say it's bedside reading for me Your Honour, but McMorland in the references I have given you at 7 and also in a further reference that I'm going to hand up now, which is just a few supplementary authorities Your Honour, and lest you blanche at that, there are only three or four and I'm only going to refer to them briefly.

Anderson J I think the inference one would take from the Manager's advice to send it to the lawyer is so that legal advice could be taken because there would have to be an agreement for sale and purchase in the usual form which one would normally expect the lawyer to advise on.

Miles Yes I understand the point Your Honour is making. Just in answer specifically to Justice Tipping's point, because I think it's an important one, whether the authority is essentially an administrative authority, or whether it's something more substantive. If Your Honours wouldn't mind going to the supplementary bundle of authorities, because there is a further reference in there to McMorland which deals with this point. If you go to tab 4, this is paragraph 1.07 in the textbook. You see at page 10, that's the second page in on tab 4, towards the bottom of that page, they deal with the authority of the agent. You've got that in the last substantive paragraph on page 10 and that's standard and exactly what Your Honours would expect that there is no authority on the agent to accept payment in

any form other than is required by the contract. Then we get on to Justice Tipping's point under (b) *Solicitors* 'the implied or usual authority of a solicitor like that of a real estate agent doesn't extend to creating the legal and binding contractual relationship etc'. Then a few lines further down

Tipping J That's implied or usual.

Miles Exactly, to doing the administrative tasks in the processing and performance of the contract which the client has already made.

Tipping J Yes.

Miles Now that's

Tipping J I'm not suggesting this is implied or usual, I'm just saying there was an express agency here, the terms of which have to be delineated.

Miles Well on the facts that the Court has, and that we have, it goes no further than simply instructing the vendor's solicitors to send the agreement to his lawyer. That's literally all that the request covered. Now surely that is nothing more than saying I propose to meet you in due course to discuss the documents but they are being sent into you now so that at the time we have the meeting you are in a position to give me sensible and careful advice.

Blanchard J But it was more than just the document, because the payment had to accompany the document,

Miles Yes Sir.

Blanchard J So that it was necessarily as I think you've already accepted earlier, an authority to the solicitor to receive the payment, physically receive it.

Miles Yes Sir, yes, yes.

Tipping J Did it go beyond physical receipt? That's what I'm trying to

Miles Well there's certainly no suggestion from Mr Foley or from Mr Doughty that that was the case. Now I don't imagine for a moment, and I'm not suggesting that there's any attempt here just to give Your Honours the bare bones of the facts and then say well there are other factual issues here that can't be determined and hence they'll inevitably go to a substantive hearing. What Your Honours are up against in a summary judgment is that the affidavits that are filed cover what the parties believe at the time to cover all the relevant facts. Months and many tears

Tipping J Tears, yes

Miles One wonders in an ideal world whether the affidavit mightn't have been a little more explicit here or there, but what we do have, and it's credible Your Honours. I mean clearly if the proposition I'm advancing is incredible and then obviously one would have to approach that with considerable scepticism, but the proposition I'm advancing I'm advancing is not only

Blanchard J As happened on an earlier occasion, but we won't remind you of that Mr Miles.

Miles Well it was I have to concede Your Honour, that was a failure by me to convince Your Honour that argument. Well coming back however to this proposition, it's entirely consistent with what we all understand is likely to happen in these circumstances, that the businessman says 'send the documents into my lawyer and I'll arrange to see him as soon as possible to discuss the documents and to ensure that all is well'. And it seems to me that the primary question that needs to be determined is firstly whether the response from the solicitors and the client, namely, 'we'll have a meeting tomorrow, it's reasonable in the circumstances'. Secondly that there was no indication from the solicitors or from Mr Doughty to the vendors that the form of acceptance had been approved. The lawyer was careful to acknowledge only receipt of the documents, and thirdly

Tipping J There was significantly no Trust Account receipt issued.

Miles Well they never banked it.

Tipping J Yes quite, that's my point.

Miles Oh Your Honour is right.

Tipping J And you might well if you were on the other side and smelt a rat I would have thought, quite a large one.

Miles Well if Mr Doughty had been aware of the issue of a distinction between a personal and a bank cheque, and the requirement under the standard agreement for a deposit to be paid in legal tender. Now I mention that point Your Honours, because if you go back to both Mr Doughty and Mr Russell's affidavits, and Russell is the primary shareholder in the company seeking to exercise the option, you will see that throughout much of 2005 they were working on raising the finance. That finance had been arranged finally by October 6th and Mr Russell says, and he says 'I then instructed my lawyers to go ahead with the exercise of the option – this is October 6th. Let me take you to this because it gives you

McGrath J I think Mr Miles if you're really wanting to demonstrate a strong arguable case of negligence against Mr Doughty, I doubt that you'll have much of a fight, and I don't want to stop you going to the documents, but I certainly have one or two questions I'd like to raise with you about earlier matters. Would you prefer to go to the documents at this stage?

Miles Well if I just complete this, because while I accept that I was getting a trifle long-winded about it, I was about to come to the point that it was Doughty who so it is said, said to his client a personal cheque is sufficient. Now this is all done somewhere between the 6th and the 25th October. It was a

Tipping J Sorry, look I don't want to encourage long-windedness, but is there evidence from the client that that's what Doughty told him?

Miles Yes, yes.

Tipping J Oh I see, I'm sorry I don't think I fully understood that point for what it's worth.

Miles For what it's worth, exactly Sir, but it was really a slightly long-winded response to Your Honour's point and Mr Doughty might well have smelt a rat. I'm not sure that Mr Doughty would have smelt a rat.

Tipping J I'm not saying he did smell a rat, I'm saying he should have.

Miles He should have, there's no question about that, because he'd got the acknowledgement on late Thursday of the documents

Blanchard J In any event I'm struggling to see the relevance of this in the current argument.

Miles The relevance to the extent that it's relevant at all Your Honour is that it is important that the formal requirements of the acceptance of an option must be complied with and one of the reasons why Your Honours can be clear about that is that the person to seeking to exercise the option has had the entire period of the option to work his way towards the acceptance. In this case the option could have been accepted at any time within the 18 months. They started work on it specifically earlier than October - they got finance by the 6th October. At any time they could have sent the documents across to the vendor's solicitors without then running into this potential problem that if there is a hiccup there isn't time in which to fix it. My point being that why does my client have to bear the brunt of the deliberate choice by the vendors' solicitors to leave it to literally two and something days.

Blanchard J The purchaser's solicitor?

Miles Yes Sir, yes.

McGrath J Mr Miles I take that point that, I like the President, have some, I'm not quite sure of how much relevance it has, but can I come back to this situation? I think Mr Douglas was the property manager of your client, and I think there's evidence, it's not contradicted, that it was he who told Mr Doughty to send the documents to Mr Foley. Now just say we had a situation in which that hadn't happened and the documents had rather been sent to Mr Douglas but we had the personal problems in Mr Dickey's family that subsequently arose. Wouldn't the duty that's been referred to in *Otago Station Estates* have nevertheless arisen the moment it would have become apparent that a personal cheque was being tendered for the payment to the property manager of your client?

Miles I wouldn't have thought so

McGrath J You would not have thought so?

Miles I wouldn't have thought so Your Honour because at any rate in the way the duty is defined in *Otago*, it's the owner as it were who has the obligation to say yes or no, and unless

McGrath J And that's a company isn't it?

Miles Sure, but the owner certainly isn't Mr Douglas and there's not suggestion that when Dickey, oh sorry, there's no indication that Mr Douglas has been closed with any authority other than whatever an office manager does, oh a property manager does.

McGrath J Without going too far I would have thought that in order to achieve what this pronouncement in *Otago Station Estates* is seeking to achieve, the Court would normally expect the quick question to be either Mr Douglas has authority or not, but if he didn't he'd have a quick question to Mr Dickey in whatever situation he was in 'do we take personal cheques from Greenmount or don't we for this sort of sum? I mean this is not a matter that would need a huge meeting at least internally in the company

Miles Your Honour I think the answer is that he never saw it. I think from memory what happened is that the solicitor rang Douglas and said what shall we do with it and Douglas said send it to the solicitors. Is that right?

McGrath J Yes.

Miles I think

McGrath J That is right, yes.

Miles So Douglas would never have seen the documents.

McGrath J I was putting a hypothetical position situation to you Mr Miles, but what I suppose I'm wondering, this is the real point, is that once the documents were sent to Foley, looking at the matter objectively as I think we must from a person in Doughty's position rather than the individual, wouldn't a solicitor in those circumstances expect that the duty to perceive any irregularity and raise it was one that it was forming part of Doughty's agency, ah Foley's agency, thank you.

Miles In due course, but surely his obligation is to ensure that he has a meeting as soon as practicable with his client to discuss the documents. Of course it could be done by phone I suppose, or

McGrath J I really don't see why a meeting is sufficient. I mean one of the reasons the documents go to the Foleys of this world is because they have the expertise to see whether the options been properly exercised, and as I think the Court of Appeal said, it would have been immediately apparent once he'd looked at the cheque that it was a personal cheque, and a competent solicitor's mind would have immediately raised questions without having to go to counsel on that issue. And it just seems to me that never mind a meeting, a quick query through to the company to get instructions on that point would have been a logical way to comply with a duty such as that in *Otago Station Estates*.

Miles Well it might be Sir, I just don't know. We know that there was a difficulty at the time because Dickey's father was very ill. We simply don't know how available he was. I accept that in certain circumstances there might be a duty on solicitors as soon as they get an agreement to advise the client if there is some specific issue that's immediately obvious, but

Blanchard J This is the peculiarity of this case that takes it perhaps a little out of the ordinary run in that normally you'd expect the vendor to be readily available, and here this vendor wasn't. If you subtracted from the facts, the father's heart attack, this would all look very suspicious. With the father's heart attack in there, it maybe comes back to a balance position.

Miles Quite Sir. Let's just assume for the moment that the heart attack hadn't existed and that it had a meeting on Friday, I would have found the argument a whole lot harder

Blanchard J Very hard. It would be a very strong inference

Tipping J Perpendicular I would say.

Miles Trickier anyway, even perhaps on a summary judgment, although again we keep coming back on summary judgment, and this is the struggle we're having at the moment. It's all factual based. Yours Honours are trying to tease out a principle when the facts which have to support it are simply not clearly proven.

Tipping J I think the problem is that the *Otago* principle is perfectly sound sort of in general

Miles Yes.

Tipping J But here we have a serious twist in the tail and that makes it quite difficult to know where the balance of justice lies if you like, let alone policy issues and so on.

Miles Well I'm very comfortable with the proposition if there's an obligation on the part of the vendor to advise the purchaser's solicitors as soon as is practicable that in the case of a cheque that it is acceptable if it's a personal cheque or unacceptable, and giving them the opportunity to respond. But if a vendor chooses to wait until the last couple of days to exercise the option then I'm unsympathetic to any suggestion that the vendor or his solicitors have acted improperly in any sense of the word; have sat on any obligation they might or mightn't have had in the factual circumstances that are there in this case.

Blanchard J I suppose something that perhaps supports that argument is that you could twist the facts again and have a situation in which the vendor was actually quite keen to get a contract from a particular purchaser, and in those circumstances the vendor might be very displeased if the vendor's solicitor without getting instructions ruined things by saying that cheque's not good enough, thereby putting the vendor at risk that the purchaser would repent.

Miles Your Honour's quite right, and

Blanchard J I mean that's not this case

Miles Of course not Sir, yes.

Blanchard J But it is possible that the vendor in some factual situations might be worried about slippage in value of the property.

Miles Yes, oh absolutely and I'm assuming that it is those factors that have underpinned the law since well the late 19th Century in the case that we cited the authority for that. That solicitors simply don't have the authority to make those decisions.

Tipping J One of the issues that I'm about in this field, and it's not solved completely by *Otago,* is the need in any many circumstances for vendors personally to take advice before they can properly be committed and equally the need of, and this is really just building on my brother's point, the need of solicitors to take instructions before they can be taken as having committed their clients. That's why I was so sharply focusing earlier on whether this Express Agency in effect solves quite a bit of that issue. Now you would say of course no it doesn't

Miles Emphatically, absolutely not.

Tipping J Because it never got anywhere near it.

Miles Quite Sir, and just I suppose building on that, and at the risk of boring Your Honours by continuing to point out that this is so factually based and that this really the problem, but that must be the heart of the obvious response to that that before you can actually find that there has been a significantly wider authority granted to the solicitor, you would need evidence indicating that that had to be the case.

Tipping J We we'd have to be certain that simply on the basis of what we know already created this quite substantial authority to bind the client by doing nothing.

Miles And neither Foley nor Dickey say that that authority existed. Intuitively one wouldn't expect it to happen; after-all they'd agreed that there would be a meeting the following day to discuss the terms of the option

Tipping J Well Foley obviously didn't think he had that form or that width of authority – now that's not decisive but at least it's a step in your direction Mr Miles.

Miles And there's not the slightest indication to the other side which is probably more important once one gets on to the waiver of estoppel issue. There was not the slightest indication to the other side that he had that authority.

Blanchard J Well a solicitor wouldn't think that he'd had authority going beyond the normal authority just because documents arrived and he knew that the other side had been asked to send them to him, because that's something that happens as an every day matter.

Miles Quite Sir.

Tipping J I think a decisive point at least provisionally in my mind is that there was absolutely nothing to alert the vendor personally at the stage of allowing the documents to go to the solicitor that this personal cheque issue was going to arise, so it would be a very long bow to say that he thereby impliedly or expressly or in any other way clothe the solicitor with authority to deal with a point that was probably never in his mind.

Blanchard J Or he had been reading *Otago Station Estates*

Tipping J Oh yes he might have

Miles Well one rather gets the feeling he hadn't been reading *Otago Station Estates* because

Blanchard J Well we know one of the players had been.

Miles Yes, well I think reading the affidavits of Dickey and Co. it was Mr Doughty, because tucked away in that same affidavit is his assertion that he believed that it was commercial practice to tender personal cheques.

Blanchard J It was the very argument that Mr Galbraith wasn't able to persuade us on in *Otago*.

Miles Even on the basis of six solicitors' evidence to the contrary, quite Sir.

Anderson J Mr Miles would it make any difference if Mr Dickey actually knew on the Friday that a personal cheque had been received?

Miles It would depend entirely Your Honour on the state if you like of his responsibilities on that day.

Anderson J I assume that it's not every day he gets a cheque for $350,000 received on his behalf, or that he enters into $3.5 million contracts, and I really wonder whether there is a deliberate hiatus in his evidence at para.6 of his affidavit where it says 'the letter and attachments etc were received on the 27th. I was unable to meet Mr Foley'. Now he wouldn't make another appointment with Mr Foley psychically, he must have discussed it with him on the Friday.

Miles I

Anderson J And can one then take the inference that the solicitor must undoubtedly have said 'look big contract's come through and blow me down they've sent a personal cheque for $350,000. Are we going to accept it or not/?

Miles I don't think you make any of those assumptions Your Honour

Anderson J If this was the evidence at trial

Blanchard J If this was the evidence of trial you would.

Anderson J Yes.

Miles Oh absolutely, but I rather suspect what Mr Dickey's evidence would be is that 'I'm an experienced property developer; I was well aware that there was an option that existed and I was expecting the acceptance of the option coming in. After all there's evidence there that the value of the property had significantly increased, and of course I expected a deposit cheque to come in', and for all I know he keeps a sufficient eye on his affairs to expect the cheque to be $350,000.

Anderson J I was really wondering whether if he knew it would have any legal significance.

Miles I doubt whether it has until he's seen his solicitor. After all the acceptance or otherwise of a cheque in those circumstances is also very much an issue that they might want to talk to the solicitor about. I mean what is the significance of it; what are the

Tipping J What risks do we run if we insist on a bank cheque.

Miles Absolutely, and for all I know Dickey had no idea whether he was entitled to reject an option on the basis of a person cheque. I just had

Anderson J Well that's fair comment, I mean if a solicitor entrusted with a $3.5 million transaction doesn't make an inquiry will you accept a personal cheque, a lay person is probably not going to be much better informed.

Miles I wouldn't have thought so Sir, and keep in mind that this is a, I mean it's a commercial deal this and as Justice Blanchard points out there may be reasons for being adamant that the deal has to be kept to because it looks as if the price had gone up. I suppose one can say in all probability it was the vendor, it was the purchaser who was anxious for the deal to go ahead, but again those sorts of issues are the sorts that would be apparent for evidence in due course. There is this supplementary argument I suppose, and I don't think it can be put on any hard basis than that, that my friend seems to be relying on in which Your Honours touched on in the judgment that they were allowed to argued, namely that the option itself indicated that the accompanying cheque was an irrelevance to the option. That the option was exercised independent

Anderson J It's a literal argument isn't it?

Miles Mm.

Anderson J It's the literal argument?

Miles It's the literal argument indeed. There are two problems with it. If I could take Your Honours to the option itself and you will see the point that I'm making.

Anderson J It's 154 of the case.

Miles Yes. If you go to clause 47(1)(b) which is the key clause, I think the important phrases if you like Sir is the first phrase 'to exercise the option the tenant shall present the landlord a signed and dated unconditional agreement with the following terms'. So that's the first step in the exercise of the option.

Tipping J Well that's the only step isn't it Mr Miles?

Miles No Sir because when you then get to roman numerals 3 you see that the deposit shall accompany the agreement.

Tipping J Well you've somehow or other got to harmonise that term with the proposition that the form of contract shall be the ADLS etc current version. That seems to me to be quite an important issue in this case. How do you harmonise those two terms, because that's how they're described – terms of the contract reached?

Miles I think the, just before we get on to that point Your Honour, which comes logically second I think to the point I'm making at the moment, if Your Honours are with me that to exercise the option there has to be two steps. Firstly the agreement with those terms, and secondly that the cheque shall accompany, or rather the deposit, shall accompany the agreement, because there's no ready reference to cheque there

Tipping J I'm not with you at the moment but I'll assume I'm with you.

Miles Yes, well that must, oh I was going to say that must be a terms but if Your Honour is not entirely with me at this stage, can I say that in my submission it must logically be the second step of the exercise of the option.

Anderson J Why isn't it the first step in the performance of the agreement?

Miles It is Your Honour but the first step

Anderson J And not the option agreement but the agreement for sale and purchase.

Miles Because the wording of clause 47 indicates the contrary.

Anderson J No, 47 requires the agreement to have a term as expressed in roman 3. The agreement must contain that term and if it does then the agreement has to be performed. So performance of the agreement requires, pursuant to the agreement for sale and purchase, not the option agreement, the immediate tender of $350,000.

Miles Then I suppose on that basis Your Honour would say that the phrase 'and shall accompany the agreement' is irrelevant?

Anderson J No, it's a requirement of the agreement for sale and purchase.

Tipping J Constituted by the exercise of the option.

Miles It isn't strictly, because when you go to the agreement that talks about that the deposit shall be done, what is it, contemporaneously – oh I've forgotten what the phrase is, but it's

Anderson J Execution.

Miles Yes on execution, yes.

Tipping J It says 'shall be paid immediately on for the second person signing', but you can't cancel for breach without the three day notice. This is the need to harmonise

Miles Yes shall pay into the deposit

Tipping J Option clause B(3), with standard form clause 2 I think it is isn't it – the deposit clause?

Miles Clause 2, yes.

Tipping J Yes, well now you've got to read them together in a sensible way.

Miles But there's no essential difference between the two. Both indicate that there has to be a deposit; both indicate that it has to be contemporaneous with the exercise of the option, and the option itself makes it clear

Blanchard J No, that's not right. 2.1 doesn't require payment of the deposit until both parties have executed the agreement.

Anderson J It may be that the form of the agreement had to be altered to incorporate 3, in which case the agreement that was tendered is not compliant with the option obligation.

Miles I accept that there is a fine distinction but it wasn't one after all that was recognised by the vendor's solicitors because they were careful to send the cheque with the agreement.

McGrath J But isn't the real problem you've got Mr Miles on this, the word "terms" indicates the contract has to come into existence before the obligation in the term applies? Now you point, and that's one feature I think that favours the respondent's side. Now you point to the contemporaneous nature which is reflected as you say in the fact the cheque was sent, but that doesn't seem to me as necessarily inconsistent with the notion that the obligation to send the cheque arises on the existence of the agreement, rather than on the exercise of the option which conceptually must be a prior event.

Miles Well that is rather how the vendor's solicitors have construed the agreement, because if they were construing it on the basis of relying on clause 2, then the cheque wouldn't have accompanied the agreement.

McGrath J Well I'm not really sure that the way Mr Doughty interpreted the agreement actually has a lot to do with this. I think we've really got to decide it objectively don't we on what the words indicate, and the word "terms" does contemplate that the obligations referred to arise only when the agreement comes into existence and that contemplates the exercise of the option.

Miles Doughty's conduct may well be consistent with an understanding that the parties had at the time that the wording of the option was paramount and that as an essential component of the option was the delivery of a cheque in legal tender.

McGrath J Is this a post-contractual argument?

Miles Ah well it was contemporaneous with the exercise of the option. It's the sort of discussion I think must inevitably take place when there is a slight but possibly significant difference between clause 2 and the wording of the option.

Tipping J Mr Miles can I put to you what I think is the fundamental point here? The issue is whether a contract ever came into existence at all as opposed to whether it having come into existence it was immediately breached. You fully understand?

Miles Totally.

Tipping J Now, it seems to me that the way the parties have constructed this it is awkward because there is a prima facie conflict between the term constituted by (b)3 and the term constituted by standard form 2(1). Now one has to make sense of this and I think the sense arguably is that a contract came into existence when the purchaser signed the form, accepted a standard written offer constituted in the lease. It was a term of that contract that the deposit be paid immediately but time was not of the essence in the sense that before you could cancel you had to give the standard form 2(2) notice. If such notice has not yet been given, the contract is still on foot.

Miles Again we keep coming back Your Honour to facts which drives almost every aspect of this case.

Tipping J Well I'll need to be persuaded about this because this is a matter of interpretation.

Miles Well Your Honour is suggesting that conceptually the deal might still be in existence.

Tipping J Yes.

Miles I would say Sir that the conduct of the parties, not to mention the pleadings, all indicated almost immediately that the contract was no longer on foot. The

Anderson J This is specific performance it must be.

Miles Yes but the, well the purchaser of course is still arguing that, but the

Tipping J I'm not saying that this will defeat you for summary judgment purpose. I think because this is such a significantly different analysis from that which seems to have commended itself to anybody

Miles Yes, that's certainly true.

Tipping J It will have to go to trial. Summary judgment could not be given fairly on the present pleading.

Miles Well that

Tipping J And I make that very plain, and this is only provisional, we haven't yet heard from Mr David but so far he will be quite pleased with this line of thought I imagine.

Miles Yes.

Tipping J But I don't think it takes him to the point where he can get summary judgment on this line of thought.

Miles You see one would have thought Your Honour if that were right that the immediate response by the vendor's solicitors, having got the letter from Foley on the Friday saying counsel have said that the cheque wasn't legal tender, the immediate response would be immediately tender a cheque – a bank cheque.

Tipping J Yes quite. Now that may well affect the issue.

Miles And it's never been done.

Tipping J No, I agree with all that.

McGrath J But nor was a notice to cancel.

Miles Well you see you could well argue that the letter on Friday was effectively that. I mean that letter was

Blanchard J No, I think I can refer you to a Privy Council decision that says you can't run that line of argument. You can't at the same time say there is no contract and say there is a breach, which we're relying on.

Tipping J I agree with that, but I think you can do it on a without prejudice basis too. You know we say there's no contract but if there is one we hereby give you notice and cancel.

Miles And particularly as they'd been

Blanchard J And no one did that.

Tipping J No one did that.

Blanchard J You could certainly do that but

Tipping J But no one's standing with it.

Miles And I'd accept of course one could do that Your Honour, but what I would emphasise is that the notice drawing the vendor's attention to the personal cheque as against the bank cheque was specifically given on the Friday.

Tipping J But Mr Miles the key point surely is this. All this may well be for trial, but you can't demonstrate clearly that, sorry, there is no clear demonstration that this contract was cancelled on the footing that I've put to you of what the correct analysis may be. Validly cancelled.

Miles I can't point to an unequivocal act of cancellation other than possibly in the pleadings.

Tipping J But can you point to the required three-day notice?

Miles Oh not such you'd notice.

Tipping J No, so you can't get a cancellation in terms of 2(2)?

Miles Well

Tipping J Well when I say you can't, based on the present material before the Court we couldn't be absolutely positive that you validly cancelled, if I can turn the summary judgment point against you.

Miles Faced with that Your Honour I would concede immediately. We couldn't go that far.

Tipping J No, so that's why think that this case may have to go to trial, but on that premise, not on the premise that's troubled. But I'm by no means firm in my mind, I just thought that point should be fairly and squarely laid out so that counsel have the opportunity to deal with it.

Miles Well

Tipping J I may be completely wrong Mr Miles on this analysis but it least it seems to me to be arguable.

Blanchard J I should signal that I'm not at the moment necessarily to be taken as being of the same view as Justice Tipping on this point. I agree that on a literal reading of 47.1(b), all that you have to do to exercise the option is to present an agreement in a certain form, but the words "shall accompany the agreement" seem to me to signify more than simply putting a term to that effect in the document, which they didn't do anyway, so therefore it would be a counter-offer.

Tipping J Well that's another possibility certainly, and I accept that it's by no means clear-cut.

Blanchard J Which again would bring you back to the main argument.

Miles Back to the *Reporoa* argument,

Blanchard J Well

Tipping J Well not necessarily quite

Miles Well it would bring me back to failure

Blanchard J It would bring you back to the main argument, was this a payment – put that aside as a lightweight argument. Is it to be taken as being a payment because the vendor didn't object - so you come back to the same argument?

Miles So we come back to that argument, yes indeed. But I obviously endorse Your Honours analysis because it's an integral part of my argument that the two-step process has to include the 'and accompanying the deposit', and the fact that there is no reference there to check hardly helps my friend's argument. The clear assumption is that the deposit has to be in legal tender which for what it is worth I would have thought is supported by the fact that the only time on that page when they do talk about cheques, they actually talk about bank cheques which they do down at 47(2)(b)ii, and my friend I think turns the argument the other way. He says that because there's a reference to bank cheque, therefore there's an assumption that the deposit in a previous clause can be a personal cheque. But that can't be right.

Anderson J Well what it amounts to in your terms is that in the first case there must be according to ordinary law and practice, payment by legal tender.

Miles Exactly Your Honour.

Anderson J And the second case, the type of legal tender is specified.

Miles Exactly, exactly Sir. Now let me turn then to the next issue - the estoppel or waiver argument, and I doubt whether there is any significant distinction on the facts in this case, except that we've got any fact at all, as to whether to waiver or estoppel. I think the primary problem in both cases for the respondent's point is that they are unable to get any unequivocal assertion by my client that it's right to receiving a cheque in legal tender has been waived.

Tipping J I would have thought it can only be a special form of estoppel constituted by *Otago* rather than a general estoppel under the general law, because I think there is very light on any general estoppel, and I think that's effectively what you're saying.

Miles I'm sure that's what I want what Your Honour is getting at, yes.

Anderson J Waiver doesn't required reliance by the other party but estoppel does, and *Otago* must really be found on the basis that the potential damage to a party is not told that there's an objection. So it's an estoppel situation.

Miles Yes, I understand the point Your Honour is making, but *Connor* and *Pukerau Store* does say reliance is a necessary element on waiver.

Anderson J On waiver?

Miles Yes.

Tipping J Well I don't think we are going to have to go there. It's either one or the other or neither.

Miles I don't think

Anderson J If the facts are right, it's one or the other.

Miles Well let me get to this issue. What we've said at and really I've set it out at pages 6, 7 and 8 in my submissions, but if you go to para.34 Your Honour you will see where I've cited the authorities which we've already discussion *Otago*. His Honour Justice Blanchard, when he was merely Mr Peter Blanchard,

Blanchard J I was but a boy.

Tipping J This is a pretty desperate submission Mr Miles.

Miles Just as authoritative though. So we had him in his handbook on agreements for sale and purchase – I've set these out in the bundle of authorities, and Your Honours will no doubt be well aware of those propositions. But just let me take you to them briefly. It's tab 8 of the authorities. You will see my learned author at page 37 just in that last paragraph there 'acceptance of a cheque by the vendor's agent cannot be construed as a waiver by the vendor unless the vendor is actually aware that the payment has been made in this manner and makes no objection to it, for in the present state of the law the agent has no authority to accept other than legal tender' but of course that was picked up and recognised in *Otago*. Then, I've just cited for the record, those other couple of cases that

tend to support that proposition and if Your Honours would also jot down there that reference that I've already taken you to in supplementary authorities – *McMorland* at tab 4 and as well in the primary bundle of authorities if I could take you to tab 7 which is again *McMorland* making a similar point, the relevant paragraphs Your Honours are at 11.12, which is page 354, where you'll see about eight or nine lines up from the bottom, 'because of the long established in New Zealand of using bank cheques to settle conveyancing transactions, it has now been accepted that in any contract for the sale of land there is an implied term that the tender of a bank cheque payable to order is good tender'. Then on the next page, halfway down in that second substantive paragraph 'acceptance of such a non-complying cheque by the vendor's agent such as the solicitor, cannot be construed as a waiver by the vendor unless the vendor is actually aware that payment has been made in this manner and makes no objection to it. The agent has no implied or usual authority to accept tender other than in the form permitted by the contract'. And that's pretty much the debate that we were having earlier that it indicates that there is nothing unexpected in the views expressed in *Otago Station*.

Tipping J I don't personally see how this could be a waiver, because the vendor had no knowledge of the right.

Miles Exactly Sir.

Tipping J It's as simple as that. You can be estopped without knowledge but you can't waive without knowledge.

Miles No, and in estoppel there still has to be the clear and unequivocal assertion

Tipping J And that's why we gave leave on estoppel and not on waiver.

Miles Yes.

Blanchard J Of course there is an almost inescapable inference that Mr Foley and his client must have discussed the question of the status of the cheque, at the very latest by the meaning they had later on the Monday afternoon.

Miles Correct Sir, I'd accept that. I wouldn't accept there had been any discussion prior to that.

Anderson J Yes well I don't have your confidence on that point Mr Miles.

Miles Well that's the evidence Your Honour.

Anderson J Yes it may be a matter of inference from the amount involved, the nature of the transaction, the hiatus in para.6 of the affidavit.

Miles Um, I'm not sure

Anderson J It's carefully crafted paragraph.

Miles I mean I accept that the amount involved is $3.5 million but in terms of commercial transactions it's not a major one.

Anderson J But it might be a major personal cheque for $350,000

Miles I just wouldn't know Sir.

Anderson J But anyway the point I make is that I'm not quite as confident as you that an inference can't be taken, that they must have at least discussed that a personal cheque had been received.

Miles Well the reason, I suppose arguing from what we do know Your Honour, which is that from Friday onwards, and for all I know, Thursday as well, Mr Dickey's mind was on other matters.

Anderson J Oh I doubt that Mr Foley would have telephoned at 6.40pm on the Thursday – I'm thinking more of the Friday when there must have been an arrangement made to meet on the 30th, whenever it was.

Miles Yes, the arrangement was to meet on the Friday afternoon.

Anderson J And that must have been set up by telephone.

Miles It's a reasonable assumption Your Honour, but I don't understand what there might be that would indicate an assumption that this Court could safely make, that Mr Foley discussed with Mr Dickey the significance of a personal cheque in those circumstances. That would be quite wrong Your Honour on a summary judgment. That just would not be a proper exercise of

Anderson J It's a question of how strong the inference might be.

Miles Well I could understand, I could at least understand where Your Honour was coming from if there wasn't this issue of the father's heart attack, but once you introduce that into the mix then my proposition becomes immediately credible.

Anderson J Do we know when the father had the heart attack?

Miles No, I don't think that's in the affidavits either Sir. We know that he didn't make the Friday appointment because he was flat out with Doctors.

Tipping J The onus is on your opponent to lay the ground for some regulation.

Miles Yes Sir.

Blanchard J Anyway, you accept that there's an inescapable inference that the status of the cheque was discussed on the Monday afternoon?

Miles Late, late Monday afternoon Your Honour.

Blanchard J Yes, and we don't know exactly when that was.

Miles No, the reference though in the affidavits is late.

Blanchard J Well that could mean 4 o'clock,

Miles Who knows.

Blanchard J But I accept we don't know.

Miles We don't know, and if Foley was faxing comments to the other side at 6.49pm on the Thursday, for all we know Mr Foley and Mr Dickey are accustomed to meeting outside office hours.

Blanchard J Well I might have then said in the evening.

Tipping J It's all speculative.

Miles And hopefully it will all be determined in due

Blanchard J Now do you contest that the time for exercising the option ran until midnight?

Miles No I don't for a moment Sir. Now again like almost everything in this case, it's difficult to be dogmatic but the indications you get from the documents is that the standard working day, which presumably would apply to this is 9am to 5pm, Monday to Friday, and you get that both in the agreement and in the lease.

Blanchard J Does it refer to working days in the lease?

Miles Yes it does actually Sir.

Tipping J But you don't contest they had till midnight so is this of any

Grant I think Your Honours he meant yes.

Miles Did I say no?

Tipping J You did say no.

Miles I'm sorry, I'm simply contesting.

Tipping J Oh you do, oh right, well I'm sorry I'm really both reading the document and taking you too literally Mr Miles.

Miles Well it's quite understandable if I said yes, when I meant no, but I think what I was saying yes to in that firm way, I am contesting, anyway.

Tipping J Well we've cleared that up. Do contest.

Miles Let's go to the relevant clauses Your Honour. In the lease you go to page 152 and you see at clauses 44.5 – this is under the subsection dealing with notices – 'for the purpose of this clause a working day means any day in which registered banks are open other than a Saturday or Sunday

Anderson J But the option is not exercised by a notice but by the tender

Miles Oh, look I said there's nothing in this case one could be dogmatic about Your Honour. I'm just talking about indications, and the indications in the lease are that notices have to be between either Monday and Friday.

Anderson J But the option is independent of the lease, it just happens to be contained in the leased document.

Miles But if you're looking for the sort of construction that my friend is talking about, an odd construction if I might say so, particularly if you're talking about a construction that deals with legal tender, then it's legitimate to look at the document as a whole to see if there are any other indications as to what the parties meant by time and

Anderson J Well they do, they say within 31 days or something don't they, or within 18 months of the period of the lease. So when the lease expired was the last time you can do it from that approach.

Miles Well yes but if you're talking about delivery of legal tender, then again I would say that either under the lease you give that indication between 9am and 5pm, you also get it in the agreement and I'll just take you to that clause as well.

Anderson J The original agreement in fact isn't properly reflected in the way the option drawn. An original agreement to enter into the lease it doesn't say

'shall accompany the agreement', so who knows there might be a rectification issue at some stage.

Miles Yes well moving well away from the summary judgment

Anderson J I think probably your stronger argument is the factual one. Was it so late on that day that nothing could really be done about it?

Miles Well that's what I was really coming to. But you've got at page 173 under definitions in the agreement, you've got working day, and at 1.16

Anderson J Well that makes the performance of the option agreement dependent upon the terms of the agreement. It's the wrong way around.

Miles Well I'm just saying Your Honour there are indications in the document that working days are between 9am and 5pm, but the reality is that if you're advised for argument sake at 5 o'clock that you needed a bank cheque, you wouldn't be able to get it.

Blanchard J Well we don't have evidence of that.

Anderson J Generally speaking.

Miles Well I'm just assuming that one can

Blanchard J I mean you may be entirely right, but it is possible I suppose that by special arrangement with a friendly bank manager some arrangement could be made. I don't know whether that can be done or not.

Miles Well I don't either Your Honour.

Blanchard J I mean once upon a time there used to be something called a 'marked cheque'. I don't know whether they still exist, but they were cheques which banks agreed to meet. They may have been long since displaced and a totally extinct animal. All I'm doing is increasingly displaying an ignorance of the modern banking system, but we don't have evidence.

Miles Exactly Your Honour and I don't think we can go pass the evidence that the meeting was late Monday. A reasonable inference, at least an inference enough to give a tenable defence which is after-all all that we have to seek is that by that stage it would have just been too late and it wasn't unreasonable to give notice the following day which is what was given.

Tipping J So you mean that although there may be a prima facie case for an estoppel if I can put it that way, that there's no detriment on account of they

couldn't have done anything about it even if the notice, or the rejection had been conveyed at whatever time

Miles Quite, quite

Tipping J The failure to do so leads to no detriment.

Miles Absolutely.

Tipping J That's the essential point I take it

Miles Exactly Sir. So we say no estoppel, firstly no representation, and secondly no detriment, and to the extent one has to get into issues of unconscionability then we say nothing in the actions of my client can be couched in that sort of language.

Blanchard J Well you're not facing an argument of unconscionability.

Miles It has been mooted as being part of the concept of estoppel

Tipping J Estoppel.

Miles Justice Tipping I think has

Blanchard J Oh I see.

Miles Specifically .

Tipping J Well I'm unwise enough to say that unconscionability sort of underlines most if not all species or manifestations of estoppel.

Anderson J Even though it was originally

Miles Well it's gone into the textbooks Your Honour.

Blanchard J In any event it still needs to be detriment.

Miles Exactly.

Tipping J Yes. Has it got into the textbooks that observation? Oh no, no, no, I was just curious because it was

Blanchard J Curious observation.

Tipping J My brother says it was a curious observation too. Yes, alright. It was *National Bank*

Miles *National Bank* or something wasn't it?

Tipping J Yes it was

Miles Well that was the case I had in mind

Tipping J *Natwest Finance and the National Bank* or something like that.

Miles Yes, oh here it is. Yes it's in the latest edition of Burrowes 2007.

Tipping J At page?

Miles It's para.4.7.3. It doesn't seem to have a page reference.

Tipping J That's alright, thank you.

Miles What's more Your Honour it's stated as one of the best known statements of the new understanding.

Blanchard J It does appear that this form jumps around a bit and talks about working days on some occasions, and days on others. I am just looking at the printed.

Miles Are you looking at the agreement Sir?

Blanchard J I would have thought that when they meant working days they actually said so. If you look at say 29.1

Miles Is this under the agreement?

Blanchard J This is the lease.

Miles The lease.

Blanchard J I'm just thinking about the argument about when a time expired at 5pm or 12, it may possibly be that nothing would turn on it and depending upon the view one took of the detriment point, but I must say at the moment I'm inclined to think that when they said days they meant days and when they said working days they meant working days and they were distinguishing between the two.

Anderson J I think it's determined by 47(1)(a) – this option can only be exercised at any time within the first 18 months of the commencement of the initial lease.

Miles Well

Anderson J It must be at midnight.

Blanchard J I think my brother has to be right.

Miles The reason why I suppose I preferred the 9am to 5pm, is that there's at least a presumption from that, that people are available.

Anderson J It doesn't matter, it just has to be a tender. I mean if there's no one there and you shove $350,000 under the door with an agreement, a complying agreement at the place where you've been told to send it

Miles What at 3 in the morning?

Anderson J No it has to be before midnight.

Blanchard J 11.30.

Tipping J 11.30 at night.

Miles 11.30 at night. Well I'm not sure. Your Honours gave that judgment recently on certainty of payment of deposits or

Anderson J I didn't, I was the one before that, that was found wanting

Miles Do I concentrate on the others at this point? But as I again

Tipping J I honestly don't think this is going to matter because there must be an arguable case on detriment, we just don't know.

Miles Quite Sir, but I am at the moment a little bemused at the possibility that this could be exercised by slipping it under the door of someone's house at 11.55pm.

Blanchard J Well I suppose we'd only get to that point, or the trial Judge would only get to that point if there was something to be slipped under the door.

Miles Yes, I suppose they've started on the proposition do I accept that they had till midnight.

Blanchard J One would have to assume that if they somehow could get a bank cheque they'd have been able to go and find Mr Dickey at his home and give it to him there.

Miles It's a possibility Your Honour. I discussed the remaining few pages in my submissions which were all about Greenmount's knowledge and I've already dealt with all of those issues during the argument.

Tipping J Doesn't it all depend really in this case on the view we take of the *Otago Station* obligation? If no obligation arose until it was too late - fine, if it's arguable go to trial, it's only if you clearly have a duty to speak at a time when it could have made any difference, unarguably could have made any difference, you could have summary judgment entered against you.

Miles And I would just add the rider to that Your Honour that even if Your Honours were prepared to go as far as that conceptually in defining the duty, you come up against the factual problem.

Tipping J Understood.

Miles Well unless there's anything more I can say Your Honours that's all I was proposing to put forward at this stage.

Blanchard J Thank you Mr Miles. Mr David.

David Sorry Your Honour, trapped by my chair. Excuse me while I just organise myself. Your Honours one obviously listens to the exchanges with interest. Just an initial point on what happened at the outset when we say the agency was created, what happens there is that the person Mr Douglas has sent everything to Mr Foley at the outset, and of course the option by its wording is directed to sending things to the landlord, so in my submission that does make quite a big difference here. If your, and I think we have to say that Mr Douglas is clearly somebody acting for Southbourne, and you ring, and this is Mr Doughty's evidence. You say we're exercising the option and the response comes back for Doughty's evidence is COA, page 68 I telephoned Scott Douglas, the property manager, to advise that Greenmount were exercising the option. He told me to send everything to Michael Foley, Southbourne's solicitors. So he arranges the courier. What I say is it does take this case out of the ordinary in my submission in establishing from the outset that with an option that's directed to presenting an agreement to the landlord, whether the cheque's a term of that or not, you have the landlord saying 'send everything to the solicitor and then after that, that's acknowledged as received. Now if we have to get into the factual debates about what happened on these days that the material was there I think I'd probably have to accept if you have to go to that level of detail just to work out whether *Otago* applies, you probably have to accept that that might need to go to trial, but what we say is on the naked facts, the bare facts, you have a clear case where there was the duty to speak because of what happens at the outset and because of the nature of this option.

Blanchard J But telling the purchaser to deliver the documents to the solicitor surely couldn't be interpreted as turning the solicitor into the principal for the purpose of making the decisions.

David Well in my submission it at least mounts to a representation from the principal that for the purposes of exercising the option I want my solicitor to handle it. It must be that in my submission.

Blanchard J I would have thought it means no more than physical delivery can be made to the solicitor and the inference that one would draw is that that's being done because it's the solicitor who's going to be asked to give advice to Mr Dickey on the documents, and on the elements of the exercise of option.

David Well

Blanchard J I don't really see you can take it any higher than that. You'd need something pretty specific, which we don't have in the sparse evidence before us.

David Well the sparse is

Blanchard J To be able to say that Mr Foley's been clothed with an authority to make all the decisions.

David Well at least in my submission to look at the material and in the words of *Otago* the agent being allowed to take the cheque, at least to that level when you have the option

McGrath J But I think Mr David you're really talking about the scope of the agency and I think you perhaps should formulate the scope of the agency in that it seems to me the proposition you may be putting to us is that the awareness of the deficiency in the tender of payment is something that's somehow come to be within the scope of Foley's agency, but for you I think that is the awareness in terms of para.27 *Otago Station Estates*.

David Yes Your Honour.

McGrath J But would you like to formulate the scope of the agency in your own way?

David Well I say that as a result of that communication there was an implied authority to assess the documents at least by reference to the personal checkpoint in *Otago*.

Blanchard J Without any reference back to the vendor?

David In my submission that would be the effect of this particular circumstance where the

Blanchard J We don't even know at this stage whether Foley knew that the property had gone up in value. Foley might

David No we don't know that.

Blanchard J Foley might, but being in the position of the hypothetical solicitor I've mentioned whose client mightn't have wanted the deal to collapse.

David Your Honour that's possible. We don't know what the solicitor knew, but what I'm saying is that when, what I'm submitting is that when the

Blanchard J So how likely is it that the vendor would be clothing him with authority to reject a cheque which on my hypothetical the vendor mightn't have wanted to occur – the vendor mightn't have wanted to take the point?

David We say that this situation there's simply no evidence about what lies behind what was said, but what we say, what we submit is that if you have the statement that's made here in the context of the option, where the person trying to exercise is saying I'm going to exercise it, it would normally go to the landlord – it has to be presented to the landlord. In other words you could probably claim breach if you didn't present it to the landlord. You could say it didn't comply and yet you have the representation made 'well send it to the solicitor'.

Blanchard J So all that is, is it's good enough for it to go physically to the solicitor, I don't have to receive it personally?

David What I said, well Your Honour I accept that that's one formulation of what can be taken from this by implication, because we're talking about the implied authority here only of the solicitor, or possibly the ostensible authority because of representations made by the principal, but what I submit is in the context of this particular case and what the exchanges are leading to is how does this dictum in *Otago* work, and how does it apply? What we say is that for the purpose of this case that a vendor who takes a personal cheque or knowingly allows his agent to do, by that representation when you are presenting and you're saying I want to exercise the option and it involves two things, and the landlord knows what is involved on his interpretation

Tipping J This argument is on the premise that if it does involve two things.

David Well Your Honour I say that's a fundamental point that we have to come back to. I wanted to deal with this point about the scope of what was said at the outset, because I think it is different where you have an option here that's quite direct. It's very specific and so you present to the landlord and you say I want to exercise; the landlord says no, send it to the solicitor. Now Your Honour Justice Blanchard's formulation is I would accept that you could say that it means that. It means no more than that, but in my submission for the operation of *Otago* the, and it's a question of interpreting what that means - I think a legal question as to what flows from those facts. For the question of *Otago* though, in the circumstances of this option where you'd have the usual form of tender would be to tender to the landlord -–find Mr Dickey wherever he is. You have Mr Douglas saying send it to the solicitor. At least for the purpose of the, I'll call it a ruling *Otago*, because I'd submit in due course that it's a sensible rule of mercantile practice – you could call estoppel waiver, what you will. But for the sake of that the operation of that rule I'd submit that there is a representation that's made at the outset that clothes the solicitor with that authority for assessing the documents for the question of the personal cheque. Otherwise the landlord, by saying send it to the solicitor, and it's the landlord that says this, puts us in a worse position than if we'd tendered to the landlord. Now in my submission that can't make commercial sense.

McGrath J I understand the force of that point Mr David, but is your point really is that there is an implicit delegation to Foley, such that it's his awareness of any defect in the form of tender that gives rise to the duty urgency to objective at all?

David Yes, and the effect of this of course is simply to wind back the time of the need to speak, because my learned friend has made much of the evidence which has been engrafted I would submit to show lateness in the last day and we don't know when. But if this submission is right then the inference that I'd say is permissible even in summary judgment, that this was sat on, it does take us back to an early appointed time. And that's the force of the points about agency that are in the submission, but if the agency runs

McGrath J We're looking at Thursday rather than late Monday.

David It's a timing issue in that situation.

Tipping J Well then you can show detriment, or it's dramatically easier to show.

David Yes. Whether Your Honour's point about detriment would in my submission only come into play if that's an explanation for *Otago*, because as I read *Otago*, the gist of it is that if you allow your agent to take a cheque without subjecting specifically to the form of tender, it's a form of

election by waiver in my submission that the soon as he or she is aware of it you must expect to be taken dispensed with the need for payment through legal tender or its equivalent, so

Anderson J It's an implied representation really isn't it?

David Yes, it could be put in that basis and I've struggled with how this is best put and Justice Blanchard uses the word estoppel. I would say it's probably a waiver because in my submission if you have the means of knowing of the facts that give the basis for waiver, you can have a waiver, so it's

Tipping J Well we're on the agency point at the moment

David Yes we are

Blanchard J That might be so if there's a deliberate statement by the vendor that cheque's okay. That would amount to a waiver.

David Oh that would change it obviously Your Honour. There's nothing of that

Blanchard J And having elected in that direction it may be that you couldn't un-elect at a later stage, but this case doesn't involve that kind of factual event.

David No what must flow here is it must flow from the conduct, and we say the bare facts of conduct, and I submit that there is an important point about the nature of this representation that's made

Tipping J Can you get home?

David Sorry Your Honour

Tipping J Sorry, can you get home unless you can satisfy us that the solicitor Foley became the vendor for *Otago* purposes? You've got to show that haven't you, whether it be by doctrine of agency or by something or by some other means?

David We no, I say that even if this meeting took place – I'm jumping to a different point in time here – but this meeting took place late on Monday, there was a duty then to speak.

Tipping J Alright, alright, well subject to that point

David Subject to that obviously.

Tipping J Subject to that point, you've really got to have Foley as if he were the vendor haven't you?

David Yes you have to produce something that goes back further in time to give this a longer passage of time, and that of course is why we make this submission. I mean the important point here though is in nature of this particular commercial document, and obviously I'll come to that when we talk about we talk about

Tipping J Yes, I understand your point and I understand the basis for it.

Blanchard J It's a convenient time now to take the adjournment. 15 minutes.

11.34am Court Adjourned
11.52am Court Resumed

David May it please the Court we were dealing with the initial communication and I think I've said all I can on that point of the initial communication and the effect of it in this context, and I'll come back to the *Otago* point as I put it, but it is important that while this is summary judgment, accord on summary judgments entitled to adopt a robust approach to evidence and affidavits and in my submission there are some noted gaps that this Court should at least avert to, because what happens here on the evidence. There are statements in the submission here that go further than the evidence about taking instructions, saying that we're taking instructions from the client. That's what's submitted but what was actually said was when the request comes through about settlement arrangements, what was said was I'm going to meet with my client. But what we have here though is receipt on Thursday; a cheque with the solicitor; some communication on Friday; an unbanked cheque over the weekend, and in my submission where, if you read Mr Foley's affidavit, it is so crafted to answer only particular point. This Court on summary judgment would be permitted, and it is fact a summary judgment matter, a Court would be permitted to say that just isn't good enough where you have the cheque with you from Thursday and you have contact with your client, not to say well what did happen, because in my submission the undeniable inference here is that with communication with the client the cheque was sat on. What do you normally do with $350,000 – you bank it – not banked. Now

Tipping J What exactly are you saying here Mr David? Are you saying never mind the heart attack, Mr Foley should have insisted on getting an answer from his client as to whether to accept this cheque?

David No I'm saying draw the inference that this cheque must have been discussed. What country must have been discussed, if no evidence is tendered about?

Anderson J You mean you only have to go so far as to say he must have been aware that a personal cheque had been received?

David It's inconceivable in my submission that that was not the case.

McGrath J So are you saying that on summary judgment principles there should be a finding of actual awareness on the part of Mr Dickey on the Friday? Is that what you're saying?

David I'm saying the effect of this is that Southbourne through its agent in Dickey, must have been aware of this cheque, and if you do not depose as to what happened in that period in my submission, and there are authorities about being critical about the affidavit evidence that's supplied, this is all within

McGrath J Yes, look I'm done with that, I'm just really trying to find out what you're saying. I think the answer to my question was yes, an inference should be drawn that Mr Dickey was aware of the personal nature of the cheque that he tendered on Friday.

Tipping J What does Dickey say about this or is he suitably circumspect about the matter.

David He's blank about it.

Anderson J Coy almost.

David It's not just coy, and I attempted to make a summary of the evidence and what you have is Mr Doughty saying what he did and then for instance on Friday when he telephones Foley to confirm everything's in order he replied he'd not looked at the ADLS agreement in detail but would do so shortly as he was meeting with his client that day. Mr Foley said he'd revert later that day. Mr Foley says I told Mr Doughty that I had received a package of documents and it appeared to be complete so there is

Tipping J Mr Dickey seems to be giving it almost expert evidence as a lawyer. A very peculiar affidavit in some respect.

David Well yes, and I was going to come back to this point. This is the construction point that I say this is where this begins and ends and should have done on summary judgment, was completely obscured by the raft of points that were thrown up by Southbourne and of course this distraction

of the GST argument. The point that there was an acceptance by the tender of the ADLS agreement is in my submission pleaded and it's been lost because of the diversity of the points that have been put forward, but what I say is that while it is summary judgment and all of those carry out supplies, it's an extreme situation, it does need to be approached robustly, particularly the case is saying commercial cases

Blanchard J What I think you're arguing is that here the gap in the evidence that the vendor has chosen to put in is such an obvious one that the inference should be drawn that they couldn't say anything favourable.

David Or *Jones and Dunkle* at trial Your Honour, but either not favourable or contrary to their interests.

Blanchard J Yes.

Tipping J Can you just take us, I don't want to be tedious either to you or my brothers, but this is quite an important point you're raising here, can you just take us through the evidence of Foley such as it is and Dickey such as it is. I've just been trying to get a handle on it myself.

David Dickey's harder but I can do Foley more quickly.

Tipping J Dickey's evidence on the deposit comprises three paragraphs, 7, 8 and 9

Blanchard J What page are we looking at?

Tipping J 84.

David And then Foley's straight afterwards Your Honour.

Tipping J Foley's straight afterwards. It doesn't say anything about what he knew or didn't know on the Friday, Saturday, Sunday or Monday.

David And he has talked to his solicitor. Well his solicitor said he has.

Tipping J And is Foley saying anything about what passed between himself and Dickey in phone calls?

David No

Tipping J I mean

David But he tells Doughty

Tipping J Solicitor and client privilege, but on the other hand you'd have thought Dickey would have said if it were the case, that when he first became aware that this was a personal cheque.

David Yes, I mean he doesn't appear to say anything and I was reading his material last night

Tipping J I apologise Mr David, I haven't read the affidavits closely because I didn't know that we were going to be looking at the factual details, and I'm not criticising, I'm just saying I'm sorry I haven't.

David I'm really loathe to say on, one is naturally loathe to say on summary judgment if there is a factual point then let's look at it, but in my submission this type of case where with all due respects to Southbourne, it's raised from the outset this raft of issues to try and avoid this option. It is relevant in my submission to look at what they say when it's put what has happened on our side, because all we can do is give evidence about what we did and what we said.

McGrath J So what do we look at?

David Well I'm sorry, I need to

Tipping J Well we look at Dickey, we look at Foley

David And that's it really.

Tipping J And that's about it isn't it? I mean it's their minds, their understanding, their knowledge that is crucial.

David He says 'the day I had ill health, he goes through his father's heart condition, once Mr Foley received the opinion I sent the facsimile'.

McGrath J Are you at 84?

David Yes.

McGrath J At what paragraph?

David 83 and 84 at 6.

McGrath J Thank you.

David And then he gives evidence as to his understanding of deposit cheques - it does not include a personal cheque, and then the practice of personal

cheques which is we say a relevant background factor to a number of the points, and of course he's trying to meet interpretative points here

Anderson J He doesn't say that he was assisting his father on the Friday does he? It says before the meeting.

David No, I probably haven't done the penetrating doublet that Your Honour will do on this, but there just seems to be a lot of silence, a wall of silence about what has happened here from the external representation at the outset of 6.49 Thursday received. It was a package, I've seen a package - it appears to be complete. He says, Mr Dickey, I received a package of documents from Foley. Yes Foley, para.6 – 'I told Mr Doughty I received a package of documents that appeared to be complete. At no time did I tell him the option had been validly exercised, because that's what Mr Doughty says', but that's not the issue what he said there, but what goes over the line between the parties here is that

McGrath J You'd have preferred to comment on the opposite proposition as to whether he told him that?

David All I can say is there is a conflict there about what was said. But looking at their case on the facts here one is entitled to say well that's the case that they had this material from Thursday and they sent a fax back saying 'received'. One's entitled to say well that sort of kicks things off because there's obviously contact between the solicitor and the client

Tipping J You're not relying on that per se are you, you're just relying on the fact that so little is said that there's an overwhelming inference that they must have known in time to speak.

David My learned junior says it beggars belief that people didn't know about the cheque, but that's really what was

Tipping J Well that a suitably hyperbolic statement but I think

David Yes and one shouldn't descend into that here, but that really does beggar belief with a personal cheque being marked 'received', sent back with a fax 'received' that it does beggar belief.

Tipping J I think undoubtedly Mr Foley knew it was a personal cheque.

David He must have.

Tipping J Of course he did, but the question is whether Mr Dickey also knew.

David The point though is simply both Foley and the client are silent about the nature of their contact and there was some and there was a cheque there which sat unbanked very curious because usually, well normally one would bank the cheque.

Anderson J It's also the fact that Southbourne is an active purchaser and substantial owner of industrial property in South Auckland so it's not a little old person wondering what to do.

David Well read if you like the inadmissible material from Mr Dickey himself, which provides legal comment on a variety of things about how things don't comply in his opinion.

Tipping J Well

David It's inadmissible though so maybe I shouldn't.

Tipping J Well your argument is that there's an overwhelming inference that they knew, the vendor personally through Dickey knew, you say by at least the Friday?

David Well this leaving aside the agency point, but in my submission in a rare example of this in summary judgment, the nature of the affidavit sort of filed back allows the Court to reach that conclusion.

McGrath J Yes, and this is not premised on any idea of a duty on Southbourne to state the facts, it's really just on the general principle that Courts must address the affidavits and the circumstances in a robust way? That's the principle you rely on?

David Yes, yes, that's the principle and of course it's as broad as it's long and it depends on the case and it depends on what one's looking at.

McGrath J Yes.

Tipping J Well I understand entirely what you're saying and it's not without some force.

David In my submission in this case, in fact it's compelling and it ought to have been the way the Courts – that's another point but I'll come to that on construction – but in my submission it's compelling and cheques simply don't sit unbanked without instructions in my submission, they just don't, and here we have silence as to instructions. It just doesn't happen and the cheque's been there in the solicitor's office with contact with the client. Those are the bare naked facts and in my submission those bare naked facts – maybe that's hyperbole too – those bare facts, those bare facts bring

Otago into play and ought to. In the Privy Council case, a Malaysian appeal, which is simply Lord Diplock saying but one better be critical about assertions that are put forward in cases. I say that that applies perhaps with a bit more effect where you are silent about your dealings. That's my submission on this point. So it's the end of this submission that we filed the estoppel point, and there are other points in the submission about, I put it this way, changing the law on implied authority, which is the *Blumberg* case, which are driven by – Justice Blanchard used the, he described I think the second argument in this submission about the option allowing a personal cheque is lightweight, so I need to address that, but that's the secondary argument on how the option works and in my submission what happened in this case was a misfiring of summary judgment. Why? – because from the outset this GST point loomed over the whole process because of Southbourne's, well because the way the case was run in the Courts. The Associate Judge at first instance became entranced by that and didn't really decide and the Court of Appeal decided it. At the Court of Appeal hearing the only ground of appeal before the hearing appeared to be the GST issue, because that was our appeal point, and that appeared to be the ground of argument, but on the day Southbourne was given leave to argue the other three points over objection. It's not recorded in the judgment, over objection, there's no notice to support the judgment on other grounds. The reason for that background is that I say that what the Courts didn't do on the summary judgment here is do the obvious, the one that one should do in constraining a commercial document. is pick it up and work out well what do you need to do to exercise this option?

Tipping J So you're about to embark on that little journey are you?

David Really my first point.

Tipping J Logically it's the first point isn't it?

David Logically. I wanted to deal with the estoppel point but I'd heard the exchanges on factual matters which I say the Court needs to be quite circumspect about, but now turning to this submission on what it means, and obviously it's a construction of this document, this commercial document, in its context. I don't believe I need to remind the Court of those principles, but in my submission there are a number of cases in the bundle of interpretation of options and these are distinctions as the submission makes clear between what you have to do to exercise and what are terms. And what happens with these options is that tends to get conflated in the documentation because you're trying to move to the ultimate transaction as quickly I think as possible because you've got parties in a commercial relationship, but this document in my submission, it's pretty clear, or very clear, that what you actually have to do to exercise

this is tender the agreement with the terms in it. And really in my submission this point was put, it's been put each time. It is in my submission pleaded.

McGrath J So it's been put both to the Associate Judge and the Court of Appeal

David Yes, and Mr Long appeared below, as I understand what was put there was and in fact it was shown to the Court, look this is what was presented.

McGrath J But all I'm asking is this point was put to the Associate Judge and to the Court of Appeal and your answer is yes.

David Yes Your Honour.

McGrath J Thank you.

Blanchard J So what sort of agreement do you say had to be tendered? What did the tendered agreement have to say about the deposit?

David May I Your Honour with your indulgence just pass up my marked up version of this document? It's to assist with the argument on interpretations.

Blanchard J Certainly.

David Because I tried to do was

Blanchard J Have you got copies for all of us?

David Yes I have Sir. What I say Your Honour, and these markings have been put in by my junior in discussions, that what the Court needs to do and what the Courts needed to do on summary judgment application and the pleading is COA 12, the statement of claim. In my submission that clearly says that what was done was present the agreement. Now I don't like the term literalism being put to the party that's exercised because the first thing that happens to you if you're on the other side of that one is they say you didn't literally comply. Well what I say is this is a construction exercise of a commercial document and the question has to be asked is what did these commercial parties mean by it, and if we look at the first line, and this is the grant of the option, now what it deals with at (a) and (b), or what you have to do to accept. And bear in mind these are parties that are in a commercial relationship and have been for some time. There's a background

Blanchard J So you say all you have to do is to present a form of agreement?

David With those terms in it.

Blanchard J Well where in the form of agreement that you tendered, your client tendered, is little 3?

David The shall accompany the agreement is not included. But $350,000

Anderson J So in fact something quite different is in the agreement. The agreement specifically refers to paying the deposit at a different time when the second parties signed, so

David Well no the front page of the agreement at 172 does have included 'refer clause 2 $350,000.

Blanchard J Just bear with me for a moment while I find it. 172

McGrath J This is the document that accompanied it is it?

Blanchard J Now what's the point you're making about the front page?

David 172 Your Honour, the case on appeal. What's been inserted there by the sister is $350,000 paid to the vendor, and what we say

Blanchard J And are you saying that that is a requirement that it must be paid at the same time as the document is tendered?

David Your Honour what we say is that the (b)(3), the first point is that all the matters through 1 to 7 are terms of the agreement that will be formed by the exercise, and what we say is that what you have to do to exercise is to put in $350,000, but what you have to do to perform, the agreement formed, is have, well whatever it is, and it has to be some form of piece of paper because nobody would ever tender cash; a separate point; but what you have to do is to accompany your exercise with the piece of paper.

Anderson J But the term also has to express that, because it says 'with the following terms' and so you have to have a term that says 'the deposit shall be $350,000 and shall accompany the agreement'. That's the term. Instead it says refer to 2.

David No, no, what I say Your Honour is that the second part of that phrase, shall accompany, is the party stipulating as to the time of the presentation of the deposit.

Anderson J Well that's why one would have said 'deposit $350,000 to be paid forthwith'.

David Well what he's said is paid to the vendor.

Anderson J But then it goes on and says 'in accordance with clause 2 and 2(1) is not forthwith. It's a different

David Well the parties can otherwise stipulate.

Anderson J But they haven't.

David Well that's the point about making

Blanchard J Isn't the point that Justice Anderson's making faithful to this argument? The reference is specific reference to clause 2 on the front page. Because when you go to clause 2 you find that you don't have to pay the deposit until both parties have executed.

David No, or otherwise stipulate

Blanchard J Where's the 'or otherwise stipulate'?

Tipping J Or as such other time as is specified in this agreement.

Blanchard J Well the only other time specified in the agreement – you go around in circles.

David But this is an exercise of an option of something that's not going to be exercised – it's the exercise that counts and it's not going to be signed by two parties, but what the parties are doing here is that when you exercise

Blanchard J Well it is going to be signed by the two parties. There wouldn't be any point in requiring the form of agreement with stipulations of signature by both parties if the vendor wasn't going to be required to sign it.

David But that doesn't impact upon the exercise of the option.

Anderson J Well I think

McGrath J What you're saying I take it Mr David is that the phrase 'such other time as is specified in this agreement' can be taken as referring back to the front page and the fact that on the front page the $350,000 is recorded in the past tense, paid to the vendor, that is sufficient to meet the requirements in respect of the deposit specified in the agreement to lease.

David Yes, you've done what you had to do, you had the option.

McGrath J I understand that.

David And if you want to work out how it works together, the judgment in *Gibson* says that well you can read them together to work efficiently, that's

Tipping J Is it the past tense of the word 'paid' that is your trump card?

David Well it's just saying that it's been done at the time.

McGrath J Yes, again is the answer Mr David.

Tipping J The answer is yes isn't it?

David Well I'm sorry, maybe I should just say that.

Tipping J It is generally more helpful if counsel can be brief.

David I'm sorry Your Honour.

Anderson J Well I think it begs the question has it been paid doesn't it?

David I beg your pardon Your Honour.

Anderson J It begs the question has it been paid which is the fundamental argument as to whether the cheque is sufficient.

David Well what I say is you don't need to pay to accept. There is a contract formed.

Anderson J Well anyway I don't know about that, but I don't think it's fatal to your case, it's just fatal to this argument.

David Yes and Your Honour I say that often the simple arguments, if the deposit requires the payment of $350,000 for it to be exercised, well then that's an interpretation as a document with which I don't agree.

Anderson J I think that to comply if you don't want to rely on the strict terms of 47(1)(b), the agreement had to comply strictly and to comply strictly it had to strike out the whole of 2 and had to say 'deposit $350,000 to be forthwith upon the presentation of this agreement.

David Well it's saying it's paid

Anderson J Well is it though, that means payable

David That's what's written here. No it's paid.

Anderson J Payable or it could be 'to be paid' or

David Well I think that is paid, past tense.

Anderson J Well normally one would say $350,000, receipt of which is acknowledged – something like that.

David The important point for us is what I submit is that what the parties have required for exercise is that you simply write in the front that it's $350,000. That's the deposit you agreed on and that's what you write in to exercise, and what you've got is a further obligation that the parties have said well, and when you have the contracts formed you will accompany the agreement with the deposit, and that's what we've agreed, and *Gibson* which is in the submissions sets out the argument for consistency and how the clauses can work together, because the argument there was no this is inconsistent with the ADLS form, and what you do here with respect in the commercial arena is see whether the bargain works on a sensible basis, and to come back to those terms, 1 to 7, all the other terms there are just obligations that actually have to be performed later, and the deposit is under this agreement has been agreed it has to be performed at the time when after you have exercised the option.

Tipping J Let's just be commercially realistic and try and be objective about this. What must have been the party's intention or meaning by saying 'shall accompany'? That as you rightly say has a time connotation.

David Yes.

Tipping J And it must mean in context that the money will come with the document.

David Well it means that whatever $350,000 comes with your acceptance.

Tipping J It means the money must accompany the document or the presentation of the document to borrow the terminology of

David Yes, what you present is to accept and the $350,000, what that means

Tipping J Now if it is a literal argument, the contract did not strictly reflect that. If it is a more commercially oriented argument we're back to this legal tender point. The money did accompany the document but was it sufficient?

Blanchard J Was it money?

Tipping J Was it money, exactly.

David Well we're back to

Tipping J I think you're on the horns of dilemma here. If you're asking us to take the, and I know you don't like the word, but forgive me for using it, literal connotation, your agreement doesn't strictly reflect that term on any rational view of it, even allowing for the past tense of the word 'paid'. If you look at it on a more broad-brush basis, so on the literal view your agreement does not apply, on the broad-brush basis, the question is, is it money as my brother puts it?

David Well the interesting case for this type of dilemma, and I say there's not a dilemma here because I say that that $350,000 paid to the vendor does comply, because all that's required for the exercise is the $350,000 in the agreement. And what you're recording there is the fact that the

Tipping J I know, you're avoiding the 'and shall accompany' problem.

David No Your Honour in my submission I'm not, because the fact that the parties have stipulated that the time for forwarding the deposit is the time that you exercise the option does not mean that that's a condition of the option.

Anderson J It's not that, the thing is that you had to present a form of agreement that contained these terms.

David So this should have read 'and shall accompany the agreement'?

Anderson J Yes.

Tipping J Yes, if you're going to be that precise about it.

Anderson J And 2 shouldn't be there.

David Well

Tipping J You can't have it both ways. You can't claim an exact approach to language and then say well it doesn't really mean exact. We've got to be consistent. We're either going to be very very precise, in which case you're in problems on the terms of the agreement, or we're going to be commercially realistic, in which case it clearly means that proper money should come with the agreement.

David I say Your Honour that commercial realism's part of the interpretative exercise at any level, and what the parties are trying to achieve is obviously relevant whether you term it a literalist or a commercial approach.

Anderson J If your tender is okay it doesn't matter that the agreement is not strictly compliant, because there's no breach in any event of the realities of it

David Well there's no breach in anything. There's no breach of either the

Anderson J It's an irrelevant term then?

David Well there's no breach of your exercise, there's no breach of your agreement

Tipping J There is no material breach would be the proper way of putting it I suspect, but so I think you're in trouble on the literal and don't you have to persuade us that in the context 350 could be tendered by a personal cheque, because that's your only way out of that one, other than the *Otago* estoppel.

David Well the *Otago* estoppel point Sir is obviously a different point.

Tipping J But are you suggesting that in the context of this transaction there is enough indication that a personal cheque was satisfactory?

David Well Your Honour I think then we come into the second argument. The argument for the interpretation is clearly set out in the submissions and the point about inconsistencies dealt with by *Gibson*, if one is saying well it doesn't work with the agreement, and it can work with the agreement, you know the payment of the deposit can work with the agreement, if the Court is saying that that paid to the vendor is incorrect in not reflecting (b)3 in compliance, then this Court could either say that

Tipping J Well not only does it not reflect (b)3, but there's a direct contradiction of (b)3 in clause 2.

David No there isn't in my submission because that takes you back to *Gibson* and how the clauses can be worked together. That inconsistency doesn't exist. It seems to be that the Court's saying that strict compliance means you have to right something on the front of the agreement. If it was that you'd have to write 'and shall accompany the agreement' on the front.

Tipping J Well it means 'shall accompany the agreement' but actually it needn't accompany the agreement, you're going to get three days of grace.

David No, it has to accompany the agreement under the agreement you form. There's two exercises. There's the exercise and then the agreement you have Your Honour, and I say well

Tipping J I think we may be at cross-purposes Mr David.

McGrath J Can I Mr David come to this. Let's say that you're in a situation that you've satisfied us that it is not an integral element of the exercise of the option that you have the provision that's in (b)3, but that is rather to be included in the agreement. Now say we consider you're in breach of that provision, a provision of the agreement,

David Yes.

McGrath J Because of the form of your tender. Can you still get summary judgment?

David We should in my submission be able to get summary judgment that we properly exercised the option.

McGrath J But not specific performance.

David Specific performance of the option agreement that's been formed, yes.

McGrath J But on this scenario you haven't complied with the agreement on this hypothetical in terms of the manner of your tender, your cheque.

David In this scenario we've exercised the option properly

McGrath J Yes

David But we've breached the agreement.

McGrath J Yes.

Anderson J So it would be a declaration in that situation that the option has been validly exercised.

David Exercised, and then the parties would be thrown back to their agreement rights.

Anderson J Contractual requirements.

McGrath J Their agreement rights in respect of a breach and there might be notices and there might be response to notices and that sort of thing.

David Well that's my point. It can work

Blanchard J You'd be arguing clause 2.2 applied, even if clause 2.1 didn't apply?

David Yes, yes, we'd go back to the world of *Otago* if I might put it this way that if there is a real problem usually the 2.2 notice comes in and in this case what of course the other side's trying to do is say oh no it's a complete clean cut out, you didn't exercise the option.

Anderson J Well this cheque hasn't been banked so if you got to that stage and you got the notice there would be a banked cheque pretty smartly wouldn't there?

David Yes.

Anderson J Yes.

McGrath J But what you concede you couldn't get

David Yes and $3.5 million was tendered as a result of the Court of Appeal judgment.

McGrath J Say that again, sorry.

David After the Court of Appeal judgment $3.5 million was tendered to purchase.

Anderson J By bank cheque.

Tipping J What evidence have we got of that?

David There is none.

Tipping J Well unless it's an agreed position you can't tell us that.

David No, it can be disputed Your Honour.

Tipping J Well I don't think it can but I mean surely if you wanted to rely on that you should have either got an agreed memorandum or put in some evidence.

David Oh that's possibly correct.

Tipping J I mean we're getting this all the time, people are telling us things from the bar.

David Well I've been trying to grapple with the case that's being

Tipping J Well you're doing a jolly good job if I may so

David I wasn't fishing for that.

Tipping J But you know you can't go beyond

David Well perhaps my friend Miss Grant could be asked if there is any issue with it the fact that $3.5 million has been tendered after the Court of Appeal judgment. I mean that it can be accepted.

McGrath J It may not matter but on this scenario, and by no means indicating that it's necessarily my thinking of the case, but on this scenario it may not matter if you got a formal announcement from the Court the option had been exercised. That I think is the real point.

David Yes, yes.

Tipping J What I can't quite understand at the moment is how you get around the fact that the agreement that you tendered, if this be the case, if the agreement you tendered did not accurately reflect (b)3, how can you still say that you validly exercised the option.

David Well I say it does validly exercise the option because it does reflect (b)3 by putting $350,000

Tipping J No, no, no, look don't go through all that again

David I don't want to Your Honour but what it

Tipping J I expressly asked you if you're wrong on that, can you still say that you validly exercised the option?

David Only if the Court would be prepared to adopt a, if I put a more pragmatic or commercial approach to options.

Tipping J Like what?

David As is set out in perhaps *Gulf Harbour* and the *Australian Authorities* that you stand back and adopt a commercial approach.

Tipping J De minimis sort of thing?

David No Your Honour, in the Australian High Court Authorities I think it's *Kirby* there is authority for the proposition that one adopts a more commercial approach to options in the same way as way one construes an

Blanchard J I don't think one could do that in the absence of an actual payment having accompanied the document at the time, which rings us back to the question 'is this a payment or must it be treated as being a payment'?

David I don't like leaving this point though because I say that all of these points at (b)1 to 7 include things that you wouldn't put into the agreement you tender. For instance you would not write out the purchase price shall be $350,00 + GST, any, you write out purchase price + GST, if any. And so you don't write out 'and shall accompany the agreement'. What you do is to exercise the option you write in $350,000 and you provide it at the time of your exercise.

Blanchard J I must say where I come crunching up against a rock on this argument is that I can't see that you can treat the words 'paid to the vendor' as an equivalent of 'shall accompany the agreement' when in fact nothing had been paid to the vendor on the assumption that the cheque wasn't a payment.

David In my submission

Blanchard J It just seems to me a commercially impossible proposition.

David Isn't then just a meaningless surplusage, like your GST point? More of the same. Isn't it something that somebody's added in that actually means nothing in terms of exercise objectively? Because what you have to do to exercise here is present.

Blanchard J It can't be meaningless because on the literal interpretation the words 'shall accompany the agreement' or some equivalent have to be in the document. But whichever way you look at it, it seems to me to be blindingly obvious that the intention was that the payment had to be made in order to exercise the option. In other words I just don't buy the literal argument.

David Well if Your Honour doesn't accept that then I have to come back to the second argument in *Otago*. I understand that, but I say that reading this and one I think needs to look very carefully at this bargain because what at (b)1 to 6, you can contrast it quite accurately what's done below on the first refusal. What do they say when they come to the first refusal, which is a different situation where you have the desire to be more secure if I could put in that way about the deal that you are getting, and that's the point that's made in submission, but what do they say there? They say you tender the agreement and the bank cheque and it's two specific requirements as to what you do under that.

Blanchard J Sorry, where are you reading from.

David If one looks at the lease, my one pager

Blanchard J Oh this is the right of first refusal?

David Yes Your Honour, there's almost an example here of what you do if you want to specify that you pay to exercise at (b)2 below, but upstairs they hadn't done that. They just relayed what you've got to put in, the ADLS agreement you put forward. And I don't like this being described as literalist, because I think it works on this document and it works properly.

Tipping J No it's pejorative in some senses isn't it?

David Is it literalist sheep and commercial goats, or is it the other way around? I don't know, it doesn't matter, you pick up the document

Blanchard J It was sheep and goats last week and we don't want any more sheep and goats.

David Well pick up the document and work out what it means is the exercise and maybe I'm being too prosaic about that, and the House of Lords came back to that with looking at bills of lading in *Starsen* is it interpretation case. It all comes back well what have these commercial parties been when you pick up this document. Well look at this document. When they wanted to specify that one of the conditions for the exercise of the first refusal was payment of a bank cheque, they specified it and they said payment as well, but those points wouldn't go into the second argument. And in this one what they said is the agreement that will be formed will have certain terms in it.

Anderson J Where's term 47(1)(b)(6)?

David Sorry Your Honour, 47(2), I beg your pardon

Anderson J Oh I understand

David I'm contrasting

Anderson J Oh I understand that argument, I was just thinking aloud really because I can't find in the agreement that was tendered a clause equivalent to 47(2)(b)(6).

David I'm sorry Your Honour.

Anderson J Special terms are on page 178, but I can't find any term that

David Your Honour's coming at it in a way, the instructed case on this is to look at how you can have divisions of opinion about this is look at the *Cluning* case which is actually about the exercise of an option and it's the basis for the dicta in *Otago* about personal cheques, but in that case there was a very

strong division in the High Court of Australia about whether you actually had to pay your deposit to exercise

Blanchrd J I haven't been back and looked at it, but my recollection prompted by something Justice McGrath has said to me about it is that there is a more distinct division between the agreement and the payment in that case.

David Yes the option cases – we have a number of them in the bundle – they all turn of course on that document a number of the Judges say when they're looking at a lot of authorities and so one has to pick up this document and work out what it means, and Your Honour is saying, can I just be very colloquial, I don't take it as meaning that you just have to write in $350,000 to exercise this option, you've also got to pay it.

Blanchard J Yes, I can't believe that the parties here meant that it was going to be sufficient to write in something that said 'there's a deposit accompanying this agreement' and that that would be enough to exercise the option, when you didn't actually pay the deposit.

David Well one looks across.

Blanchard J It doesn't seem sensible.

David Well commercial parties in a relationship where cheques have been used

Blanchard J But one has to take them as meaning – well that's a different point.

David But it also informs what degree one could say, it informs well what would they require to exercise this option, because you're still construing a commercial document in it's context.

Blanchard J Well

David That's why I have a suppose a difficulty with it's literalist, you're just simply standing back from the document construing it in it's context.

McGrath J But there's no notion of acceptance by the vendor on this particular point. I mean it's a unilateral document isn't it?

David Yes it is, it is.

McGrath J I mean it's a unilateral document isn't it? It's a question of compliance and

David You put it forward so you could have an option that had very vague things you've had to do I suppose but it's more likely to have certain things you have to do, and so you have to comply.

Tipping J Can I read you a passage out of Chief Justice Barwick in *George v Cluning.*

David Yes.

Tipping J He said the agreement is undoubtedly of clumsy draftmanship and it may not be possible to give it consistency but in my opinion it doesn't express an arrangement under which the price to be paid for the land will be $30,000 and that a deposit of $300 should be paid on the formation of the contracts. Now isn't that really the nub of this case, whether you see if as a pre-condition to formation or an element that's essential so it overrides the three day rule; it overrides the first part of one and whether you've done it or not depends on whether it was legal tender.

David No, in my submission, Barwick. I thought he came to the conclusion

Tipping J Chief Justice please. He's resorted to the neat compromise of on the formation of the contract. That really quite clever, because it could mean as part of the formation or it could mean immediately on the coming into being with the contract, but whichever it is it has to be right up front. I'm at page 59 at line 10.

David Well the headnote Your Honour of this case

Tipping J Well never mind the headnote with the greatest of respect Mr David, I'm asking you to

David I'm reading with Your Honour with interest because

Tipping J Never mind the headnote, I'm just asking you to tell me why and you may have a very good reason why if one approaches it in that robust way it all turns on either analysis on whether you made legal tender.

David If you approach it in that robust way, yes it does, but that's equally robust to say this is where the epiphytes probably don't help, it's equally robust to say that if these parties meant that you tender the ADLS agreement with those terms in it and you accept, that any non-payment of the deposit is dealt with under the agreement and is not a condition for exercise. It's robust to say look at *Cluning* itself.

Tipping J But how can you get specific performance if you haven't fulfilled the terms of your contract

David I suppose

Tipping J Never mind question of cancellation, if you're in default how can you get specific performance even on your own argument?

David If we were in default, and of course that comes to whether it's

Tipping J Of course,

David Yes, if we were, and looking at this through, I think the position would be that we'd be entitled for the Court to declare that the option's being badly exercised.

Tipping J No you've asked for specific performance and you can't get it, and will you will just dismiss the application and then see what happens? I don't understand how even on your own argument you can get by summary judgment specific performance or even on trial when you're in default.

Blanchard J But you might have a pretty good damages claim.

David Well there may be a situation where one means to include that claim, but I understand the position that Your Honour's putting and I'm just trying to think the position through, but if it is a situation where there's a subsequent breach, what you have is a validly exercised option but a breach I think that's correct.

Tipping J Maybe, maybe you've got a validly exercised option, I don't necessarily need to decide that, but what I do know is you can't have specific performance.

Blanchard J It may turn out in the long run not to matter much.

Tipping J It may.

David No, and Your Honour that's just one of the issues with the case as my learned friend said that a number of issues

Tipping J That all depends on whether your tender was valid. Whether it be to fulfil the option or as the first step in the contract. It all comes back to that. If it was valid you're home and hosed, if it wasn't you can't have specific performance.

David I suppose what one can usefully do as we're at *Cluning* is look at that particular case where the pragmatism of commercial life really has come

Tipping J So you're now telling us, or perhaps you're now submitting that this tender of the personal cheque was okay?

David Yes, yes.

Tipping J Yes, right

David I think I've exhausted the seam on the first 'we accepted'.

Tipping J Well we fully understand your points and I'd like to hear you briefly on the supplementary of the written on why we should take the view that this isn't an *Otago Station Estates* case, vis a vis the payment, never-mind nothing to do with estoppel.

David Well let me organise myself. My first point really is that this option doesn't, well it's not the standard form while related to it. I accept the standard form is the agreement that's informed. The *Otago* decision is based on the standard form with its many references to pay. This agreement though, and contrasting the first refusal in the $350,000, it says that the deposit shall be $350,000 and shall accompany the agreement. In my submission, and *Bringmays* I think is a case where the question is referred to in this Court's decision in the *Rick Dees* case. It's a case where I think Justice Brandon says nobody would pay in cash but the contract specifically stipulated in cash and what *Cluning* says is that absent particular provision, and this is two of the Judges in *Cluning*, absent particular provision, a personal cheque would satisfy the deposit there and that in my submission makes very good sense if one's interpreting the agreement here because there is no specific provision about how you provide this deposit. Something has got to accompany another set of documents in my submission in the real world

Tipping J Is this argument that you can extract yourself from the rigours of *Otago* by construction of this agreement?

David Yes Your Honour.

Tipping J That's the conceptual basis of the argument?

David That's right, there's a whole argument as construed this agreement. But construed against the background of the comments that are made in *Cluning* and the submission refers to I think the phrase is 'apposite'. It says, sorry Your Honours, I'm just finding exactly where it is. And the submission deals with this at 6. In the High Court of Australia, Barwick CJ, and Your Honour has commended his robustness in one area, and I suppose I'm coming back to estoppels and saying don't blow hot and cold about all this, but he says robustly the practice and giving accepting

personal cheques and he uses this. This is the test that's found its way into *Otago* and further down at 67 he says in modern times if you interpret those things as requiring legal tender to the flat payment, one would need in my opinion very precise indications to that effect.

Tipping J Well these are statements of a general kind which really can't sit with *Otago* can they? I thought your purpose was to show us that you were outside our general rule because of the wording or province or whatever of this particular transaction.

David Your Honour I say that that is the commercial background to construing what a commercial person, what somebody would mean by saying 'shall accompany the agreement 350,000, that's relevant to

Tipping J Are you asking us in effect to go back on *Otago*?

David No, I'm saying that *Otago* can be distinguished because the standard form and one of the reasons for *Otago* are the many references to pay

Tipping J With which you contrast what here?

David Well I contrast here that something 350,000 shall accompany the agreement. It must be in my submission be a piece of paper of some kind.

Blanchard J Like a bank cheque.

David Well Your Honour that's obviously an issue before me what has to accompany here but in the absence

Tipping J A payment, a payment has to accompany, surely.

David Well

Blanchard J We dealt with this in para.24 of *Otago Station EstateI* where we referred to *George Cluning* in Mr Galbraith's efforts to persuade us along similar lines to you endeavours today, and we pointed out that what you find there are no more than observations on the widespread use of personal cheques but that Justice Mason actually said that a personal cheque wasn't legal tender.

David Well Your Honour just to refresh, he does say that but he says also, because this Court divides in a number of different ways for the reasons that is validly exercised and that's the reason that we have obviously the different positions, but he says had it been necessary to do so I would have been prepared to hold that the agreement authorised payment by cheque.

That's the next paragraph of Mason after your *Otago*. And what they're doing there is interpreting provisions that say in *Fatsa* you've got to pay.

Tipping J So it's the absence of any reference to payment as such that is the key point of distinction is it?

David It's an absence of any particular provision that makes the commercial man say well a personal cheque doesn't work here. Because to be

Blanchard J Well it doesn't work in the standard form of agreement because of the word 'payment' but I wouldn't have thought that a deposit is anything other than a payment.

David Well many sums of money that will be written into a contract, every sum of money, if you refer to a sum of money in the contract it would be a payment, but the issue is construing the contract to see whether a personal cheque which is the most common – you will have heard these arguments maybe better expressed in *Otago*, but the most common method of making a payment commercially would be a personal cheque, unless the position is so much modernised that we are doing the real time banking all the time, but the most common negotiable document is the cheque and in my submission

Blanchard J That's because people are prepared to accept payment in that way

David Yes.

Blanchard J Where is in fact it is only at the most a conditional payment and on one argument not a payment at all until cleared, but commercial people are entitled to say no, I want the equivalent of cash, I want cleared funds.

David Well if you want that in my submission in the real world

Blanchard J You have to say so at the time, but you don't have to spell it out in your documents.

David No, in my submission you have to spell it out if you want that

Blanchard J In that case *Otago* is wrong and the word 'payment' would be satisfied under the standard form agreement by the tendering of a personal cheque.

David In my submission *Otago's* looking, and the Court's decision drives off, the fact that it's a standard form by legal draftsmen who are aware of what legal tender would be, and so if you like as opposed to interpreting a contract and I accept Your Honour that the Court interprets the form there. What drives it there is a different approach and in my submission what one

does here when you interpret $350,000 in the context is work out while standing back from this what would a commercial person make of this. An absent particular indication that a personal cheque because both of the things that can accompany the agreement here are going to be pieces of paper, they're actually not going to be things that are technically legal tender, by implication a bank cheque has become one, but they're both going to be pieces of paper and in my submission you don't specify the mode here as to cash or bank cheque. It's a perfectly permissible interpretation and a proper interpretation in the commercial world for that to mean a personal cheque is in order.

Anderson J So if you're not minded to accept a personal cheque even for some small contract involving very little, you have to say I require payment in legal tender?

David No, because I think you're still interpreting different types of contract.

Anderson J Well the amount might have something to do with it mightn't it?

David Yes, because normally people will make tender of coins or notes for smaller sums.

Anderson J Well you wouldn't want $7 million 5 cent pieces

David No, well they maybe wouldn't be legal tender because over certain sums I'm not sure it is to present a whole lot of coins.

Blanchard J But if you wander into a shop and they're advertising something for sale for $100 shall we say and you give them your personal cheque, they don't have to accept that.

David No, it all depends in my submission on the construction of what's there. It is not though in my submission an imposed legal meaning, it cannot be and it should be. What the Court has to do is to work out well in this context what do the parties mean.

Tipping J But the law has to have a starting point.

David It does.

Tipping J That's the crunch. You want the starting point to be the reverse of *Otago*?

David No.

Blanchard J And the reverse of a lot of commercial cases here and overseas, the rule that you're suggesting it seemed to me would lead to great uncertainty.

David I'm sorry

Blanchard J No one could ever be quite sure when the contract was requiring payment in the traditional sense modified to allow cleared funds in any form and when it didn't.

David Well Your Honour I can give one or two examples of specificity would I think help, because what the Courts were saying, and *George and Cluning* was a long time ago and in that particular case this was about the exercise of an option too and it had provisions as to payment and what the Courts are saying they know in the context, and it's not imposing a rule in my submission, it's not imposing a rule, it's interpreting the contract, and I accept that for instance if you're interpreting a standard form you may need to make it clear to the market what that form is.

Tipping J But doesn't the law have to have a definition of what constitutes payment from which the parties may move if they wish, because otherwise you're going to have chaos?

David Well I suppose the spectre of chaos can be raised both ways. If personal cheques are not, if you're never going to construe a provision that says 'pay X dollars' as meaning a personal cheque is acceptable in the circumstances, you will have a lot of unmeritorious rejections unless you apply *Otago* strictly as a separate point. My junior is making the point that even in *Otago*, even in the context of the form, this Court explained the possible exceptions of outside office hours at auctions as being exceptions to that

Blanchard J But that was by implication from the circumstances in which the option was set out.

David Would that be an implied term Your Honour?

Blanchard J Well yes, because commercially it wouldn't work. The purchaser would not be able to comply.

David So is the formulation there an implied term or is it a construction of the provisions of the option. You see in my submission that's actually the nub of the issue.

Blanchard J Well that's the same thing actually.

David What exceptions I wonder.

Tipping J I'm waiting with keen anticipation of my brother's answer to that question.

David I'm in fact not here to challenge *Otago*, but just to apply it plainly to some set of facts, but I do say that on this point of interpreting an option it ought to be limited and it ought not to apply here for the same reasons as are set out in *George and Cluning*, because of the commercial reality. What would a person say confronted with this document? The reasonable commercial man in the position of the parties. 'Do I have to pay cash? Well I can't physically pay cash, well I could I suppose'. But it's not Arthur Daley in his suitcase full of notes. 'I can't do that I must tender some paper – what paper'? It doesn't say there when we talk about a bank cheque below we're more certainty's required, it's specified, so construe this agreement, and in my submission don't impose the lawyers' rule, construe the agreement. I don't dispute though that there is a legal meaning to payment, I can't. But the reason for instance that all charter party forms, all charter party forms in a very active market, the reason they provide in cash is to make a particular reference to that – the standard form in fact doesn't. It probably should. But that's the reason for it. It's so that the reasonable commercial expectation of a person who would for instance want to pay at night perhaps his charter party hire, can't turn up with a cheque. He will lose his ship because it says it's in cash. In my submission there's no express reference to how the tist and mode of payment. There is a clear contrast, and it can be drawn either way as Justice Anderson said about the first refusal where the parties have expressly provided for a bank cheque in payment of the deposit and in my submission a proper interpretation of the deposit shall be $350,000 is that a personal cheque is acceptable, and there are some background factors in this relationship on the use of personal cheques you will have seen from the submission. I suppose I don't personally like these arguments on interpretation when they come to this type of point, but I suppose one also has to bear in mind, and it is related to the *George and Cluning* point, that the Court's saying there well you need particular indications, particular terms, to show that the personal cheque's not acceptable. You're also here in a situation where this is the grant of an option by the grantor. The document in fact is tendered through Foley and Co. They in fact insist upon, quite ironically they insist, the only thing they insist upon is retaining the subject to lease provision which led of course to the GST point. But it's a tendered document, it's an option and it should be construed if there is doubt about it.

Anderson J Here we have an agreement that in the form says that you're entitled to three days notice if you don't pay the deposit, and if a personal cheque is paid you won't know whether it's going to be met or not for several days, and then if it's not met then you get three days on top of that. Now I doubt that that could have been the bargain of the parties in relation to the option. Normally options are exercised by putting your money where your mouth is.

David Well if it's a condition of exercise of course Your Honour if you're coming back to that, but that does give of course a permitted safety net which is there as well. In this situation if you don't stipulate for what should be paid and you receive a personal cheque and you don't like it, you can simply serve a notice.

Anderson J I suppose that's so, but why do that rather than simply saying I'm not going to accept it?

David Well in my submission it needed to be particular as to that and there are some indications in this document is one is looking at it as a whole that where it was to be particularly, because quite ironically both of the commercial acceptable documents have not to be technically legal tender, so there is a point there that Southbourne probably has to contend it has to be a bank cheque.

Anderson J It's not legal tender but the explanation is that the Courts will construe anything of a bank cheque as compliance with an obligation to pay.

David But if you say well if we put in dollars in an agreement it should be pay, well it should be legal tender is a point that's really being put to me, well this cannot be because well if we had done a charter body telex transfer or a real time transfer of funds, I suspect the response would be it didn't accompany the agreement. So you were down to two possible pieces of paper, not designated which one is which, which you want

Tipping J That would have been an absurd proposition to say that the telegraphic transfer of cleared funds didn't accompany the agreement, I mean I think you're pushing the barrow a bit Mr David.

David I suspect we would have fielded that, that we would have had to field that.

Tipping J Well

David But you would be right on that would be good funds

Tipping J Sure.

David But when you look at accompany the agreement

Tipping J When shall be paid contemporaneously is how I would construe it.

David Well I don't want to go over earlier arguments but I say that what that contemplates, or can contemplate, and I was just going through the point about construing against the grantor with the option, that is a

Tipping J Contra proferentum?

David Well it's a slightly different principle in the authorities

Tipping J Well I don't think this is going to get you very far if you're not

David Well I thought that might be the reaction, but it would in my submission come into play here because this is an option granted and *Lewis Interpretation of Contracts* I think it is, I looked at it briefly, 707, it has one or two of the older authorities on construction against the grantor of the option. So if you haven't made it clear and commercial people would merrily send personal cheques for this type of sum and you've got a history of dealing with personal cheques up to I think nearly $100,00 in the course of the lease, shouldn't that be construed against the person granting the option?

Blanchard J Alright well I think that's a convenient time to take the break.

David I don't have much more Your Honour, but I know it's a convenient time to take the break.

Blanchard J Yes, well we're going to have to hear Mr Miles in reply obviously so we'll take the luncheon until 2.15pm.

1.02pm Court adjourned
2.17pm Court Resumed

David May it please Your Honour

Blanchard J Mr David.

David I don't have much more to say. Obviously the written submission contains amplification of many of the points. I'll just sketch one or two further points from this morning. Justice Anderson raised the question of the inclusion of where is I think (b)6 in the

Anderson J The one that says if there's a nominee

David A nominee?

Anderson J Yes.

David And having looked at the standard from I think that would be taken care of by is it 1.3 in the case on appeal

Anderson J Page 173.

David 173. 1.32, where the purchaser executes 'shall at all times remain liable'. I think as one says about the *Cluning* option, it's not a perfectly drafted document in its operation

Anderson J If you're tendered properly it's not an issue anyway is it because it's been executed by implying there's no nominee.

David It's there and it's in there and you haven't had to write it in. But as had to happen for it to operate, there were things that had to be written into it and Mr Doughty does write some of those things in for it to operate.

Anderson J Yes, thank you.

David But that's the point about that. We were dealing with payment and what the option means before the break and I would submit that *Cluning* isn't just a set of observations about cheques. I think that's a very important point. It is actually a construction issue that reached the High Court and least did two of the Judges decided in what payment, and it was specifically designated as payment for some money lent in that case. It wasn't accompany shall be, two of the Judges say that what the dollar denomination means in far as payment means in that option is that a personal cheque is appropriate, and that's a construction point, so the use of *Cluning* quite properly in this Court to provide the basis for the *Otago* rule shouldn't obscure the fact that it's a construction of an option case, in which in 1979 the High Court of Australia said that commercial usage means a personal cheque, well two of the Judges said that the personal cheque would satisfy the option. In my submission that's significant in this case and ought to be strongly taken into account, because in this option you don't have what Barwick described, and I looked again at his judgment as Justice Tipping pointed out, it's quite a, I wouldn't say offensive, perhaps it's offensive in the judgment when you read it, but as Barwick CJ pointed out, he is talking there very much about needing particular indications if a personal cheque is not going to be acceptable – he says that. So I say it's an instructed case on the issue of construction, not just about personal cheques. And the corollary to if any reference to money is to mean, when I say money I mean if you write out a sum of money with dollars in front of it, is to mean legal tender, then the strict, and I called it a mercantile rule in *Otago* needs to be applied with the fullest possible force. That's an important point. But what I come back to here is that this particular option agreement in our submission, permitted the tender of the personal cheque in the same way as the option agreement

in *Cluning* was held to by two of the Judges in the High Court of Australia. And if you want to refer with specificity to cash legal tender, you can do so, and in the case on appeal by chance you have the English charter party decision in *Afovos* which is really about saying you've got the whole day to perform, but it does give you an example of a standard form that just says 'payment in cash' so that you have that very clear denomination of legal tender, and there's a discussion of that too in the *Brimnose* in which of course the issue was whether a telex ordering transfer was payment and unsurprisingly held not to be when the charter party terms said you had to pay in cash. Dealing with the scope of *Otago,* I think I've made my points on the facts about the way in which what I'll term as the rule of objection to the tender of the personal cheque ought to apply and ought to be applied, here in my submission it ought to have been applied robustly, notwithstanding that summary judgment given the state of the evidence that's been provided to this Court. On the point dealing with the 'ready, willing and ableness that Justice Tipping raised, that is pleaded and in the pleading there is a 'have no knowledge and therefore deny of course' at the beginning of the case, and throughout the case until the Court of Appeal's judgment, the issue was whether there was any binding option. Whether the option had been properly exercised. What happened after the Court of Appeal, and I'm surprised that this is in any way controversial and I accept Justice Tipping's point that it would be in a technical sense, it would be for the applicant for summary judgment to bring this to the Court, but after the Court of Appeal judgment what happened was that there was a tender and indeed Southbourne applied to stay the judgment to the Court of Appeal because of Greenmount's desire to have the property in to tender its money. So I would be surprised if that is not accepted. On the drafting of this option, the point made of construing it against the grantor and again I don't in my submission allude to this as an exercise of a last resort. It is always seems to be one of the last arguments you come to that it should be against the person proffering it, but in my submission the dicta in the cases, and if I can hand up the *Lewinson* extract that cites the case, I don't have the actual cases but there are long English cases and it's a well-known principle, but the principle is that the option granted is construed most strongly against the grantor. The grantor here is the landlord and COA66 – it's *Foley and Hughes* – that draft it. I say that that is relevant to the point on payment, what mode of payment is. There's a final point really that I wanted to emphasise was to come back to the *Otago Estates* point in the application of the point made by Justice Blanchard in the case about allowing someone to accept a cheque. I've been over the evidential position here on the summary judgment, but what I submit is that if references to payment wherever they are, you are only going to find that payment permits a cheque in the most exceptional circumstances by dint of an implied term perhaps. If that's to be the rule then this counter-balancing rule which would uphold the most regular tender of paper money – this has been used since I think the

Goldsmiths allowed people to have deposit slips in the medieval times so that people didn't have to carry cash. If that's to be construed, and that does go back to the 13th or 14th Century, if that's to be construed as not in this type of contract, not permitting the tender of a cheque, then in my submission the *Otago* rule needs to be, not innovated, but applied very strictly on its terms, and in my submission in this particular case given the facts, even if you have the case which I say you really don't have because this cheque can only have stayed there on some form of instruction agreement with the client, can only have stayed there on that basis, but even if you have, that late on Monday we had the cheque, it is not something that you need detail on. You have it, you know and I think you would be deemed to know what you think your contractual rights are. You have an obligation if this is the approach to this commonly accepted mode of payment, and I use that Justice Blanchard in the commercial sense, it's a commonly accepted mode of payment and I accept there's a debate about what it means in legal terms but to say it's a conditional payment which suspends the payment obligation until such time as it's clear. But it's a commonly expected mode of payment. If that is the position that that is not acceptable on the interpretation of this, and it would be on most contracts, then *Otago* needs to apply with fullest force and it's akin to, and I tried to think of some examples, it's akin to losing your right to reject I suppose – your right to reject goods; your right in a CIF contract if you pick up the documents and pay them and you miss something, not exactly pay them but it's an implied waiver and the case on this is *Panchaud Freres*, it's a 1970 English decision but it's noted in *Chitty*. We may not be over-readily to explain it in terms of waiver estoppel or those doctrines but it is a commercially applicable rule in the mercantile position, in the mercantile situation, so that commerce works, and I say though that you could, you can from the conduct here construe even an estoppel or a waiver, but in the simplest terms I say that the conditions that are laid down by this Court in relation to personal cheques and allowing someone to pick them up are plainly met here on summary judgment. Those are my final points. There would, depending on the outcome, there would be perhaps issues on costs and I don't know if that is appropriate to make the points now.

Blanchard J Well why would we depart from the normal practice we have on costs.

David Well there's a slightly complicated position in the Court below, in the High Court, the Associate Judge granted costs against Greenmount. That was appealed to the Court of Appeal on the basis it should have been a reserved order and that issue of course hasn't been dealt with by the Court of Appeal.

Blanchard J But a normal practice would be if Greenmount were to win, to award Greenmount costs here

David Oh yes, I'm sorry Your Honour, I'm looking at the possibility if we lost in the position of costs.

Blanchard J If you lost

David I understood I had to make the point

Blanchard J What was the appeal on costs all about?

David Well there's a decision, I think it's called *Philpott*, which says the usual process would be to reserve them and there is a rule now I think in the High Court rules that that's the usual position in the summary judgment. The Associate Judge though made in addition to not really deciding the points put before him, made an order that Greenmount would pay the costs; didn't reserve them. That was in appeal but of course the Court of Appeal turned that around. So what I wouldn't want is a costs order to simply turn everything back to what it was if you see my point if we lost.

Blanchard J Well do you say that the situation in the High Court should be for the costs to be reserved in the event that you lose here?

David Yes, that will be the general approach, and there's also a further point Your Honour. If I'm not making the point at the right time I'll stop and I could file a memorandum about it, but there would be a further point on the costs situation that this Court might wish to consider, it's this it's that both the leave application and the vast majority of the hearing in front of the Court of Appeal was given over to this GST point and I've made my kind of mental submission that I think that's derailed the process here of analysis, and that might be an issue that this Court would want to consider on costs because the leave as you will be familiar with, the leave hearing dealt with primarily GST points, and obviously if we lose in this Court the battleground I suppose at that stage has been declared and the issues are in front of the Court. In the Court of Appeal certainly the primary issue was the GST point. Those are my submissions.

Blanchard J Thank you Mr David.

David If there is anything else I can assist with. I have some material here but I'm not sure it really is

Blanchard J I don't think that would help us very much.

David It's this document that counts Your Honour.

Blanchard J Mr Miles.

Miles Essentially two points Your Honour; the first of them dealing with the clause 47.1 and .2 issue and the fundamental problem that my friend has which is the issue of legal tender and how the deposit should have been paid. My friend put it to you I thought on two bases. The first was that there was a constructural argument, was the way he put it I think, that by the proper construction of clause 47.1 is that a personal cheque would be sufficient. Now in my submission Your Honour he comes up against the fundamental problem of *Otago Stations* which of course was to the contrary. The basic premise that was so important in that case was the recognition that regardless of what the practice in certain parts of New Zealand might be, the law was that under the standard Law Society agreement, the cheques for the deposit must be in legal tender which essentially meant a bank cheque unless otherwise agreed, and by holding that you rejected indications to the contrary in *Australia*, and my friend's difficulty is that to construe 47.1 the other way is to turn that proposition on its head, where what he has to show is that clause 47 specifically recognises the right to make a deposit cheque by a personal cheque rather than as *Otago* rules by a bank cheque, and if the parties had agreed in clause 47 that a personal cheque would be appropriate then of course he's fully entitled to make the submission. The difficulty he is in is that the option specifically states that the deposit has to be in terms of the standard agreement for sale and purchase, a copy of which of course was produced, which under *Otago* has the inevitable implication that the deposit has to be by bank cheque. His second difficulty is that 47.1 doesn't of course refer to a cheque at all. The key clause is that the deposit shall be $350,000 and shall accompany the agreement. That of course means by a bank cheque because that is the only form of cheque that that agreement recognises, and if there had to be any further indication, and there doesn't, but had there to be any further indication, then 47.2, which is the only reference to cheques at all, specifically talks about a bank cheque in payment of the deposit. That of course is for the first right of refusal, but if you're looking at the agreement as a whole then it is a perfectly reasonable assumption that where a reference to a bank cheque is made in the following clause, that that is what is understood to be required in the earlier clause. Now faced with this, impossible I would say, construction my friend is forced really to say to you that *Otago* was wrongly decided. Now he skirted around that obviously but time and time again he came back to saying that *Cluning* is the preferable way to go, that *Otago* either had to be construed strictly on its terms was I think his phrase. I'm not entirely sure what he means by that but the clear impression is I think that it should be distinguished at least in these circumstances because it doesn't follow commercial practice. A proposition that was firmly and authoritatively rejected in *Otago*. It seems to me Your Honours that one comes back time and again to the untenable proposition which my friend is bound to have to fall back on, that in the exercise of the option his client produced a personal cheque

which was not legal tender and that was not in accordance with the option. On that basis it seems inevitable, subject to the other issue of estoppel, that leave must be granted to defend the case. Indeed it tends to suggest that the likely result of the litigation will be judgment in favour of my client. Now let me come then to the estoppel issue. Now I am very concerned and got increasingly concerned as I listened to my friend's submissions on this issue. What he ultimately was saying to Your Honours is that there is a crucial credibility issue here, because the affidavits filed by Mr Dickey and by Mr Foley did not contain crucial information that would be open to them; essentially the issue of whether Mr Dickey knew about the personal cheque on the Thursday or Friday or perhaps Monday before the meeting; that he did nothing about it; that that delay would be enough to amount to estoppel and that the affidavits in declining to give that sort of information were coy I think was a word that was used at one stage. What he was really saying is reject those affidavits because behind it is the clear assumption that Dickey and Foley knew about this personal cheque and that they set out to provide affidavits that by the absence of this information would give the impression that Dickey did not know about it until late Monday. It's a specific and deliberate attack on the credibility of Mr Foley and Mr Dickey. Now, my friend is entitled to make those submissions if firstly there was any basis for them and secondly if the argument had been raised before hand, and I'm going to take you, not just to the affidavits, but to my friend's submissions where he argued a quite different proposition to you. Now let me take you to the affidavits first, and I accept that in retrospect, looking at some of those affidavits, one would have liked to have seen more information. I can only say Your Honours that, and I can say it on the basis that any litigation lawyer that has had experience in these areas knows perfectly well that when you're filing affidavits and summary judgment applications you're concentrating on certain factors, and inevitably years later when you're putting affidavits under the laser-beam concentrating on a specific item and not just the four or five other issues that seemed important at the time, there will be gaps in the affidavits. Now let me take you to the affidavits themselves. If I could take you to page 69 of the case on appeal which is an affidavit from Mr Doughty, at para.24 - You will recall at some sage there was a suggestion, it might have been from His Honour Justice Anderson that the affidavits from Foley or Dickey didn't even point out when the operation was and I think Your Honour is right, in their affidavits I don't they do. In Mr Doughty's affidavit at para.24 he says this 'I again telephoned Mr Foley at 2pm on Monday the 31st October, the final day of the option period, to confirm his client's settlement requirements. Mr Foley advised that his client's father had had heart surgery on Friday 28th October, therefore his client had not been able to meet with Mr Foley on that day. He advised he was meeting his client that afternoon, Monday 31st October.' Now if we go then to the affidavits by Mr Foley and Mr Dickey, you get those at 83 and 84. I know Your Honours have already been taken to these but let's

put it into context of a heart operation on the Friday at 83 Mr Dickey, at para.6, I was unable, at the bottom of the page, 'I was unable to meet with Mr Foley until late on 31st October, the date that the option expired due to my father's ill health. My father had a serious heart condition and subsequently died on 6th December'. It's only five weeks later that his father actually died. 'I was assisting my father with appointments for Doctors and specialists prior to the meeting with Mr Foley. As soon as I met with him I gave him instructions to request an opinion'. What we have is a clear picture of a man with other pressing matters on his mind from the Friday through to the Monday, and presumably the Thursday. We go then to 89, Mr Foley, at para.10. 'I was unable to meet with Mr Dickey, the managing director of the defendant company, until the day that the option expired due to his father's ill health. As soon as I received instructions from Mr Dickey I requested an opinion'. Now Your Honours let me go to the submissions that my friend filed in support of the appearance today and you will see why I am particularly concerned at the thrust of his submissions that he gave orally this morning. If you've got my friend's submissions I'd like you to go to para.3.12 at page 8 where the subheading is *Southbourne's Actual Awareness*. No at 3.13, 3.12 Greenmount submits that a vendor who takes a personal cheque without objecting specifically to the form of tender of payment as soon and he or she is aware of it, must expect to be taken to dispense with the need for payment through legal tender or its equivalent. That's the proposition. Now in support of that he says Southbourne actually knew the form of tender payment by late on the afternoon of 31st October. It failed to object specifically as soon as it was aware of it. As a consequence of that failure to object Greenmount didn't replace the personal cheque with legal tender or its equivalent prior to the expiration of the option at midnight on 31st October. Southbourne is now prevented by reason of its conduct from denying that it accepted the personal cheque as adequate to satisfy the requirement of the option. Now not content with that he repeats exactly the same proposition in marginally more detail at para.8, at page 19 of his submissions. The sub-heading *Southbourne's Actual Awareness – Southbourne's Duty to reject*. At 8.1 'it appears to be accepted that Mr Dickey, sole director of Southbourne met with Mr Foley on 31st October. Mr Dickey says this was late on that day. Mr Foley gives no evidence as to the time of the meeting. Although it is not expressly admitted, it must be inferred at the very latest as at late 31st October Southbourne was actually aware that it had received a personal cheque'. Over the page where the final submission is set out at 8.14, the last two paragraphs, 'it is submitted (a) the option did not expire until midnight on 31st October; (b) Southbourne had until midnight in which to specifically object to the tender; (c) even if it could be said to be highly probable that Greenmount couldn't have rectified the failure in payment by that time, which Greenmount submits isn't the case, that is wholly irrelevant. Southbourne had around seven to eight hours in which it could have objected to the

tender of the personal cheque. It didn't do so and in a context where (a) the option would expire at midnight; (b) had been in the possession for four days; (c) Southbourne wasn't aware that Greenmount wished to know whether or not the option had been promptly exercised etc'. Now that was the case that I had to answer and that was the case that I dealt with this morning and I'm instructed Your Honours that this was essentially, while of course things got more focused as a result of the leave application, and we got focused on just when time started running from the awareness and how reasonable was that period of time open to Mr Dickey to do something about it, and similar sorts of issues, the suggestion that the affidavits were in some way misleading or that the inferences that the Court should draw that Mr Dickey had been aware of the personal cheque since Thursday or Friday or even Monday, had not been raised in the High Court or the Court of Appeal and as is perfectly apparently from the submissions that I've just read to you, it was never suggested in the submissions before you now. Had it been suggested Your Honours that the affidavits were either inadequate or worse still were actually misleading and structured deliberately to avoid this key issue, then I would not have hesitated in the circumstances to have sought leave to file a further affidavit to deal with this very point, because it would be grossly unfair if this issue was going to be determined on a credibility issue which could have been sorted out if notice had been given that that was going to be the attack and that this of course is the last Court and the last chance that we have to get leave. I reject the right of my friend to raise these issues in the way he has without giving, not just not giving notice, but specifically advising us of the basis of on which the appeal would be defended. It is simply not open to my friend to say to you now because the proposition obviously that we should have given notice on late Monday afternoon or early Monday evening, thus giving him another seven or eight hours to deal with it. Clearly the recognition had been reached by my friend that the proposition was inherently improbable and unlikely to succeed before Your Honours and thence he advanced the proposition as I say for the first time that you ought to read something more into those affidavits and to hold that they had been deliberately structured to avoid the very point that's crucial on this appeal.

Tipping J It's of some significance perhaps Mr Miles that this issue doesn't feature in the judgment of the Court of Appeal as I understand it.

Miles It doesn't Your Honour and I am advised that it was not raised in that sense there. Now

Tipping J By this issue I mean the specific point that adverse inferences should be drawn

Miles Quite, oh quite Sir, I understood Your Honour. What does one do? It seems to me the options are these. The most appropriate option is to require the respondent to stay with the arguments that have been emphasised in the previous Courts and before this Court in its written submissions and that you should not pay any attention to the invitation that he raised this morning of going behind those affidavits and taking the inferences that he invited you to take. The second, which I suppose then naturally follows on from that, is that you do not take those inferences and you accept for all the reasons that I discussed with you this morning, that estoppel has not been made out on the papers; that it is inherently factually driven and that the appeal should be granted. As a very last alternative, an unattractive one I would have thought from everyone's point of view, but if you're not with me on the first two then it can only be that I would ask leave if this remains an issue to file an affidavit dealing with that very point. Now I don't, I say that as a last resort. I don't anticipate that Your Honours will find that an attractive proposition but I specifically reserve that option in the circumstances that Your Honours might nevertheless think that my friend for whatever reason was entitled to raise the issues that he did this morning and in those circumstances that would be the only fair way of going about it, but I reiterate that that is a last resort and an unattractive proposition from all of us, but

Tipping J Well if we're going to have to do that we might as well have a trial.

Miles Well exactly Your Honour.

Blanchard J That would be fun wouldn't it.

Tipping J I mean I don't mean a trial in this Court, I mean a trial in the appropriate forum.

Miles Quite, quite, exactly Your Honour. Well those are my submissions Your Honours.

Blanchard J What do you say about the costs question in the High Court?

Miles Oh that was new to me Your Honour. Could I suggest that depending on the outcome you suggest a memorandum as to how costs should be dealt with in the lower Courts.

Blanchard J Alright, thank you. Yes thank you Mr Miles. Well we've been greatly assisted by counsel's arguments and we'll take time to consider our judgment in this case.

David I have to deliver some section Your Honour, I forgot to place it before the Court. It's the passage I referred to from *Lewison* on the Contra proferentem rules

Tipping J On the construction of contracts

Blanchard J Oh yes by all means.

David Of options. I can just hand that out, thank you.

Blanchard J We will now adjourn.

2.56pm Court Adjourned