IN THE SUPREME COURT OF NEW ZEALAND SC 115/2016

BETWEEN **KAWARAU VILLAGE HOLDINGS LIMITED**
MELVIEW (KAWARAU FALLS STATION) INVESTMENTS LTD (IN RECEIVERSHIP)
Appellants

AND **HO KOK SUN AND ORS**
PENINSULA ROAD LTD (IN RECEIVERSHIP AND IN LIQUIDATION)
RUSSELL McVEAGH
Respondents

Hearing:	6-7 April 2017
Coram:	Elias CJ William Young J Arnold J O'Regan J Ellen France J
Appearances:	D J Goddard QC, M G Colson and T B Fitzgerald for the Appellants S J Mills QC, A R B Barker and M Singh for the Respondents

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CIVIL APPEAL

MR GODDARD QC:

May it please the Court, I appear with my learned friends Mr Colson and Mr Fitzgerald for the appellants.

ELIAS CJ:

Thank you Mr Goddard.

MR MILLS QC:

May it please the Court, Mills with Mr Barker and Mr Singh for the respondents.

ELIAS CJ:

Thank you Mr Mills. Yes Mr Goddard.

MR GODDARD QC:

Your Honour, the Court should have two things from me, the usual short roadmap with no Lewis Carroll attached this time and one authority which I'll take the Court to and the only authority I'll go to on interpretation. It actually has some striking parallels with what went wrong in my submission below in this case and I thought was worth referring to for that reason. And I'll do that instead of going to all the others, so ultimately it should save time.

Beginning then with an overview, there's a single issue at the heart of this case which is whether the vendor was entitled to call on the purchasers to settle in late 2011 and if the vendor was entitled to call on them to settle, then it's plain that they didn't and they didn't at a time when they had not cancelled and had not purported to cancel and I'll go to the detail of that later but if the vendor was able to call on them to settle, then they didn't and the vendor's cancellation was justified. If, on the other hand, the vendor was not entitled to call on them to settle, the vendor's cancellation would have amounted to a repudiation which was accepted and the purchasers would have cancelled. So that's the central issue. Below that sit four other issues. First the issue on which the Courts below disagreed, the question of whether the vendor promised to complete the entire Precinct development, in particular stages 2

and 3, the stage 1 was completed; whether that was an essential term and if so what the consequences were of the finding by the Court of Appeal which is not challenged, that it was clear by late 2011 that the vendor was not in a position either to complete the development or to procure its completion. The vendor appellants say that there was no obligation to complete the rest of the Precinct, that the High Court Judge was right to read the contract in that way but that even if there was such an obligation, it was not essential and even if there had been such an obligation and even if it had been essential, in the circumstances where the purchasers had not cancelled and where the obligation in question was not due at settlement, was not – and there's no question in this issue about that. It's quite clear that completion wasn't required on or before settlement, whether they were entitled simply to refuse to perform on the day and we submit that they were not entitled to refuse, that they had reached Justice Tipping's fork in the road and that having refrained from cancelling, very consciously refrained from cancelling and I'll take the Court to some of the correspondence later on, it was not open to them to simply to sit on their hands and fail to settle.

Then the respondents, if they're unsuccessful on that issue, seek to uphold the decision of the Court of Appeal on other grounds, all of which were unsuccessful in both the High Court and the Court of Appeal. So we have concurrent findings and they are to a very large extent factual findings, that the remaining complaints out of that vast array pursued at trial, which at least have narrowed down somewhat on appeal, the remaining complaints which are the ones dealt with on the last page of my roadmap under paragraphs 6, 7 and 8, the complaint about non-residential uses of Lakeside West, about the common property at Kingston West and about the lease tern at Kingston West which as I say both Courts below held did not justify a refusal to settle, can now be invoked before this Court by the respondents to support the result reached in relation to one or other building by the Court of Appeal. Those of course relate to specific buildings, not to all purchases, whereas the complaint about non-completion of stages 2 and 3 applies to both buildings. The Lakeside West building and the Kingston West building which form part of stage 1 of the Precinct. I won't go through the rest of the overview of my

submissions in any detail. This case is one of a number that this Court has had to deal with in relation to developments in Queenstown where in the buoyant pre-2008 period people purchased properties often, as in this case, off the plans. By the time settlement was due, the buildings were completed, in this case in 2011, the global financial crisis had had a dramatic impact and an oversupply of property in Queenstown, which given the usual way in which these bubbles lag, financial booms cumulatively meant, as I say in 1.4 of my submission, that the value of the units had fallen to somewhere between a quarter and 39% of the purchase price. So the reason why the purchasers would not want to settle is not far to seek. It's pretty clear, the question though is whether they were entitled to rely on other matters; for that of course is not a good reason, that's a risk they took, to fail to do so.

The case doesn't turn primarily on authorities. I'm only going to go to a small selection of the ones in the three bundles that my learned friend and I between us have inflicted on the Court and it turns primarily on the interpretation of the contracts, applying very well settled principles and then some issues about cancellation which I will have to drill into in a little more detail. The *Holmes v Booth* (1993) 2 New Zealand ConvC 191,633 property ventures, *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 line of cases. But the High Court found the answer to this simply by reading the contract as a whole and looking at the relevant clause in context and in my submission that is the surest and most reliable path to the right answer in this case.

So I'm going to begin by going through the agreements in a little bit of detail and that requires us to get out volume 6 of the case on appeal. Certainly the most useful volume, not quite the only useful volume; I will refer briefly to a couple of others, there's something to be said for volumes 14 and 15 as well. Most of the rest merely provide some heavy lifting exercise on the way to Court. So because it's at the front of volume 6 let's begin with a Kingston West agreement. The key difference, as I'm sure the Court will have seen from the parties' written submissions, Kingston West was always intended to be a serviced apartment hotel. So the units were to be sold subject to leases

which would provide for the operation of a hotel business in that building and that is indeed how it is operating today. Lakeside West on the other hand was not structured in that way. One of the complaints that the purchasers made at trial was that they'd always intended to have the option to let their properties as serviced apartments, and the encumbrance granted to the Queenstown Lakes District Council limited their freedom to do so. That argument was stood on its head in the Court of Appeal and in this Court, so the complaint is now that it was possible to let those as serviced apartments, and I'll go through the background to that, but what is quite clear is that's the provision for leases to be granted as a matter of contractual obligation before settlement formed no part of the Lakeside West agreements, and we'll see that difference.

But let's begin, the common, the front of the agreements is essentially the same. So beginning at the beginning, page 1061, and I'm working off the numbers in the top right-hand corner of the pages, which are preceded by SC. The unequal struggle to get rid of confusing page numbers has been abandoned by my instructing solicitors who have instead just added that as a reference to show that those are the Supreme Court bundle numbers. So you have a contract between two purchasers from Singapore, Lee and Phua. We have the details of the parties on 1062 and over on 1064 the unit number. This agreement didn't include a carpark, many did. The price, $405,000, and a standard deposit term which we can see was modified by agreement between the parties.

Over the page 1065, there was provision for inserting additional conditions of sale with two notes at the bottom, and this is relevant to some of the rule 20A points raised by my friends, so I'll just note he's now on the way through, notes (1) and (2), "Any amendments or additional conditions must be noted on this page or they will be deemed not to bind the vendor… Any addenda referred to in this page must be signed by the parties." And (2), "Any variations to the draft outline plans and specifications or any representations made by the vendor or its agent not otherwise recorded in this agreement must be noted on this page or they will be deemed not to bind the

vendor," and we'll look at clause 16.9 when we reach it. Those are important when we look at the reliance placed on marketing materials by the Court of Appeal.

An information sheet over the page, which is of no particular importance. The solicitors noted, on page 1067. Then we come to the definitions and interpretations on 1068, and these are important because they inform obviously the reading of the substantive provisions, and they contain some important material for the arguments in this case. Reference to the Unit Titles Act 1972. Then we come down to the definition of "building". "Building means the building erected or to be erected generally in accordance with the draft outline plans and specifications." Perhaps note here that the word "generally" was omitted and replaced with the word "substantially" in this definition, and we see that on page 1141. There are a couple of amendments made by an addendum and I'll come to that page later but the Court might just want to note now that "generally" should be crossed out and replaced with "substantially". "So building means the building erected or to be erected substantially in accordance with the draft outline plans and specifications." So even the building there's some flexibility in relation to and we'll see just how much as we go through the contract.

The next relevant definition, "Certificate of practical completion," is as one would expect the certificate given by the relevant architect or independent professional upon practical completion, we'll come to that in a moment. "Common property means the common property to be vested in the body corporate following deposit of the unit plan." Importantly common property is not defined by reference to the draft outline plans and specifications. We'll see how the link is made further below.

Consents should be noted because this played a larger part in the argument at trial, and it stills seems to be relied on to some extent by the purchasers in their argument before the Court. "Consents means the full and final approvals for the Development," and as we'll see in a moment that's just the building and its curtilage, not the rest of the Precinct. The development of the Precinct,

construction of the building, subdivision and so forth. So consents was a broad term that extended to consents –

WILLIAM YOUNG J:
Just, I don't fully understand this. By "curtilage" does it just mean the area of land immediately surrounding each building or does it mean the area of land that goes to make up stage 1?

MR GODDARD QC:
Just surrounding that building and we see that at the top of page 9 Your Honour, the next page. "Development of the building and immediately adjoining land by way of a curtilage to the building."

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
And I don't think there's been any suggestion otherwise at any stage of this. So we've got, and in fact that was the next definition I was going to go to, so development, and this is important when it's capitalised in this way, it just means the development of the building and the immediately adjoining land by way of curtilage to the building. And it can't be emphasised too strongly that there is no complaint at all about the physical building, about the features of each unit or about the immediately adjoining land. No issues about any of those. Then we come to another very important term for this case, draft outline plans and specifications. Meaning the outline plans and specifications of the unit and the building, a copy of which is annexed to this agreement is annexure 2. I'll come to those later but just a couple of things to note about this definition at this stage. The first is the content of the definition itself. It could hardly be a more tentative labelled draft outline, plans and specifications one might have thought either was enough. I have sometimes noted things I've written as draft outline, it indicates a significant lack of confidence on my part about where I will ultimately land and the same is conveyed by this label hear and it's well established that one can allow the

language of a defiant term to shed light on what it means. There's a number of the famous interpretation cases in the UK Supreme Court including one of Lord Hoffman's speeches that make that point.

ARNOLD J:
One thing the draft outline does seem to assert as a positive is in "location" at 1.2. It says, "The building is located as part of a 17 acre master plan and so on"?

MR GODDARD QC:
Yes. It does under the heading "location" and as part of the draft outline and subject to all the qualifications about that. Your Honour's exactly right and I'll set that in context as I go through the body of the agreement and then come to that and a couple of the other provisions relied on by the purchasers.

The other point I wanted to make about the definition at this stage is that it's defined as meaning, "The outlined plans and specifications of the unit and the building." So what the outline tells us we can look to these for is for information about the unit and the building. It doesn't suggest that they're outline plans and specifications of the Precinct as a whole and my submission will be that the reference is to location, the map showing it, are just by way of effectively location, just that where is it, where does it fit in the context of a wider proposed development. I should perhaps make the point I make at my 3.1, right at the outset to avoid distraction, is absolutely common ground that the developer, the vendor intended to construct stages 2 and 3. Of course they did. They sought consents to enable them to do so although of course you're not bound to implement the whole of a consent and that was explored in evidence, at trial and ultimately I think they accepted, even by the planner witness for the purchasers. The planning of the case is a matter of law, getting a consent to do something doesn't oblige you to do it. But also there was marketing material in which each building was marketed in the context of the plans to build a wider development. But the key question for the Court on this first issue is not what the developer intended to do, it's whether the developer, the vendor promised every purchaser of every unit that they'd build

the whole thing, and as I'll seek to show as we go through the agreement, that just makes no sense when one looks at the commercial framework for this. It's not a natural reading of the agreement as a whole, or of clause 5.7 seen in context. So no issue about intention, the issue is around what was promised.

Coming back to the definitions. "Land, that part of the Precinct land on which the development is to be undertaken." Come on down to practical completion. "Practical completion means that stage of the Development" so that's development of the building and its curtilage, "When the property," and the property we see over the page is the unit including furniture, fittings and equipment, and the carpark. So it's very narrow, that's just what sold. "So practical completion means that stage of the Development when the property," the unit and carpark, "and those parts of the common property for the purchaser's use and enjoyment of the property are, in the opinion of the architect or independent project manager… complete except for minor omissions and minor defects." So practical completion doesn't even mean completion of the building, completion of the Development, the building and its curtilage. It means completion of the unit, any carpark sold, any FFE, furniture, fittings and equipment, and common property to the extent available for the purchaser's use and enjoyment and as we'll see that's what triggers settlement.

There's a definition of, "Precinct", the development to be undertaken on the Precinct land. Precinct amenities and infrastructure, "All amenities and infrastructure and associated works from time to time within the Precinct intended for common use by all owners."

ELIAS CJ:

Just pausing at that "Precinct" definition. It's the development to be undertaken on the Precinct land and the development as you emphasised in your submissions means the development of the building and immediately adjoining land.

MR GODDARD QC:

Yes, development is not capitalised there and the convention that's followed almost, but not entirely perfectly in this document, is that when a defined term is used elsewhere it's capitalised. I haven't felt able to argue, once we see how this term is used, that this is only a reference to the building and its curtilage.

ELIAS CJ:

Right.

MR GODDARD QC:

So I accept that this is a reference to wider development beyond this particular building.

ARNOLD J:

That really flows from the definition of Precinct land which includes the whole 17 acres or hectares doesn't it?

MR GODDARD QC:

And from a number of other provisions which show that that is a reference to something wider. As we'll see there's one clause which is relevant to this case, 4.1K, where it's not clear whether the capitalised term was correctly used with the wrong article. I'm not comfortable whether it shouldn't have been capitalised. I don't think we need to resolve that finally but yes I think, I accept that this is a reference to the wider development, and that's actually important, and perhaps this is the other thing I could pick up, one of the key reasons why it was necessary to talk about the wider development of the Precinct land was that the process of doing that work could have practical impact on existing buildings. There would be disruption from construction. It might be necessary to grant easements or licences to, in relation to existing properties that had been sold in order to enable further work to be done, so a lot of the references to the wider Precinct in this agreement, in my submission, one of the main reasons it's referred to is that there's a strong emphasis on the fact that this would be happening later and that the purchasers of units in

the early stages would not impede that, could not object to it, and were required to take certain steps to facilitate it.

WILLIAM YOUNG J:

Just as a matter of interest, has there been any further development pursuant to the sale that's taken place? This is I guess for the south and east of the buildings that are there.

MR GODDARD QC:

My understanding is that there has been essentially residential subdivision on part but not all of the land. My learned junior who is fully up to date with that, nods, which is encouraging. There was some reference to this in the evidence at trial being proposed, and that's progressed some way.

WILLIAM YOUNG J:

Thank you.

MR GODDARD QC:

So we've looked at "Precinct Amenities and Infrastructure," so road's an obvious example and there is reasonably extensive roading in place from the entranceway out by the road, down, looping around all the stage 1 buildings, the five buildings and enabling access to other parts of the 17 acres. And then Your Honour Justice Arnold's point that "Precinct Land" is defined by reference to the certificates of title which were the whole 17 acres or so at that stage. There are references over the page, I'll come back to this later to the "Precinct Rules" and the "Precinct Society" to be formed and then the property, we've look at that one already, means the unit, including FFE and the carpark, if any, perhaps just worth just noting that, although I think it's reasonably obvious from context that the Kawarau Falls Station, sorry the Kingston West units were all sold with furniture, fittings and equipment because they're intended to be leased and used as serviced apartments. The Lakeside West ones were not, there's no FFE package required to be taken under that agreement.

Then we have the definition of “Settlement, settlement of the sale and purchase of the property,” i.e., the unit and any carpark and “Settlement Date”, important, “The later of,” now again just to keep things tidy where we see references to “the tenth working day” in (a) and (b) that was actually replaced with fifteenth and again that change can be seen on page 1141. So the fifteenth working day after providing the practical completion and the issue of a certificate of title, the later of those. So issue of a title for the unit and practical completion of the building to the extent needed to enable use of the unit and common property was the trigger for the obligation to settle. And it was always expected, again this is common ground, that that would happen before stages 2 and 3 had been completed. Some unspecified amount of time before that and so indeed it proved.

“Unit” defined to, “Mean the unit specified in the particulars of sale.” Over the page, “Unit plan,” now I do want to emphasise this because at various points my friend’s submissions refer to the “Unit plan attached to the contract.” What is quite clear from this definition and from the context to the agreement as a whole is that no unit plan existed at the time these contracts were entered into. Unit plans defined to mean, “The unit plan to be prepared,” because it had not yet been, “In accordance with the Act to be deposited in respect of the land and which, subject to the provisions of this agreement, will be based upon the content and intent of the “Draft Outline Plans and Specifications,” so again based on its content and intent a linkage but a rather broad conceptual one and subject to the provisions of the agreement which permit extensive modification of those as we’ll see in a moment. But there was no unit plan at the time of contract and the drawings we see in the draft outline plans and specifications were referred to by Mr Moore, called as an expert property lawyer, expert conveyancer by the purchasers in what I think was not intended to be a complementary way as architectural drawings with a slightly disapproving tone that I’ve also heard from engineers but for slightly different reasons. The point Mr Moore was making was this doesn’t contain any of the sort of detail and information one would need in a unit plan, rather like engineers are saying, but how will it stay up. So unit plan was to come, it didn’t yet exist.

Then we come down to a provision which provides commercial context for what was being agreed here. The importance of which really cannot be overstated in which the Court of Appeal, in my respectful submission, did not fully appreciate. And that's clause 2.1 the agreement conditional. So this is a sale of a unit off the plans in relation to a building that didn't exist. In fact when the first contracts were signed it hadn't even begun and it was intended to be part of a very ambitious development that would take place over an extended period and depending on a wide range of factors. And what we see here is the conditions that surrounded the vendors willingness to commit to building just this building. What would it take for the vendor to promise that this thing that the purchaser wanted to buy would actually come into existence in the context of a sale off the plans. Well, the agreement is subject to and conditional upon (a) the vendor obtaining by 31 December 2008 a minimum level of sales of units in the building which in the vendor's sole opinion justifies completion of the building, and obtaining the consents, and (c) the vendor confirming by the same date that the projected construction costs for the Development, the building and its surrounding curtilage are acceptable to the vendor acting in its sole discretion. So what we said here is the vendor saying I am not prepared to commit to building this building in which you've bought a unit, unless I've presold enough units to justify completing it, and unless the projected construction costs are acceptable to me, and those conditions are for the sole benefit of the vendor, as 2.2 says.

The effect of the Court of Appeal's decision is that if the vendor was satisfied about the economics of this one building, they were promising to build everything regardless of its economics. They were promising to build the huge escarpment hotel in the middle of this, regardless of how much it would cost, with some flexibility on timing but otherwise committed to building it. They were committed to building every one of the 13 buildings, including Kingston East, way up in the top corner, so insignificant that in fact it got dropped off the lists in the High Court and Court of Appeal accidentally, it's in the agreed statement of facts. They say firmly 13 buildings then list 12. So it's any reasonable observer reading this would think the vendor is not

committing, even to building the very building that is the subject of this contract, unless the economics stack up, both in terms of presale of units and construction costs. Is it likely that they were saying, oh well, if the economics of this one building, Lakeside West, not that large a building say, down by the waterfront, if those stack up we'll commit to build everything. It's extremely unlikely. Nothing is impossible in this world but this is at the heart of my submission that the Court of Appeal's reading makes no commercial sense. It would require a reasonable observer to think that the vendor was promising that as long as the economics of this stack up, they'll build everything. Even if they haven't been able to sell a single unit in one of the other buildings. Very unlikely.

2.2 confirms that these conditions are for the benefit of the vendor and can be waived by it and 2.6 and 2.8 deal with what happens if the conditions aren't satisfied, that condition is subsequent so the agreement comes into existence, but if they're not fulfilled by the date of fulfilment time being of the essence either party can give notice terminating the agreement, the deposit gets returned. So if the economics of this building don't stack up, plug can be pulled, the deposits get given back conversely and the High Court says, and then there's no obligations at all, and conversely if the conditions are satisfied, if it's economic to build this building, and these conditions are met, then there's a promise to build this building, that makes sense, that's what the High Court said. What the Court of Appeal said was, well if these conditions stack up, and it's economic to build this building, you have to build 12 others as well. Bit unlikely.

And then another important provision when it comes to understanding the scheme of this contract, 2.9, the Precinct amenities and infrastructure. The rest of the Precinct contains basically two things. The Precinct amenities and infrastructure, which are intended to be enjoyed by everyone, including the purchaser of this unit, and the other buildings to which they'll have no rights. No suggestion of ownership rights in relation to the buildings. The Precinct amenities and infrastructure are the component, if you like, of the rest of the Precinct that is most relevant to the purchaser here. What does the

contract say about it. Well, “The purchaser acknowledges and accepts that not all of the Precinct amenities and infrastructure will be completed at the settlement date and that the purchaser shall not be entitled to avoid this agreement, delay settlement or claim any compensation, damages, right of set-off or any right or remedy by reason of the fact that all of the Precinct amenities and infrastructure are not completed at the settlement date.” So you must settle, you can’t defer it, you can’t refuse it and you can’t claim any set off just because all of those are not in place. Your core obligations have to be performed and then it goes further, “The purchaser further acknowledges and accepts that the vendor may prior to completion of the Precinct amenities and infrastructure alter, vary, add to omit any amenities or facilities from time-to-time proposed to be installed or constructed.” Now there’s no complaint here that amenities, shared amenities that might have existed also in the Precinct weren’t going to be constructed at least separate from the whole argument. The argument is that all of it had to be constructed, every other building. It would be impossible to run that argument in isolation because it’s quite clear that the vendor was entitled to omit any amenities or facilities from time-to-time proposed to be installed or constructed. Again –

ARNOLD J:

So let me understand what you're saying, Precinct amenities and infrastructure is the amenities and infrastructure within the Precinct intended for common use by all owners?

MR GODDARD QC:

Yes.

ARNOLD J:

And so is your argument that because you can alter, vary, add to or omit any element of that the consequence must be that you cannot build any of the associated buildings?

MR GODDARD QC:

It casts doubt at the least on the suggestion that there was a positive obligation to build the buildings, this purchaser would have no right to use at the same time as being entitled to omit things like parks or roads that they would have been entitled to use. It's all part of an overall picture and I'll put it all together at the end. But some emphasis is placed by the purchasers on the absence of any reference in clause 5.7, the clause they hang their hat on, to omitting or cancelling buildings and the point I'm seeking to make is that that makes perfect sense if there was never any obligation to build those buildings in the first place. Whereas because the purchaser had no rights in relation to it at all, whereas the purchaser at least had some expectation of enjoyment although no contractual commitment to the delivery of Precinct amenities and infrastructure and on those there was a positive right to own it. So in other words, I'll come back to it. Then we get, turn over to clause 4 which is important, "Development and issue of title," 4.1 "Disclosure and acknowledgements: The vendor discloses and the purchaser acknowledges and agrees that (subject to any express provision to the contrary herein)" so there is that qualification, absolutely accept that but what it means we'll have to come back to. First of all, "A separate certificate of title has not yet issued for the unit," obviously it's a sale off the plans. "(d) a purchaser will be a required to be a member of the Precinct society, to comply with the Precinct rules," and so on and there's provision for restrictive covenants just harking back for a moment to last week and the *Lakes Golf* case. And then a couple of important paragraphs over the page, (g). (g) is also extremely important and was given insufficient weight in my submission by the Court of Appeal. "Completion of the development of the Precinct, or parts of it, may be deferred or suspended," and the use of those two words is again important. "Deferred" I think in this, here as in ordinary English has the sense of put back a certain amount of time, we're going to defer it for a year, we're going to defer it for two years. "Suspended" means put on ice until it's brought out again.

ARNOLD J:

It doesn't say "abandoned" though.

MR GODDARD QC:

It doesn't say abandoned but –

ARNOLD J:

Which is what you're saying really is the result. It can be abandoned?

MR GODDARD QC:

I say it can be abandoned. I say that the reason for this acknowledgement was that when it comes to the positive obligations to facilitate construction of the Precinct, what the purchasers were acknowledging was that some time down the track when they're living in their unit there may still be a whole lot of construction work going on and the vendor may come back to them and say, oh I'd just like access to your building to do X or run some trucks over your lawn, you know, and we can do that years down the track if we want, and I think some of the peculiarities in this contract, and it's not –

ELIAS CJ:

Sorry, you're saying this is to preserve the flexibility to complete the Precinct.

MR GODDARD QC:

Yes. There were two things going on in the references to the Precinct coming sometime. One, and it's the principal driver for the references to it, was to facilitate its completion. But there was an element of consideration also of what, from their perspective, the purchaser could expect in relation to the Precinct and my submission is that the provisions of this agreement were dying to say basically expect nothing in terms of when it will be delivered, or whether it will be delivered, no promises in relation to Precinct amenities or infrastructure, even their expected development. No promises in relation to the other buildings, except the negative covenant that the High Court correctly in my submission read 5.7 as containing that we won't do anything on the rest of the Precinct land which will materially impair the value of your unit. But the reason we see so much treatment of this –

ARNOLD J:

Sorry, just say that again. We won't do anything on the Precinct land which will impair the value of your unit.

MR GODDARD QC:

Which will materially impair the value of your unit.

ELIAS CJ:

Put houses there instead of the…

MR GODDARD QC:

Well for example building a huge building that removed all views right in front of Kingston West.

ARNOLD J:

But on your theory of it the vendor would be entitled to build only this one building that we're dealing with, right?

MR GODDARD QC:

No, because they've expressly reserved the ability to do the rest of the Development on the Precinct land.

ELIAS CJ:

There is a covenant –

MR GODDARD QC:

They're obliged only to do that but they're entitled to do more.

ARNOLD J:

Yes, that's what I'm saying. So if they decided well we're just going to build this building and the economics and the rest of it don't stack up, we're going to sell that land and the new purchaser gets the consents, they put in a huge supermarket complex and all that stuff, is that not affecting the value on the Precinct land.

MR GODDARD QC:

A large supermarket or, you know, New Zealand's largest nightclub or something like that, could, and then there'd be a claim to damages –

ARNOLD J:

Right.

MR GODDARD QC:

– because they'd failed to ensure that. If there's, yes, claim to damages.

ARNOLD J:

Okay.

MR GODDARD QC:

As and when that occurred, and one of the issues that was tried was a question of whether there was any material impact on value as a result of the non-construction of the rest of the Precinct and the loss of the ability to do that, and based on the valuation evidence the Courts found that there was no offsetting claim for damages.

ARNOLD J:

Because some of the valuations I saw to Melview did incorporate what they described as a sort of premium to reflect the fact that this was a unit in a very high class village-like development and they said you can justify a price premium for that.

MR GODDARD QC:

Yes. So two things about that. First, the thinking was very different in 2007/2008 where there was this enormous optimism about what would happen in relation to tourist numbers and visitor numbers in Queenstown, and at the time that settlement was called for in 2011 where the evidence of Mr Schellekens, the valuer called by the vendor, was that the non-development of the Precinct had a small immaterial adverse impact on Lakeside West so it was a negative, but a small negative, and was actually

positive if anything for Kingston West because the additional rooms, which would have increased accommodation capacity in Queenstown by basically another 30%, would have had such an enormous depressing effect in terms of supply.

ARNOLD J:
I see.

MR GODDARD QC:
So timing is everything, that's the first point and the answer could be and based on that material, you know would have been different at those two points in time because of the difference –

ARNOLD J:
I suppose the point that I was making in a sense is that the purchase price which these people paid was effectively calculated on the basis that the people were purchasing a place in a village which had these various characteristics?

MR GODDARD QC:
So that was the second point I was going to make was that that evidence that Your Honour saw in those valuations don't relate to these buildings, they relate to some of the other buildings and what the valuer called by the purchaser said was well I think that would probably have been true of these units as well, although there's no valuation of this building suggesting that. And he said that the per square metre rate also, which was above some others, also suggested that. That's possible but that tells us nothing about what contractual promises were made. If I buy a house in a new subdivision on the edges of Wellington say, what I pay for it is going to be influenced by expectations, mine and the market's, about what's going to go up around it in the next few years, if a school's going in nearby, if a supermarket's going in close but not too close; all those things, I will pay more for it, the market will pay more for it than if it's likely to be the last outpost of Wellington for some time with no amenities anywhere nearby and it's just common sense, it's

common experience that expectations about future development drive prices, even in the absence of any promise because no one promises me when I build, buy a house in Churton Park that a school will be built, that a supermarket will go in.

ARNOLD J:

The vendor has no ability to control that. What the vendor was selling here, even on the contract it seems to me, was access to a Precinct with certain characteristics, characteristics which you can derive from the contract without even looking at the brochure.

MR GODDARD QC:

I'll come back to what you can and can't derive from this because –

ARNOLD J:

Anyway go on, I don't want to –

MR GODDARD QC:

But the short point is that Your Honour's absolutely right of course that this is more within the control of this vendor than my example of the Churton Park house but that leaves open the question of whether the vendor was willing to commit to deliver all of that and my submission based on 2.1 and some of the other provisions we have yet to meet, is that's extremely implausible, that a reasonable observer looking at this would think are they really promising to do all that regardless of its economics for them, it doesn't seem likely. And there are plenty of signposts to that effect elsewhere in the contract. So, and the consequence of that of course would be that the vendor would get potentially an uplift based on what it would be worth if everything came to fruition but wouldn't be promising that outcome. So you'd expect to get actually less of a premium and none of the evidence about premia gets that refined and says are we talking about a hopes and expectations premium or are we talking about a promises premium.

So, “Completion of the development Precinct or parts of it may be deferred or suspended in the development of the Precinct will be completed in stages and maybe subject to change from time-to-time in whatever manner and for whatever reason the vendor deems necessary.” So Your Honour said it can’t be abandoned but what is quite clear, and I should have probably read the rest of this clause before I answered your question, I was a bit over enthusiastic is that it can be subject to change from time-to-time in whatever manner and for whatever reason the vendor deems necessary. So take a simple example. Looking at this, would one think the vendor can drop a building or a couple of buildings, I would have thought it was obvious that that was contemplated by this. That subject to change must at the least mean that that’s possible.

ELIAS CJ:
Sorry which clause are you referring to?

MR GODDARD QC:
I’m still back in (g) so I’m on clause 4.1(g).

ELIAS CJ:
But the same sort of terminology is used in respect of the building in (h)?

MR GODDARD QC:
Yes and that’s where the introductory language about, “Subject to any express provision to the contrary herein,” becomes important because what we get further on in the agreement is explicit restrictions on how much you can tinker with the unit and the building. Whereas we don’t see the same sort of constraint in my submission on what you can do in the Precinct.

ELIAS CJ:
And it couldn’t be argued that the ability to defer, suspend, change prevented the obligation to complete the building, even though the same language is used?

MR GODDARD QC:

Once the contract had gone unconditional and its economics, because its economics had been confirmed. That is right and we see an explicit promise to build the building which we don't see in relation to the Development further down the track.

ELIAS CJ:

Well isn't that the main argument – yes really that that there's no explicit –

MR GODDARD QC:

Yes absolutely.

ELIAS CJ:

- obligation to build the Precinct?

MR GODDARD QC:

Build the Precinct. Yes unless one reads 5.7 in a very strained way and in a way that takes it completely out of context, that's the *In Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571 point I'll come back to. And that was a case where by honing in on a particular phrase and a particular clause the High Court in England and Wales and the majority of the Court of Appeal with Lord Neuberger dissenting found that in the insolvency of this finance company.

ELIAS CJ:

It's just that I wonder really how far you can take this reservation of power to defer and so on. I suppose you're saying that that is an indication of the staging that you say is a very important part of the context in which the obligations have to be looked at?

MR GODDARD QC:

Exactly Your Honour. It shows, and if one pauses to ask what is the minimum performance being promised, it's very clear that either it's none or even on the purchasers' case it is potentially a very different thing quite a long way down

the track and that's very important when we come to essentiality as well. Because again, and I'm going to go through the clauses and then make the submissions reasonably efficiently I hope in light of them.

ELIAS CJ:

And the submission you make I think in your written submissions is that positive obligation would be odd to find in clause 4 in, 4.1 in any –

MR GODDARD QC:

In 5.7.

ELIAS CJ:

– event?

MR GODDARD QC:

And 5.7 which is where they tried to find it. And we'll see one other clause where the purchasers at trial argued –

ELIAS CJ:

Yes, sorry 5.7.

MR GODDARD QC:

– no, no Your Honour's quite right. So I say, and that was another point that arose in *Sigma Finance*, this would be a very funny place to find something that radically changed the economics of the deal and that's exactly what I say about this one. I was really struck, it's actually while I was preparing for the Lakes case that I reread *Sigma* and thought oh actually that's more relevant to next week's case which is why I've inflicted it on the Court slightly belatedly. And it's a plea in mitigation I think, providing it late. So (h) as Your Honour the Chief Justice pointed out is similar language in relation to the building, "Completion of the development of the building or parts of it may be deferred or suspended and maybe be subject to change from time-to-time in whatever manner and for whatever reason the vendor deems necessary," and then we jump down to (k) and (k) is very important because what again we orthodox

interpretation principles tell us is that we'd expect (k) to be doing something different from (g) which clearly discloses and is reciprocally acknowledged that the completion of the development Precinct maybe deferred or suspended subject to the completion status. What is it doing, it's telling us what the purchaser is relying on, what is important to them, what is or actually rather is not essential. So say it is expressly stated otherwise in this agreement the purchaser is not purchasing the unit in reliance upon completion of the development of the Precinct," so far so good. "The purchaser is not purchasing the unit in reliance on completion of the development of the Precinct." Which makes it very hard to see how any promise that might be construed somewhere else can be an essential term, I'll come back to that. Or if any, now here's the bit that's a little bit problematic in terms of drafting, "Or of any part of that development proceeding," so there are two ways this could be read. One is that it should be of any part of that "little d" development, referring back to the development of the Precinct and the other is, "Or of any other part of the "capital D" Development proceeding. The more natural reading I would have thought looking back at the way (g) is structured, which talks about completion of development of the Precinct, maybe deferred or suspended, and the development of the Precinct will be completed, is that it's "little d" development. My friend suggests that it should rather be read the "capital D" development proceeding. I don't think anything really turns on it at the end of the day other than subject to any other term of this agreement, and that clearly deals with rights to limit what's delivered, completion of the unit and the building and the issue of a separate certificate of title for the unit. So what is accepted by the respondents, for example, at paragraphs 11 and –

ELIAS CJ:

Sorry, can you just tell me how you say we read (k), because it is quite…

MR GODDARD QC:

Well there's part that's clear and a part –

ELIAS CJ:

You say that where they use a “capital D” you do read in the definition, but how does that work in this?

MR GODDARD QC:

It doesn’t work here, that’s the problem.

ELIAS CJ:

No.

MR GODDARD QC:

Because –

O’REGAN J:

It must be a mistake I think.

ELIAS CJ:

Yes.

MR GODDARD QC:

There’s a mistake and the question is what’s the mistake. Either it shouldn’t say that “capital D” Development, because we weren’t just talking about the building, we were talking about the wider Precinct, it should just be that “little d” development, which would be a reference back to the Precinct as a whole, and we see references to the development of the Precinct back in (g) for example and that’s, I must say, how I’d always read the clause. But it was suggested by my learned friend in the Court of Appeal, and I don’t think this reading had occurred to anyone before that, that it should actually be a reference to the “capital D” Development in which case the problem is with the article. It shouldn’t be “that” it should be “the”. It’s a possible reading. I don’t think anything turns on it.

O'REGAN J:
It doesn't really make sense though because then it goes on to say but you are, it is also back to building of a building which you couldn't do if you don't do the development.

MR GODDARD QC:
It would be a specific clause concerned with the curtilage, which seems –

O'REGAN J:
Oh I see.

MR GODDARD QC:
– possible but in my submission very unlikely. Fortunately –

O'REGAN J:
It doesn't matter.

MR GODDARD QC:
No, that's what I was going to say, fortunately it doesn't matter, but –

ELIAS CJ:
What's that comma doing there either, it's very, very badly done.

MR GODDARD QC:
Your Honour will see that in 3.4A of my roadmap I make the point that there is some clumsy drafting in particular clauses of this agreement and I won't take the Court to *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 , it's one of the many authorities that makes the point that the clunkier the drafting the more important it is to focus on the commercial structure and framework of the contract to understand what the unsatisfactory provisions might be doing.

What is common ground as a minimum, the respondents accept this at paragraphs 11 and 50 of their submissions, is that there's no reliance by the purchaser on completion of the Development when settlement is called for.

But – and even that calls into question both their argument that any term about completion of the Precinct could be essentially because almost the whole, effectively the whole of the vendor's performance will be required, potentially years and years before that happened, making cancellation if it didn't –

O'REGAN J:
I mean is that their argument? The argument is more that the possibility of the Precinct being completed still had to be alive at settlement, isn't it? I mean they're not suggesting it had to be actually done?

MR GODDARD QC:
No, they're not suggesting it had to be done. They accept that. But they say that all this clause is doing is reiterating that. In my submission that was self-evident. They just wouldn't be doing much if all it said was that in the context of a staged development, and it certainly wouldn't add anything to (g) or to the provisions of practical completion. The fact that (k) is there at all, and that is uses the language, it doesn't talk about the purchaser settling in reliance, it's talking about the purchaser not purchasing the unit in reliance on completion, does something more and it tells us that it's not essential to them and it responds not only to any argument there might be that there's a contractual obligation to do so which is essential, but also to questions of, you know, representations, or misleading and deceptive conduct.

Then over the page 4.2, no requisitions. "The purchaser is not entitled to avoid this agreement or any of its provisions, raise any objection or make any requisition or delay settlement or claim any compensation, damages, right of set-off or any other right or remedy under this agreement or otherwise at law or in equity in respect of (a) any of the matters referred to in clause 4.1," and one of those matters is completion of the development of the Precinct. That is a matter referred to in respect of which the purchaser is not entitled to avoid the agreement and, "(b) any alteration, variation or cancellation made by the vendor under any provision in this agreement." And that's important when we get to some of the rule 20A arguments.

Unit plan, 4.3, “The vendor shall at such time as the vendor considers appropriate (in its reasonable discretion): (a) submit the plans for the Development,” so again the building and its curtilage, “To the relevant authority to obtain the consents; (b) implement the consents, (c) carry out all work necessary to subdivide the building,” and, “(d) prepare and deposit the unit plan.” So that’s a relevant clause for two reasons. First, again, it confirms that the unit plan is yet to come. We don’t have it here. But second it’s important because through about three-quarters of the trial the purchasers were arguing that this was the other clause that gave rise to an obligation to complete the Precinct. They argued based on (b) that there was an obligation to implement the consents, which meant you had to build everything in the resource consents, but it was accepted by counsel for the purchasers, and/or just before closing, I can't remember the exact moment, that consents can't be read in that way here and this clause can’t be doing this and His Honour observed at, the Court might want to note paragraph 65 of the judgment, I won’t go to it, but that must be right. That the whole of this clause is concerned with the plans for the Development being consented, “capital D”, and implemented, and you can't take (b) out of context as an obligation to build everything that might happen to be included in the resource consent. So it conceded and rightly conceded.

4.6 is important when we come to some of my friend’s arguments, it’s worth noting on the way through, “Easements, encumbrances, rights and obligations. The vendor reserves the right to grant or receive the benefit of any easements… encumbrances, rights or obligations may be required… in order to satisfy any conditions of the consent… by any statute, regulation or relevant authority; or (c),” which is the important one, “Which in the sole discretion of the vendor are deemed to be necessary or desirable for the completion of the Development or use and operation of the Precinct,” so that’s the wider Precinct, “Or use of the building.”

This is a striking example of the point I was making in answer to a question from Your Honour the Chief Justice earlier, that the vendor was saying, look,

I've got all these plans to build all this stuff and I may need to grant various encumbrances, easements, other rights in respect of the building your unit is going to be in to facilitate that. Provided, and this is an important proviso, "That such easements, building line restrictions, consent notices, covenants or other encumbrances, rights or obligations shall not materially adversely affect the value of the property." Now all of the matters which are in issue before this Court, except one which I'll come back to later, were challenged primarily at trial on the basis that they weren't permitted under 4.6. Things like the Queenstown Lakes District Council easement, because they ran foul of that proviso, and the Judge found that that wasn't the case, that there was no material adverse impact on value from any of these matters complained of, of this kind, and that the easement in particular was permitted under 4.6.

4.8, measurements. So this again just indicates the level of flexibility that was being reserved, and as a good example of the sort of provision that constrains the flexibility that Your Honour the Chief Justice pointed to in relation to 4.1(h), Her Honour said but there's the same sort of flexibility in relation to the building, that can't be right, but of course it's subject to any other provision and what we see here is a provision setting the outer bounds for how much you can mess with the unit. There's something similar in relation to the wider Precinct. So you can't claim any compensation, damages, right of set-off or make any objection or requisition based on variations in measurements and areas, except where the area of the unit as indicated in the draft outline plans and specifications exceeds the final measured area of the unit by first of all more than 5%, so if it's less than 5%, if you get three or 4% less unit, you've got no rights at all. If you had a 5% threshold then you still have to settle but there's a reduction in the purchase price by the percentage exceeding 5%. So if for example you've got something which is 7% smaller than as I understand this clause you get a 2% reduction in your purchase price and then (b) which reads here, 15% again was modified to 10%. The Court might like to note that (b) was modified to 10%, that's again another one of the page 1141 changes and so if you're within that 5% to 10% range the purchaser has to settle but gets a pro rata deduction from their purchase price and if it's more than 10% then the purchaser has a limited right within 10 working days of

becoming aware of that to cancel and the deposit's refunded. So what we see in 4.1 is a broad reservation of flexibility constrained by quite detailed provisions here in relation to the unit so far as size is concerned, we'll come to other changes in a moment and specification of the circumstances in which the purchaser is relying on what's in the draft outline plans and specifications which is not at with the 5% wiggle room, limited amount to be met by adjustment of the purchase price within the five to 10 and you can pull out if you're more than 10% out.

And then we see other types of variations dealt with in 4.9, "Variations to the draft outline plans and specifications: The purchaser acknowledges that," and this is important because it tells us what those are. "The draft outline plans and specifications represent the vendor's current intentions with regard to the capital "D" Development and will need to be evolved and detailed during the progression of the Development." So even so far as the Development of the building and its curtilage is concerned, all that they represent is the vendor's current intentions. And they're going to need to be evolved and detailed a fortiori they are at best current intentions in relation to everything else to be built. And (b), "The vendor may at any time alter or vary the draft outline plans and specifications and any subsequent plan relating to the Development."

So again that focus on the fact that what we're talking about here is the Development and how the Development is treated in the draft outline plans and specifications, "(including inverting or 'mirroring' the unit, varying, altering, adding to or omitting parts of the common property," it's important when we come to the common property complaint obviously. "Varying, adding to or substituting external components and finishes on the Building, alteration, variation or cancellation of any proposed easement) in such manner as the vendor considers appropriate having regard to the circumstances," what's the limit – "Provided that such alternation or variation does not materially adversely affect the value of the unit, the purchaser shall not be entitled to claim any compensation, damages, right of set off or make any objection or requisition based on such alteration, variation or cancellation." So again in relation to the specific unit and the specific building there's a right to make any

change down the track from the draft outline plans and specifications provided only that at the time it's made there's no material adverse effect on value. And again important to remember that the evidence at trial established that none of the differences between what the purchasers' claimed they had been promised and what was delivered had any material effect on value separately or cumulatively. So again peculiarly the result of the Court of Appeal reading of this contract is that the vendor is more constrained on what it can it do outside the Development because you have to comply exactly with something that's an essential term, there's no concept of substantial compliance with essential terms, this Court quite rightly has rejected that before, you'd have to build everything contemplated in that with no similar flexibility to omit things, whereas you can omit things and make significant changes. You can chop out common property in the building itself, property which that unit owner would actually have an ownership in as long as it doesn't affect materially the value of their unit. And if our reasonable observer having read this far in the contract was asked, so do you think the vendor is promising that they won't depart from the one-page sketch of what's elsewhere in the Precinct at all, that they must build exactly that albeit over time, in my submission the reasonable observer will say well no that makes no sense. You've got this level of flexibility in relation to the building itself and the common property of which this person will be an owner to be more constrained in relation to the whole would be bizarre.

Come on to 5, the Precinct Society. 5.1 is important when we come to the non-residential uses, complaints in relation to Lakeside West, you'll notice it quickly now, purchaser acknowledgement, "The purchaser notices that the unit is part of the Precinct. The public have access to the Precinct via public roads, footpaths and other means. Commercial, retail, restaurant, licensed premises for the sale of liquor, tourist accommodation and other activities may take place within and adjacent to the Precinct at all and any times." The purchaser can't object, or seek compensation.

ARNOLD J:

It's interesting it says the unit is part of the Precinct, not the building. Sort of reinforces this idea that the buying the unit gave you access to the Precinct's facilities.

MR GODDARD QC:

And exposed you to all the, which is the focus here, inconveniences potentially and noise and things associated with that. Yes, it does, and again I think we need to bear in mind that the whole of stage 1 was, in fact, completed. There is –

ARNOLD J:

I don't think that's got any relevance to your argument. Your argument is that as a matter of law all a purchaser could expect was the building. So if this vendor decided to build simply one of these buildings, the purchaser still had to join the Precinct Society, still had to do all that sort of stuff, even though there was one building sitting there, and there was never any other building built. That's the logic of your argument.

MR GODDARD QC:

Yes, that is the logic of it.

ARNOLD J:

Yes.

MR GODDARD QC:

That was all the vendor was committing to do under this contract.

ARNOLD J:

Right.

MR GODDARD QC:

And that follows through the whole of it. That's the primary argument. The alternative argument, which in my submission is irresistible if the

purchasers get past the first one, is of the commitment to build all that other stuff was not an essential term.

ARNOLD J:
Term, yes.

MR GODDARD QC:
And that, I think, doesn't even raise the question that Your Honour has raised about, you know, does that seem odd that they were getting into this, because if it's an essential term, then even the smallest departure from it would justify cancellation. Then there'd be the question about whether or not there was cancellation but at least you'd be entitled to. If it's not an essential term then there's always a claim for damages, and in addition if there's a breach of it, which has a substantial effect under the Contractual Remedies Act 1979, then having regard to the substantiality of that effect, you could cancel, and that it seems to me is the absolute highest at which any obligation to build more could be pitched. That it's not essential, we see that by the ability to defer, by the ability to change, by the ability to tweak it in various ways, which is explicitly recognised, and that if there is to be a right to cancel it must turn on how significant the departure is. So just omitting one little building up in the corner, which would be a breach of the term contended for by my friend's, and would entitle on their theory cancellation, wouldn't, even if there is such an obligation on my submission because it's not substantial enough. When we come to the drawing I'll suggest one that I think really highlights that.

ELIAS CJ:
For myself I'm not sure why this isn't the principal argument.

MR GODDARD QC:
I'm agnostic, obviously, about which –

ELIAS CJ:
As long as one succeeds, yes.

MR GODDARD QC:

Yes. I think understanding why, in my submission, rightly the High Court Judge came to the conclusion that you couldn't spell out a promise to build anything more, really underscores why if there was such a promise that it couldn't be essential. So the same points occur in both, and I think it's just helpful to go through looking at it. There are a couple of other reasons, also based on what's not there, that I think do mean His Honour is right. But of course I don't need to get further than if there is such an obligation it's not essential with the result that there'll always be a claim to damages, and a right to cancel if there was a substantial departure, but again what we established at trial was that there wasn't. That the non-delivery of the rest did not have a substantial effect that was contended for and failed and it's not pursued on appeal. So here we had section 5 on the Precinct Society, we've had 5.1 which talks about acknowledging its part of the Precinct, 5.2 the Precinct sale will be set up and every property is expected to be part of this scheme and there'll be various covenants and 5.3, "The memorandum of encumbrance (Precinct) will be registered in priority to any other mortgage or charge," so all subsequent owners will always be subject to it, all mortgagees. 5.5, what's the role of the Precinct Society, so we're the deep in the Precinct Society and what it does here. 5.6, the vendor can amend the Precinct rules and then... 5.7 and this ended up being the only clause that the purchasers could point to as the source of a positive obligation to build the whole of the Precinct. An obligation that if it had been assumed by the vendors would be the largest obligation by value that the entered into anywhere in the contract because you're talking about building 13 whole buildings including the massive Escarpment Hotel and various other things that were contemplated. So it will be the biggest promise, we find it in the Precinct Society section of the agreement under a heading "disclosure". "Development of the Precinct is an evolving concept which the vendor will develop in stages and over time. The concept and development of the Precinct may be altered or varied as the vendor determines and the vendor shall not be obliged to consult with or give any notice to the purchaser." So, so far it's all qualifications and what comes through very clearly is that the concept and development maybe altered or varied so again consistent with 4.1(g) they made very significant changes

including, in my submission, obviously omission of whole buildings or chunks of the Development. And then we get the phrase half a sentence on which my friends hang their hat, “Except that the vendor covenants that it will (or will procure that) the Precinct shall be developed (albeit in stages) in a manner consistent with the draft outline plans and specifications provided that any alternation or variation shall not be such as to materially adversely effect the value of the unit.” Now this is not an easy clause to read, there’s several different ideas happening in here. The first sentence is a disclosure, it’s happening in stages over time. The next two parts of the second sentence are consistent with that, “Concept and development may be altered or varied as the vendor determines,” it harks back to all the references to discretion. “The vendor shall not be obliged to consult with or give any notice to the purchaser.” We’re not going to talk to you about what we do. Except, well what is this exception. “The vendor covenants that it will (or will procure that) the Precinct shall be developed in a manner consistent with the draft outline plans and specifications.” Now there are two ways of reading this as a matter of ordinary English, even in isolation. The first is that it will procure that the Precinct shall be developed in a manner consistent with it, it emphasises consistency. It says, we are promising that there won’t be inconsistencies. The other is, we are promising that it will be developed and one way to test that is, is there a breach if nothing happens on the land because that’s not an inconsistency with the draft outline plans and specifications which are plans and specifications of this development.

ARNOLD J:
It’s not inconsistent to do nothing at all.

MR GODDARD QC
For an indefinite period of time, yes.

ARNOLD J:
I thought you were talking about ever. You're excepting, you're talking about suspending rather than abandoning?

MR GODDARD QC

Or an insolvency which has the effect of suspending and raises a question about what will happen later; in my submission that's not inconsistent because it doesn't preclude consistent development.

ARNOLD J:

To me the most natural reading of that clause is it does what you pointed out earlier in relation to 4.8 about the measurements it gives to the unit, that it gives the vendor flexibility but then puts limits and provides remedies if there's a greater than 10% or whatever variation and you can argue that the structure of 5.7 is exactly that. Where we're going to develop this, there's flexibility in it, but the one thing we do say is we will do it.

MR GODDARD QC:

And two broad chunks of response to that. I'd say two points but each has got little bits. The first chunk is that in my submission when we step back and read that in the context the agreement is whole.

ARNOLD J:

Yes, no, I understand that.

MR GODDARD QC:

We can't make that work, 2.1 and where's the detail.

ARNOLD J:

Yes, no I understand that, but I'm just looking at this clause and trying, yes.

MR GODDARD QC:

Yes, and what His Honour said about that, and I think it's fair, in the High Court is, and it's at paragraph 71, "Read literally and in isolation, there is force in Mr Skelton's submission," that it does what Your Honour indicated, but of course what we don't do with contracts, sorry that *Sigma Finance* point I'll come to in a moment, is read clauses literally and in isolation. We read them in context having regard to their purpose.

ELIAS CJ:

But the clause proceeds on an assumption for which there is support in a number of the other provisions of the contract, and you've said the developer intended to undertake the Development, but there are a number of indications in the contract, which you've taken us to, in which the assumption is that the Precinct will be developed and that the developer is committed to developing it.

MR GODDARD QC:

I would say the developer has the intention of developing it, but that it's not consistent with the rest to say that he's promising to develop it.

ELIAS CJ:

Well that's the argument.

MR GODDARD QC:

That's the argument.

ELIAS CJ:

But I don't think it's, I think it's underplaying the strength of the respondent's argument to say that this is the source of the obligation. The source of the obligation is the whole agreement and the context in which it was entered into, and this is wholly consistent with there being an obligation on the vendor to undertake the Development. That's why I say for me your fallback argument is much more powerful.

MR GODDARD QC:

I don't resile at all from the submission –

ELIAS CJ:

No.

MR GODDARD QC:

– that actually read in context every other provision we've gone to is consistent with the vendor having a disclosed intention to do this but carefully not promising to.

ELIAS CJ:

But this refers to –

MR GODDARD QC:

But this, that's why this is the hook for something more.

ELIAS CJ:

Yes, but it's not the source of the obligation but it's an indication that the whole contract is on the assumption of a covenant that it will develop.

MR GODDARD QC:

This is – well, there is no other language in here that could possibly be understood as a positive promise to develop, and that's certainly the way it's been presented at every level, is that this is the source. It was argued at first instance as I say that it was this and 4.3, but 4.3 it was accepted didn't provide any support for an obligation to develop. So this is the hook but obviously you're right. The respondents need to argue that it's consistent with the structure of the contract. My first argument is that actually reading this as an obligation is not. But I'm very comfortable to say alternatively the message it sends is that exact compliance with any promise to build the rest of the Precinct was not required. Rather you could vary it in any way you liked, including not building large chunks of it, provided that it had no material adverse impact on value, and what that tells us is that these are questions of degree, not of absolute obligation, and that they are not essential. Rather if there is a particular failure, one has to assess its substantiality, and that again failed, and I can't emphasise that too strongly, at first instance and is not pursued before this Court. My submission about that I think is –

ELIAS CJ:

And yes, and that it failed and that in any event it wasn't an essential term?

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

Wasn't an essential term and the argument that even though it wasn't essential there was a substantial breach, [inaudible] failed and then there's also my argument which the High Court didn't reach because they didn't need to and the Court of Appeal needed to reach but didn't refer to, that even if it was essential and even if there was a right to cancel, it's very clear in this case that right through to the end of 2011 these vendors, these purchasers were very carefully not cancelling, presumably because they didn't want to be thought to be in repudiation but they very, very carefully did not do that, we'll see that from the correspondence and from the pleadings. So even if they had a right to cancel it wasn't taken. And of course the point Justice Tipping made in *Holmes v Booth* if the contract remains on foot because it hasn't been cancelled, despite the existence of the right to do so, it remains on foot for the benefit of both parties and the breaching party can also call for any performances that are due, I'll come back to that. Then, "6 undertaking of development. Vendor to build," well if one's looking for what the vendor's required to build, a clause headed "vendor to build" is quite a good place to start looking I would have thought.

ARNOLD J:

Well again if you look at 5.8, that whole clause is on the assumption that the Precinct will be developed and all the rest of it.

MR GODDARD QC:

And a very large part of it was.

ARNOLD J:

That's neither here nor there on the scent for your argument, your argument is we've gone through, relates to one building and you say one building is it, that's all the obligation is to a unit holder in that building.

MR GODDARD QC:

Yes, that's my first argument.

ARNOLD J:

Right.

MR GODDARD QC:

And I say that anything else just can't be reconciled and particularly 2.1 and 4.1(k) but it's 2.1 and the logic of that and then the draft outline plans especially when we come to them, because the other point I want to, I will be making Your Honour is the suggestion that there was a promise to build something else cannot be given any meaningful content. That is just not information about what or when. And that if there was an intention, if that our reasonable observer would say well if this vendor was promising to build these other buildings, we would be told at least how many stories they'd be and what sort of things they would be. Are they hotels, are they – there would be some of that, there would be something probably about external materials and appearances.

ARNOLD J:

All right.

MR GODDARD QC:

And there's nothing, as far as I can tell if one just looks at the one page said to be the source of information about this, you know if one put up really nice marquees would you have satisfied it?

ELIAS CJ:

Glam camping.

MR GODDARD QC:

Glam camping. Now maybe those aren't buildings but some, you know there's – we don't know.

ELIAS CJ:

Can you just, I'm a little confused about there is a Precinct?

MR GODDARD QC:

Yes.

ELIAS CJ:

There probably always had to be part of a Precinct, did there? In other words –

MR GODDARD QC:

Yes.

ELIAS CJ:

– there's more than the curtilage?

MR GODDARD QC:

Absolutely.

ELIAS CJ:

Yes.

MR GODDARD QC:

There's you know, the Wakatipu steps down to the jetty, there's the jetty, there's the lakefront promenade –

ELIAS CJ:

Yes.

MR GODDARD QC:

– there's roads that you wind down when you go past other – to get to the Lakeside West building, for example, it's right down on the lake front, you have to get all the way down on a road from the road entrance it's quite a long way, down past the Hilton wiggling around –

ELIAS CJ:

So to the extent that the contract looks to participation in the Precinct Society and a Precinct –

MR GODDARD QC:

There is one.

ELIAS CJ:

– and subject to the extent of what was, had to be provided, there is actually a Precinct?

MR GODDARD QC:

There is, there is a Precinct.

ELIAS CJ:

And there always was, was there?

MR GODDARD QC:

Yes, from when settlement was called for there was a Precinct Society and there were incumbents as registered in relation to it so all we're talking about is extent as Your Honour said, and again the Court of Appeal with respect was plainly wrong to suggest that references to the Precinct Society make no sense unless stages 2 and 3 are built. There always had to be a Precinct Society to own and operate the substantial common infrastructure and amenities required for stage 1, and there was. So again that's why in my submission –

WILLIAM YOUNG J:

Not all of stage 1 is complete is it?

MR GODDARD QC:

Yes, I think all of stage 1 is complete. Yes, all of stage 1 is complete.

WILLIAM YOUNG J:

So all the buildings mentioned by the Court of Appeal in stage 1, are they all completed?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Okay. Because I just thought it was really the hotel, the two buildings and the steps and associated roading –

MR GODDARD QC:

The five buildings that form part of stage 1, five out of 13 are all there. Years ago now, because it was before the trial I traipsed through them all but it's a bit of a blur, and so yes that's all there, the roadway's there, the promenade's all there. I hadn't' thought of inviting the Court to go on a view. We could have the hearing perhaps in the Hilton. I had mediation about the Hilton in the Hilton. I see it's half-past.

ELIAS CJ:

It is half-past. We'll take the adjournment now thank you.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.47 AM

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

Your Honour. I was on, still working my way through the contract and I was on page 1079 of the bundle, page 19 of the contract. Just turning to section 6, "Undertaking of development," and I'd come to 6.1, "Vendor to build," and I was suggesting before or starting to suggest and then fielded a question from Your Honour Justice Arnold that "Vendor to build" is a good place to look for the promise about what's to be built and what we see here is, "The vendor shall ensure construction of the capital "D" Development (including in respect of the unit) undertaken in a proper and workmanlike manner and completely substantially in accordance with the content and intent of the draft outline plans and specifications and in accordance with," relevant legal requirements. So what we have is a promise to construct the Development and complete it, "Substantially in accordance with the..." which meshes perfectly with those conditions back in 2.1. If you've sold enough units in this building and the construction costs of this building are acceptable, then the agreement goes unconditional and you promise to build it. And again that emphasis on substantially in accordance with the content and intent, the vibe of the draft outline plans and specifications.

Then after dealing with detail about rectification and access and things like that we get a couple of clauses we don't need to dwell on. Over to 10, just maybe very briefly, "Title, boundaries, etc. Requisitions, The purchaser is deemed to have accepted the vendor's title for the property and will not issue objections or requisitions on it," and the usual, "Errors and misdescriptions," clause.

Then clause 12 is important, "Default. Settlement notice: If the sale is not settled on the settlement date," and just pausing there, there's no suggestion that the settlement date as defined didn't come, the two requirements for that practical completion being certified and the issue of a certificate of title both happened. So that started time running for the settlement date. "If the sale is not settled on settlement date either part may at any time thereafter serve on the other party notice in writing a settlement notice to settle in accordance with this clause," which is what the vendor did in late 2011. "But the notice shall be

effective only if the party serving it is at the time of service either in all material respects ready, able and willing to proceed to settle in accordance with the notice or is not so ready," because of a default of the other party which is not relevant here. So what do you have to be ready, willing and able – ready, able and willing to do to proceed to settle? Now the Courts have said and my friend points out in his submission and he's quite right, that it's settle in accordance with the contract, the notice has to be consistent with the contracts, you have to call on them to do the things that the contract requires at settlement. You can't issue a notice that departs from what the contract requires at settlement and then complain about and then rely on that. But the essence of my third argument in relation to this is that what is required on settlement is that the party calling for it, the party issuing a notice must be in all material respects ready, able and willing to proceed to settle, to do things they're required to do on settlement.

And then over at 12.3. so in my submission valid notice was issued because the vendor was in a position to do everything required of them on settlement and both Courts below have accepted that, that everything that was actually required to be done on settlement the vendor could do. My friend argues in his rule 20A application and that wasn't the case but that hasn't been accepted by the Court below. So what happens if the notice validly given is not complied with, well 12.3, "Without prejudice to any other rights or remedies available to the vendor at law or in equity the vendor may: (ii) cancel the agreement and pursue either or both of the following remedies: forfeit the deposit and sue for damages." So what we have here is a remedial scheme which in my submission is consistent with the Contractual Remedies Act 1979 but if it weren't would of course prevail over it because the parties can agree to depart from that. If you serve a valid settlement notice and it's valid if you're ready, able and willing to proceed to settle, to do what's required of you on settlement and if it's not complied with in the time specified you have a contractual right to cancel, keep the deposit and sue for damages. And that is what happened here.

Just one other provision to notice in the body of the agreement, clause 16.8 over page 1087, page 27 of the contract, "Representation: The parties acknowledge that this agreement, and the annexures and attachments, together with any approvals and consents in writing contain the entire agreement between the parties and notwithstanding anything contained in any brochure, report or other document. The purchaser acknowledges that it has not been induced to execute this agreement by any representation, verbal or otherwise, made by or on behalf of the vendor, which is not set out in the agreement, and it's read and understood the warnings on page 5," and that links into clause 16.9 which says if you rely on anything else it must be on page 5 and if it's not on page 5 you accept you didn't rely on it. And we saw a nice blank page 5 earlier.

Turning on, what we get next is annexure 1, the Precinct management agreement, I don't need to take the Court through the details of that. Again complaints were made about Precinct Society rules and further trial, none of those are pursued now. Then over at page 1096, page 30 of the contract we get to annexure 2, "Draft outline," and I've both of those words underlined in my copy. It's a draft, it's not a final, it's an outline, it's not detailed plans and specifications.

Turn over to page 1097. This is the page where Your Honour Justice Arnold took me to what might now already seems quite a long time ago. "General description. The building is intended to be a serviced apartment complex providing between 90 and 100, 1 bedroom apartments," and certain other things. Again the level of imprecision at this stage indicated by the uncertainty about how many one bedroom apartments there would be. And can't emphasise too strongly, intended to be, not will be, not required to be but is intended to be. As earlier provisions in the body of the agreement underscored, these are statements of the vendor's current intentions, it's the concept. And again 1.2, remembering we're still in the territory of a draft, an outline, a concept. "Location," so where is this building? "The building is located in the central northern quarter of the site," don't have controversy with that, "Part of a 17 acre master planned development comprising a variety of

individual buildings set amongst landscaped parks, squares, plazas, avenues and roads." And so it is today although not all of the 17 acres has yet been built. "The building is bound by tree lined," I think that should be bounded, "By tree lined boulevards to the south, west and north and the Square to the east. Building description," give a more detailed description of the building, "Laid out over 5 levels with 2 levels of below round car parking," and some more detail about principal amenities.

"2 construction," and here we get some detailed provisions, as you'd expect given that this is defined after all back at draft outline plan specification, the outline plans and specifications of the unit and the building. So this is plans of the unit and the building and we do indeed get, having located it and provided a general description of it, some detail about how it will be built. "General, structure, envelope, floors, internal walls, ceilings. Section 3 building services," over the page. Details about infrastructure. Mechanic extraction, other services, "Lighting, lifts," so and so forth. "4 apartments," and now we get down to the unit and get even more detail. Living rooms, what sort of carpets there will be, it finishes on the walls.

ELIAS CJ:
Why are we going through all this?

MR GODDARD QC:
Just to see the level of detail that's provided where things are to be built.

ELIAS CJ:
Because I think you can really push on.

MR GODDARD QC:
Right let's push on. And bedrooms and bathrooms and stuff. And then over on page 1102 the fixtures, fittings and equipment, again lots of detail about that. And then 1103, another heading "Outline specification," and then we get some drawings of the building and what we see, for example, if we turn over to 1104 is level 1 shown here with some numbered rooms over the next page,

level 1. Over the next page level 3, over the next page level 4 and over the next page 1108 level 5 and on that we see some notes by this purchaser. There's sort of in the middle of the page near the signatures, number 508, 34 metres squared. So these purchasers were buying room 508 on level 5 which was to be roughly 34 metres squared, subject to the permitted variations we saw earlier, meant to be plus or minus 5% with no consequences. Then over to level 6 and over to level 7. And then we get the only indication anywhere in this contract at all of what else might be found in the wider Development and it's described as a Kingston West Precinct draft outline. Kingston West is that very dark building, these are not great copies unfortunately, in the middle that looks like a fat line and then a triangle. Does the Court –

ARNOLD J:
We were given a cleaner copy.

MR GODDARD QC:
Good, let me see if –

ELIAS CJ:
I don't know that I was but –

MR GODDARD QC:
I have that – it's all right I think I'm fine, I think. If the Court has it that's the main thing.

ELIAS CJ:
Yes I have it. It is better.

MR GODDARD QC:
It didn't print that way in my office, I'm grateful. So we see that Kingston West, this is the Lakeside West one in fact that I've been given but you know we see Kingston West in the middle. And some other buildings shown, dotted around. Kingston East the one in the bottom right-hand corner, the south-east going by the key, the compass rows in the top is the one that kept falling off

everyone's list, I don't know why. A good example in my submission of a building, the presence or absence of which would make no difference to the Kingston West purchasers or the Lakeside West purchasers, a good example of why to say everything on this page must be built can't be right, of course if that's not the requirement, if it's well no you build this or, but you can change it as much as you like as long as there's no substantial reduction of value then we haven't got an essential term and we haven't got a right to cancel.

WILLIAM YOUNG J:
Sorry where's the hotel in this image?

MR GODDARD QC:
The Reserve North building, on the Lake Front on the far left –

WILLIAM YOUNG J:
Okay so that's –

MR GODDARD QC:
– that's the Hilton.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
When Your Honour says "the hotel", the Reserve North is the Hilton Hotel, Kingston West is the quadrant.

WILLIAM YOUNG J:
Okay.

MR GODDARD QC:
I think. No the Kawarau, the DoubleTree, it's also a hotel of course that we're talking about. But the big hotel that Your Honour might have seen or been to you know across the water, have seen, is the Reserve North.

WILLIAM YOUNG J:

And then the steps, are they to the east of Reserve North?

MR GODDARD QC:

Yes Your Honour, they run between Reserve North and Lakeside West.

ELLEN FRANCE J:

And the gastro pub and so on, where do we see them on this?

MR GODDARD QC:

That's on the corner of Lakeside West, right by Reserve North. So the Wakatipu Steps run down between Reserve North and Lakeside West and there's all sorts of outdoor areas and hotelly things and cafes down those steps on the Reserve North side and the gastro pub is on the same level, the street level which is level 3 of Lakeside West when we come to it on that corner.

ARNOLD J:

On one of these agreements provided for the parking for the building to be under the hotel I think?

MR GODDARD QC:

And it was then located under Kingston West. And no issue's been taken about that.

ARNOLD J:

No, I was just interested – they obviously contemplated that a hotel would be built and it would provide parking for the building.

MR GODDARD QC:

I think it, I'd have to look back, I think at one stage the thought was that it might be under the Hilton but in fact now the parking for Lakeside West is under Kingston West.

O'REGAN J:

So which are the five buildings that are built?

MR GODDARD QC:

Reserve North, Lakeside West, Kingston West and then I think Reserve Central and Reserve South.

O'REGAN J:

Say those again?

MR GODDARD QC:

So right on the left-hand side of the drawing, Reserve Central and Reserve South –

O'REGAN J:

Right.

MR GODDARD QC:

So the whole of that left-hand side of the picture has been built.

O'REGAN J:

I see.

MR GODDARD QC:

And so too has Lakeside West and Kingston West and there are other things happening on the site, there's some residential development –

O'REGAN J:

That's all right, I just wanted to know which ones were built.

MR GODDARD QC:

So those are the ones that are built. And you can see Your Honour Peninsula Road running along the bottom of this diagram which is where the

access comes from, so that road that winds down around Reserve South and then around Reserve Central and then around the Hilton, all that is there and round Kingston West in a loop, I've driven round it many times looking for parking without much success, is all there and managed by the Precinct Society or [inaudible]. So what we have is this and coming back to my preliminary answer to one of Your Honour Justice Arnold's questions earlier, this is it in relation to what these are. There's not a whisper anywhere in this contract about whether, for example, Lakeside Central West, Lakeside Central East, Lakeside East will be one storey or two storey or three storey, not about what they'll be, are they going to be residential, are they going to be hotels, nothing.

So one of the striking consequences of the Court of Appeal's conclusion that there's an obligation to build all of this is that the "what" is not identified anywhere. And nor of course is the "when" except for all the reputed emphasis on it being able to be deferred or suspended, put on ice indefinitely, that's in my submission what suspended means, until conditions improve for whether consenting or financial or otherwise. And the suggestion of the Court of Appeal that you could imply a reasonable time is not easy to understand in circumstances where you don't know what it is you're supposed to build and where there's expressed provision for huge amounts of variation. So when you ask what's reasonable, just what are you contemplating being built and what assumptions do you make about the exercise of those explicit time modifying powers. I'm not aware of any authority that against the backdrop of provisions like this explicitly permitting deferral or suspension of an obligation, a Court has implied a reasonable time for performance, I've never seen a decision in which that's done.

So we don't know what, we've just got some gray blobs and we don't know when. This does tell us where Lakeside West is supposed to be so it links into the location clause we saw earlier, it doesn't in my submission tell us anything more.

O'REGAN J:

Does it give any indication of the bulk of these buildings?

MR GODDARD QC:

No. None at all, there's not even the slightest description in the contract of anything other than the outlines. So how much of it's built, how much of it's courtyard, what it is, all completely silent. We then come over to a diagram of a typical guestroom plan on 1112, then we get the lease provisions which are found in the Kingston West contracts but not Lakeside West and I need to look at a couple of these because of the 20(a) arguments. So over on 1114, "Addendum (Lease) to be signed and read in conjunction with Kingston West agreement form," we have the, "Request for lease. The vendor shall procure a lease of the property from the lessee," and there's a requirement that the lease commence before settlement so that what you're selling is a going concern and there's obviously GST consequences. "Rental and term," this is the clause that raises the term question. "B the lease shall provide that the lessees agrees to pay the lessor a fixed rental, a specified amount, "For a period of three years from the commencement date. The term of the lease shall be determined by the vendor but the initial term of the lease (including renewals) shall not be greater than 20 years with further renewal periods of no more than 10 years in total." Now again this is not the height of the draft –

WILLIAM YOUNG J:

I'm just lost with the paragraph, which part are we looking at, what page?

MR GODDARD QC:

I'm sorry I'm on page 1114. Your Honour –

WILLIAM YOUNG J:

Okay, thank you.

MR GODDARD QC:

A step ahead of me as not infrequently happens but I'm still pedantically going through. And this is an important clause, rental and term and it's B on this

page. And it's the second sentence, "The term of the lease shall be determined by the vendor but the initial term of the lease (including renewals)," and that in itself is a phrase that just makes one's head hurt. The initial term including renewals then reference to further renewal periods. But this was dealt with at trial on the basis after some suggestions of lesser terms that it permits up to 30 years of lease but not more, it's common ground that the leases that were entered into including renewals can extend up to 40 years so it's accepted that there is an inconsistency so far as the purchasers on this form of lease are concerned. Perhaps just by way of comparison, let me take the Court to the other form of term provision, so if we just, there's two Kingston West contracts in this bundle and the corresponding page from the other one is over at 1194, so if we jump to 1194 and this is an agreement that was entered into later than the one that we've been looking at in 2008, rather in 2007. And what we see in B in that second sentence is, "The term of the lease shall be determined by the vendor but the initial term of the lease shall not be greater than 10 years with further renewal periods of no more than 30 years in total." So this contemplates the 40 year maximum which is what was in fact signed for all units by the vendor. But for a substantial number of the Kingston West plaintiffs, almost all I think of those that are left, what we have is the provision back on 1114 which contemplates a maximum term of 30 years.

And then over the page on 1115 we see provision for, half way down the page, "Variation to the agreement. The agreement is amended as follows, 'inclusive of GST' replaced with 'exclusive of GST'." Because it's a sales going concern and then a new clause 17 is inserted. The property will be sold subject to the lease and "17.3. Completion of the lease: Prior to execution of the lease, the vendor shall ensure the lease contains the following details," and over the page item (b) is the commencement date and (d) is, "The final termination date (if rights to extend the term are exercised): and other details."

Over on page 1117, 17.10 there's the promise by the vendor, "That, as at settlement date the vendor will have put in place contractual arrangements between the vendor and the lessee to manage the building, the property and

the letting of the property." So a positive promise to have also arranged, not actually to have let it but also to have arranged for its operation as a hotel and then, lease to mean to mean the lease to the lessee on the terms attached to this addendum which can be converted to a deed of lease form and so on.

And then over the page to 1119 we see the lease and I just need to go to a couple of provisions of this and then we're finished with the Kingston West. In this lease form I want to begin by looking at some of the definitions so on page 1123 we have a definition of common areas, "Parts of the building now or hereafter designated by the Body Corporate for common use and enjoyment," including entrances, lobbies, passages, stairways, everything really, "Which are not the subject of exclusive occupation pursuant to this lease or any other lease in the building and includes all areas designated as common property on the unit plan," so that becomes important later. Further down that page, "Hotel business means the serviced apartment/hotel bus for the benefit of the serviced apartments."

Over the page, 1125, a couple of, three definitions that were important at trial and remain relevant to my friend's arguments. "Management unit means principal units [ ] on the unit plan," so it was common ground that this form of lease attached to the unit anticipated that there would be principal units that were management units and that these are not shown, not identified. The management units anywhere on any of the drawings we saw, so we don't know where they're going to be and both the expert conveyancers agreed that they had no idea what they were going to be or where they were going to be, they could talk about what they might normally be and the disagreed on that but what they'd actually be here, just can't tell.

"Management unit lease, a lease in respect of the management unit." Then "Operating cost," this is important because there was a guaranteed rent for three years and then each unit owner got the gross revenue from letting that unit less their share of operating costs and what were operating costs were, "Ordinary and/or necessary expenses incurred by the lessee in exercising the letting service rights, including without limitation the expense

of," and a paragraph that we spent an inordinate amount of trial on at trial, (m) over the page, "All rent, expenses and outgoings incurred by the lessee in its capacity as lessee in respect of the management unit lease and the lease of other hotel areas including but without limitation, food and beverage areas, retail areas, spa and recreational facility areas." And where I think we go to on that was that contemplated by the contract, signed by the purchasers that there would be management units and that those would be leased to the lessee operating the hotel and that there would also be a lease of other hotel areas, so even if some areas weren't included in the management unit, areas that form part of the common property could be leased to the lessee, which really meant that it didn't matter exactly what was and was not in the management unit, I'll come back to that.

Over on 1127, "Operator," yet to be identified. Permitted use, use of the unit or the serviced apartment or hotel room. "Renewal term," all sorts of square brackets, not yet firmed up, that was left to the vendor to decide once they had negotiations with an operator, presumably and then over on 1129 provision for an initial term of 10 years from the commencement date. And then over at, on page 1136 clause 16, "Right of renewal." Again no details, just saying if there are rights of renewal then this is how they work.

Over at 1140, the last part of this contract, finally. The addendum – additional terms and then we get to the 1141 that I mentioned which amends various provisions of the main body of the agreement so that was deleted generally and, "The definition of 'building' inserting 'substantially' in its place." Changed the settlement date to the 15th day thereafter practical completion and certificate of title issue rather than 10th. And then clause 2, a drop dead date, if there's no certificate of title to the unit by 30 June 2011, then the purchaser can cancel. And then amendment to 4.8(b), the variation in area, deleting 15% and replace it with 10. So that's that.

Next in this bundle, and I'm not going to go through it, is the –

ARNOLD J:

Just before you leave that, I notice that the Development was defined as the Kawarau Falls Station, how is that, how does the lease talk about that?

MR GODDARD QC:

Where is –

ARNOLD J:

That's at 1124.

MR GODDARD QC:

Yes.

ARNOLD J:

How does the lease address, where does the Development come up in the lease, I couldn't see –

MR GODDARD QC:

I couldn't see it performing any – no one's relied on it being used in a particular way in the lease –

ARNOLD J:

That's fine, I just saw it.

MR GODDARD QC:

Yes, no, no one's suggested it matters. Your Honour's right, it's a different use of capital "D" Development to the one in the main body of the agreement plainly. And not helped by the fact that Kawarau Falls Station is not then defined so we don't know what it's talking about. That was the sort of marketing title given to the developer's project. And I think there might still be a rather large sign outside that says that but I can't remember for sure and I shouldn't give evidence from the Bar.

So then we have the other, well actually – what we do see is that heading on the front of the agreement Your Honour, so if we turn over to 1143 the agreement I was about to say I wasn't going to read but it's true of the other one we've just looked at as well. On the cover page of these contracts, what you see is a very pretty, semi-pretty logo at Kawarau Falls Station with some squiggly hills, so that was the promotional title for all of this.

ARNOLD J:
Well it's also the name of the Precinct Society is the Kawarau Falls Station, Precinct Society.

MR GODDARD QC:
Yes. Again I don't think anyone's suggested anything turns on that. If we turn over in the bundle to 1207 what we have is the sample Lakeside West agreement signed by Dr and Mrs Ho. There's been a bit of tendency in some reports and other things to refer to the case in the Court of Appeal as *Sun and Ors v* but of course that's not the relevant plaintiff's surname, it was Dr Ho who was one of the two purchasers who gave evidence and Mrs Ho and they purchased unit 202 in Lakeside West. As Dr Ho explained in his evidence he also purchased a unit in the building that was intended to become the Escarpment Hotel, but that was cancelled by the receivers because it wasn't proceeding and he got his deposit back on that.

Perhaps worth again just pausing to notice that the rather peculiar consequence of the Court of Appeal's interpretation is that because Dr Ho's Lakeside West agreement went unconditional because building Lakeside West was economic, Dr Ho received a promise to build the Escarpment Hotel in this contract at a time when the Escarpment was not committed and ultimately it was abandoned and the deposit refunded. So a little odd to think that that might have been the case and followed necessarily from the way the Court of Appeal read this.

All I'm going to do on this, apart from noting that the body of the agreement is exactly the same as the one we've looked at for Kingston West, is to jump

straight to the draft outline plans and specifications which begin on page 1242 and turn over to 1243, general description, "Lakeside West is intended to be a luxury lakefront residential apartment building providing between 40 to 45 residential units that will have the option of benefiting from the amenities and services provided by the adjacent hotel. A lounge, spa pool, sauna and gym are provided within the building for the residents." And the vendor says first that this is a statement of intention in a draft outline plans and specification but second that actually all of this has been delivered. It is, in fact, a luxury lakefront residential apartment building that provides between 40 to 45 residential units, it does have that option, and the facilities in the building are indeed in the building. So location, and my friend's argument about the residential character of the building requires that one read in here somewhere exclusively residential, or something like that, which it doesn't say, and there was a lot of evidence which, as the Courts below accepted, established that one can have a luxury residential apartment building that has cafes and things in it, and in Wellington of course the Clyde Quay Development, the old overseas passenger terminal, is the best example, we're familiar with that, and I cross-examined about that example at trial.

Location, "Is located on the lakefront," as indeed it is, "In the north-west quarter of the site and is part of a 17 acre master planned development comprising a variety of individual buildings." All true. "Set amongst landscaped parks, squares, plazas," et cetera. "The building is bound," again I think that should be, "By Lake Wakatipu to the north, a tree lined boulevard to the south, Kawarau Park to the east and the Wakatipu Steps to the west." Again, all true. Building description, and then all the stuff about construction that Your Honour the Chief Justice quite rightly encouraged me to move over before.

ELIAS CJ:

I was dithering about encouraging you to move faster again.

MR GODDARD QC:

I am, I am. I'm laying the foundation for almost everything I want to say.

ELIAS CJ:

Yes, I understand.

MR GODDARD QC:

We're really good on time, I promise. We do need to pause at common areas though because of this issue about the use of the spaces on level 3. So I'm on page 1248, part 5 of this outline specification.

WILLIAM YOUNG J:

Sorry?

MR GODDARD QC:

Page 1248, clause 5 of the draft outline plans and specifications headed, "Common areas." Page 1248. Comply with the Code, that's not very interesting. 5.2, "Resident's lounge, a lounge will be provided for the use of resident and their guests on level 2." Spa pool and sauna on level 1 for use of residents and their guests, and a gym on level 1 for use of residents and their guests. So that was contemplated at that stage, and I think is where everything ended up too, and I'll check that, not much turns on it. What we then have, turning over, is one of those hard to read pages as I was sent a replacement which was just as hard to read but it turns out that that was just especially reserved for senior counsel and my learned junior kept the better copy for himself, I've now got it. And again it's the same very rough locational plan that we saw before but this time it's the Lakeside West building that's coloured dark because that's the one we're talking about and we've just seen a moment ago that reference to the Wakatipu Steps to the west, i.e., between it and the Reserve North, the Hilton going down there to the jetty. A very nice place for a glass of pinot noir in the evening after skiing.

ELIAS CJ:

We wish we were all there.

MR GODDARD QC:

Yes, I see we could reach a consensus on that very quickly Your Honour. Then we get to the floor plans and I'm not going to spend much time on those except level 3 which unfortunately I have to.

ELIAS CJ:

So why are we going to these?

MR GODDARD QC:

Because the purchasers say as one of their rule 20A arguments that there was a requirement that the large spaces on level 3 be common property.

ELIAS CJ:

Yes.

MR GODDARD QC:

And my submission is that the only commitments that were made in relation to common property were specific facilities to be on other levels and when we come to the diagram of level 3 we'll see that were these big spaces road facing which were not any of these things and I cross-examined at length on those and Your Honour may think I'm going slowly now but Your Honour will be very –

ELIAS CJ:

So this is the management unit?

MR GODDARD QC:

No this is the gastro pub and hairdresser.

ELIAS CJ:

Yes thank you.

MR GODDARD QC:

So we don't need to spend much time on level 1 or level 2 but if we turn over to page 1252 what we see are, and this is level 3 and we can see it's level 3

from the key on the right-hand side of the page, draft outline floor plan L3; again it's a draft, it's an outline, architectural as Mr Moore said, disapprovingly. We see some units, 301, 302 and so on and then what we have in the bottom left-hand corner of the page is a sort of corner shape with a bulbous protrusion, the best I can do is a description of it, that's the gastro pub, so that bulge down here is the gastro pub and these two little ones here, one of them is the hairdresser, I think on the far right. Yes I'm told I'm right. So in that other corner here we've got a hairdresser. I'll just mark that with an "H" on mine. What I think we need to pause on this for a second to notice is first of all that it's on level 3, that it's a large space that has no designation of any kind on it. So this doesn't specify what it's for but we know it's none of the common area provided for in the draft outline plans and specifications. We know it's not those. And the other thing that is very noticeable about it is that its access doors open onto the road and onto the Wakatipu Steps and the decks outside those. So where I ended up with Mr Moore and I'll have to go to this later briefly, is that we just don't know what it was for but there's certainly no indication that it will be part of the common property and such clues as this architectural drawing provide are that far from being an inwards facing space designed for use by people who approach it from the corridor inside, it has extensive openings out onto the road. Similarly those two little spaces along the road frontage, one of which is the hairdresser, have doors out onto the road, they are not shown in these admittedly draft outline plans as having any form of internal access so there's not a lot of information about these in here, certainly nothing that could be construed as a positive promise that they'd be common property which is the important question but actually such clues as there are suggest that they are designed to serve the public going past on the road, rather than the residents approaching from the corridor.

Then the last, and you'll get levels 4 and 5, sorry level 4. Then we have some typical rooms and just to complete this one, over at 1255 we have a particular apartment layout that Dr and Mrs Ho were purchasing for 202 with their initials on it, and all the others are crossed out. So that's the contracts.

If I come back then to my roadmap, I do want to emphasise the substantial overlap between the argument I set out in paragraph 3, there was no obligation to construct stages 2 and 3 and the argument at paragraph 4, that if there was such an obligation it would not be essential and I'm not going to go round the loop twice on that but let me zip through the argument, to the structure of the argument in 3. The first point, 3.1, absolutely it's accepted that the vendor, the developer intended to construct stages 2 and 3 and actively promoted its intended concept for the Precinct. But that tells us nothing about what was promised by the vendor to each purchaser. The second point, the basic commercial scheme and logic of the agreement is inconsistent with a promise to each purchaser of each unit to build all 13 buildings. And I emphasise certain clauses. I've taken the Court to all of those but I particularly emphasise the condition in 2.1 and the commercial disconnect between saying yes we'll go unconditional because the economics of this one building stack up and they promise to build 12 others. And the structure of the agreement which explicitly contemplates deferral or suspension, which in my submission is an indefinite concept of everything else, that refers to everything else because of the, in my submission, primarily the burdens imposed on the purchasers in relation to its ongoing construction. And what is very clear which is that it was expected and expressly contemplated by the agreement that settlement would take place at a time when other stages had not been completed, it may not have even begun and with complete uncertainty about the precise form they might take, what might be built there and when it might be built.

And that leads into my 3.3. It's the emphasis on what's not there in the ASPs. A reasonable observer having trawled through this, suffered my run through it with any additional points that my learned friend might wish to make, would still be saying then but hang on, had the parties intended that there be an obligation to construct stages 2 and 3 surely there would have been more detail about what had to be built. Justice Gilbert, in my submission, was right to say that it's inconceivable that such a significant obligation, an obligation to do many hundreds of millions of dollars worth of building work on the purchasers' theory of the case would be imposed with such scant detail, were

His Honour's words. And if one pauses to say, well hang on what has to be built and when, it's impossible to answer that question. My learned friend makes something of what was supposedly a concession on my part in the Court of Appeal that 5.7 was not void for uncertainty. I'm not arguing that the contract's void for uncertainty but what I do say is that the absence of the detail that would be essential if an obligation to build these buildings were imposed, strongly points against reads the contract in that way. Again, bearing in mind, this would be not some sort of ancillary obligation but the most onerous obligation in the contract on the purchasers' theory of the case.

I say at 3.4, and this was how it's presented, Your Honour the Chief Justice suggested that it's a contextual reading of clause 5.7, the only basis for the argument is such an obligation is clause. First, it's clumsily drafted, as with a number of other clauses, floating commas are the least of the issue. So it is easier to conclude that something's gone wrong with the language, and it underscores the need to read the agreement in context in a manner consistent with the commercial scheme and logic of the agreement as a whole. It's important not to focus too narrowly on one phrase. And let me take the Court very briefly to the one interpretation authority I'm going to go to which is *Re Sigma Finance Corp (in administrative receivership)* [2009] UKSC 2. It's another post-GFC case about the distribution of the insufficient assets held by sigma, which was a structured investment vehicle. Basically what the very long contract that governed realisation of assets of Sigma provided for if there was an enforcement event, is that you divide the assets into a short-term pool and a long-term pool, to match up with short-term liabilities and long-term liabilities, and that that would be done pro-rata in the event of insufficiencies. There was also provision for payment of certain debts that matured during the realisation period while you were setting up those pools, and the question was whether what that meant was that all those debts that matured during the realisation period got paid in full and then you put what was left into the short-term pools and the long-term pools, and the High Court Judge, and the majority in the Court of Appeal said, yes, that's how it works. Because there was a provision that said you pay debts that

occur during the realisation period from the assets in hand, clause 7.6 I think it was. But the Supreme Court said, whoa, whoa, pull up. The whole scheme of this is that there's a pro-rata allocation of assets between the short-term pool and the long-term pool, and the mere fact that your debt matures during the realisation period isn't a reason to leapfrog that. That clause was really concerned with a different issue. And the way in which Their Lordships deal with this point really accepting the approach of Lord Neuberger in the Court of Appeal who dissented is helpful I think.

So the judgment of Lord Mance with whom Lord Hope, Lord Scott and Lord Collins concurred begins on page 574 of the judgment. The security trust deed is discussed in paragraph 7 and following, just after the heading, "The Security Trust Deed," and as His Lordship says, "The appeals turn ultimately on the meaning given to the final sentence of clause 7.6 of the Deed. But this needs to be set in its context. Clause 7 is long and detailed," and then happily we don't need to read it, it goes on for ages.

If we turn over to page 580 of the report, "The Law. The principles upon which a court should interpret a document such as the present are not in doubt. They have been reviewed and restated by the House of Lords in a series of cases." Then just under letter D, "*In Charter Reinsurance Co Ltd v Fagan* [1997] AC 313… Lord Mustill underlined the danger of focusing too narrowly on a critical phrase (in that case, a phrase defining the term 'net loss' as meaning 'the sum actually paid by the reinsured in settlement of claims.'), saying… "This is …. an occasion when a first impression and simple answer no longer seem the best, for I recognise that the focus of the argument is too narrow. The words must be set in the landscape of the instrument as a whole. Once this is done the shape of the policy and the purpose of the terms … become quite clear." And that's why Justice Gilbert's observation that initial impressions [inaudible] obligation is right but is also a snare under delusion. One needs to set 5.7 in context. In adopting that approach the House in that case concluded the words, "Actually paid were in context intended not to introduce a pre-condition of pre-payment," but to deal with measure.

Then there's another quote from Lord Mustill beginning just above letter H. the normal principle, "That the liability of a reinsurer is wholly unaffected by whether the insurer has in fact satisfied the claim.. is one which can undoubtedly be changed by express provision, but clear words would be required; and it would to be my mind be strange if a term changing so fundamentally the financial structure of the relationship were to be buried in a provision such as clause 2, concerned essentially with the measure of indemnity, rather than being given a prominent position on its own." And again in my submission that's one of the features of this contract that helps us here. If there was going to be a promise to build the rest of the buildings in the Precinct, you would expect it to have a prominent position on its own and to deal more clearly with what had to be built and when.

Then there's a reference to ICS including the famous principle 5 over the page, "The 'rule' that words should be given their natural and ordinary meaning reflects the common sense proposition, we don't easily accept people who made linguistic mistakes. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had." And again the famous quote from Lord Diplock about, "If detailed semantic and syntactical analysis of words in a commercial contract can lead to a conclusion that flouts business common sense, must be made to yield to business common sense." Again I say the basic business common sense here is what drives off clause 2.1. You have an economic viability of the building test, if that's met the contract goes unconditional, what are you promising to build? The thing that's economically viable – the building. "In the present case, Letter J the focus on the general nature of the business involved – apparent from the document itself – and upon the scheme and wording of the document read as a whole," and I say the same is true here.

Over to page 582, heading "Analysis" and large parts of this could be transposed with necessary modifications to this case. "12. In my opinion, the conclusion reached below," in the Court of Appeal I say here, not the High

Court, “attaches too much weight to what the Courts perceived as the natural meaning of the words of the third sentence of clause 7.6,” here the second sentence of 5.7, “and too little weight to the context in which that sentence appears and to the scheme of the deed as a whole. Lord Neuberger was right to observe the resolution of an issue of interpretation in a case like the present is an iterative process, involving ‘checking each of the rival meanings against other provisions of the document and investigating its commercial consequences’. Like him, I also think that caution is appropriate about the weight capable of being placed on the consideration that this was a long and carefully drafted document, containing sentences or phrase which it can, with hindsight, be seen could have been made clearer, had the meaning now sought to be attached to them been specifically in mind.” I’d say the same here. “Even the most skilled drafters sometimes fail to see the wood for the trees, and the present document on any view contains certain infelicities,” as with ours, “As those in the majority below acknowledged”, letter G, “Of much greater importance in my view, in the ascertainment of the meaning that the STD would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme. Ultimately that’s where I differ from the conclusion reached by the Courts below. In my opinion, their conclusion elevates a subsidiary provision for the interim discharge of debts “so far as possible” to a level of pre-dominance which it was not designed to have in a context where, if given that pre-dominance, it conflicts with the basic scheme of the deed.”

And at paragraph 14, last extract I’ll go to. “The provision by clause 7.6 for discharge of short term liabilities as they fall due thus appears in a context where the underlying assumption is that all secured liabilities can be covered and no issue of priority can arise.” Similarly 5.7 proceeds in a context with the underlying assumption is that the developers intention is being pursued. It doesn’t require it, it assumes it. “ To treat it,” that is their clause 7.6, our 5.7, “in the different context of insolvency, as creating effective priority for such short term liabilities as may happen to fall due during the realisation period may, therefore, involve a similar risk to that identified by Lord Mustill in

Charter Reinsurance, that of giving to a sentence, buried in a provision like clause 7.6 concerned essentially with a different situation, the effect of changing fundamentally the apparent financial structure of the relationship." And again much of that could be transposed to our case. It treats 5.7, in our document, a clause which was concerned with the developer proceeding over time to pursue its intended development, as if it required that, thus imposing an obligation more than 13 times greater than the one that had passed the financial condition provided for in 2.1. I mean I can't emphasise too strongly that this would have increased the burden of performance on the vendor by a factor of more than 10. It's quite a thing and to do that without any conditionality on its viability without any detail of how exactly or when exactly it would be done. Commercially it just makes no sense.

So coming back to my roadmap, I've dealt with 3.4(b) and (c), it's an improbable context and improbable location for such a major commitment. The Court of Appeal reading of this single phrase is at odds with the commercial scheme and logic of the agreements. It flouts business common sense, and it can't be reconciled with 4.1(k) and 4.2 for reasons the High Court explained at 73. It's impossible to identify the content of this future obligation from this clause. It's not spelled out anywhere else. On the other hand the High Court Judge's reading of 5.7 as a promise that further development will not depart from the broad indications provided in a way that materially adversely affects value makes perfect sense.

Worth noting that, "Even the purchaser's legal advisers did not understand the ASPs to impose an obligation of this kind at the time settlement was called for – no such obligation was asserted in the contemporaneous correspondence." I'll go to some of this –

ELIAS CJ:
Well…

MR GODDARD QC:
I'm happy to skip it and come back to it if it's helpful.

ELIAS CJ:

Well I wonder really whether it's necessary to.

MR GODDARD QC:

I'm happy to make the statement and if it's challenged go to the detail.

ELIAS CJ:

But on what basis are you inviting us to look at the correspondence the parties having encapsulated their agreement in the agreement.

MR GODDARD QC:

The reason is that if this had been an obligation which was essential in the contracts, one would have expected it to be invoked.

ELIAS CJ:

Well I understand that that's what you'd be trying to draw from it. I wonder whether, can we return to it in reply if need be, or would you like it…

WILLIAM YOUNG J:

Well just so I understand, are you saying, is it material to the essentiality argument that the purchasers would not, in fact, have entered into the agreements if they knew that there was no commitment so complete stages 2 and 3. So is there a subjective element to what's involved or should we just deal with it on the basis of the contract and the context.

MR GODDARD QC:

I accept that it's not subjective. That must be right. But just as Your Honour Justice Young in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] NZCCLR 1 pointed out that it was a harder road to hoe for the insured in that case to assert a meaning of the policy which had occurred to no one at the time, or for some years afterwards. So too it seems to me that there's something more than a cheap advocacy point in saying that what we have here was correspondence about a long list of suggested deficiencies in the vendor's proposed performance. There was also

correspondence about suggested representations and it was asserted at that time that there were representations that engaged the Contractual Remedies Act and the Fair Trading Act 1986, that the buildings would be in a master planned Precinct with all these other buildings. But it was never suggested that there was a contractual obligation to that effect which, by the lawyers acting for all of these purchasers, which suggests that a reasonable observer looking at the agreements would not understand them.

ELIAS CJ:
Well I don't think this is –

MR GODDARD QC:
Your Honour's not sure about that.

O'REGAN J:
I mean you have given us the references.

MR GODDARD QC:
Yes.

ELIAS CJ:
Yes, if it becomes necessary to ask you to elaborate on it in reply we'll do that but it doesn't seem to me material that is really properly taken into account in this case.

MR GODDARD QC:
It's not an accident that it's the last of the points in my 3.4. I accept that it's arguably irrelevant and even if relevant not as important as everything else.

ELIAS CJ:
Well particularly if really what you're asking us to look at is the legal interpretation that the legal advisors were putting on matters after dispute had arisen.

MR GODDARD QC:

Yes. I think at the least that's a good reason not to waste time on it now.

ELIAS CJ:

Yes.

MR GODDARD QC:

3.5, again just a quick correction to the Court of Appeal's reasoning, that is important. The Court of Appeal was wrong to suggest that the Precinct Society provisions were not necessary which is what they said at 58 of stages 2 and 3, were not matters of contractual obligation, they're needed and they're in use in relation to the five stage 1 buildings and the substantial shared amenities and infrastructure for stage 1, and also to provide for stages 2 and 3, if and when constructed. Again the evidence of the representatives of the receivers was that the Precinct Society that was ultimately put in place was structured to enable the owners of buildings in the rest of the 17 acres to join if and when that was developed. So it serves and purpose in relation to existing infrastructure and forward planning and that's perfectly consistent with the way the contract works.

I won't spend a lot of time on the relevance to contractual interpretation of the resource consents and marketing material because although I think there are strong arguments that that was not relevant, given the structure of the agreement, the entire agreement clause and just timing issues, a number of these contracts were signed before the resource consent's issued, a little difficult to see how they can be relevant to its interpretation or how if consents were modified over time you'd read the contracts in different ways depending on those modifications. But the fundamental point is that what all of those tell you is what the developer intended to do, not what the developer was promising to do. And you have to come back to the structure of the contract to work out what was being promised as opposed as to what was being touted, those being quite different things. And the point at 3.7 that I touched on earlier, that there's actually no evidence of a resort premium in the prices for these units but even if there was, that tells us nothing about whether a

promise to build all of this was made or whether there was simply an expected enhancement of value if the development proceeded which the developer was intending to do. So you've got a whole range of background facts that influence the value of a unit. Your expectations about tourism in Queenstown over the next 10 years, no promises can be made – that's probably the most fundamental driver of the value of these units is where you expect tourism in Queenstown to go over the next 10, 15 years. Obviously the developer can make no promises about that. You've got some other issues, what's going to happen immediately around it, which also have a bearing on value, of course. Your expectations about those will inform what you pay but that tells you nothing about whether it has been promised.

ELLEN FRANCE J:

There was some evidence about a resort premium, are you saying – I mean are you making some distinction there between these particular units and the idea more generally of a resort premium? It was just, so Mr Humphries, for example, did seem to be suggesting a resort premium.

MR GODDARD QC:

Yes. He pointed to valuations of other buildings in the Precinct which incorporated a resort premium. There were no valuations of these buildings that referred to a resort premium or derived a value in that way at the time.

WILLIAM YOUNG J:

It would be a bit odd that these buildings didn't have a resort premium and all the others did.

MR GODDARD QC:

And that's because of the expectation that there would be a resort and there is indeed a resort, it's just a smaller resort than expected.

WILLIAM YOUNG J:

Yes, no I understand all that.

MR GODDARD QC:

So that's what I'm not, I make first the point that there is some rather loose language in the respondents' submissions about the evidence of a resort premium in this building, so that's really a matter of inference drawn from valuations of other buildings, but I don't have a problem with the idea that the expectation about what would develop over time would inform value and that if you had a developer saying now do this, just as if you were buying next door to this. If you imagine buying the house on that Lake Front walkway just next to this Development, what you would be willing to pay for it would be influenced enormously about what was going up and the fact that you'd be next door to the Hilton would affect your view on value, whether positive or –

ARNOLD J:

Up or down is another matter.

MR GODDARD QC:

Yes I was thinking – I would just have to pause and work out – but what you wouldn't do Your Honour is ignore it, it would inform what you paid. And maybe if you were seven houses away you wouldn't be worried about the noise but you'd just have an obvious up-tick from being able to stroll after a couple of glasses of wine back home without needing to drive. So maybe those are the people whose properties would be more affected by an expectation of what was going to happen but no promise. So I don't have a problem with the concept or the possibility one might have been paid. What I say is that tells you nothing about what was promised.

And then we get into the variation on this argument that if there were some sort of obligation of this kind that could be spelled out along the lines that Your Honour the Chief Justice has suggested might be found in 5.7 and the scheme of the agreement, and again I completely accept that there's an assumption that that is what is likely to happen, it doesn't necessarily mean a promise, but if the court were to think that there was a promise, that something of this kind would happen, then we get into the question of whether it was essential or whether it was a term which imposed an obligation but

where there'd be a right to cancel only if the breach were substantial. Obviously always a right to damages if there's a contractual obligation and a right to cancel if it's substantial, or was it a term that was essential in the sense that any failure to comply with it triggered a right to cancel, however insubstantial? There's no express agreement that such a term was essential, that I think is –

ELIAS CJ:

Well, I suppose in a way the very extent of the promise would probably push you towards the essential side of the spectrum, which probably means you are right to put at the forefront the absence of promise.

MR GODDARD QC:

Not necessarily, Your Honour…

ELIAS CJ:

Depending on the terms of the contract, you'd say.

MR GODDARD QC:

Because – yes. I mean there's no – yes.

ELIAS CJ

Yes.

MR GODDARD QC:

And the scheme of it.

ELIAS CJ:

Yes.

MR GODDARD QC:

And what one has to look at when one asks about essentiality is first of all the minimum performance that's required in terms of content and timeframe, and when one looks at what that would involve my submission is that actually it's

very amorphous but its practical implication has the potential to be very distant and relatively small.

ELIAS CJ:
Yes.

MR GODDARD QC:
But what you need, as the Contractual Remedies Act provides, is express or implied agreement that the term was essential – it's not express, I don't think that's been contended for, so we're looking for implied agreement that was essential. It's perhaps just worth turning up one paragraph of the Court of Appeal judgment which, in my submission, clearly does mis-state or misunderstand the test. So if we go to volume 1 of the case on appeal, tab 3, and turn first of all to page 41, we see the essentiality test expressed by this Court in *Mana Property Trustee Limited v James Developments Limited* [2010] NZSC 90, [2010] 3 NZLR 805 and quote in paragraph 76, "The question is whether –

ELIAS CJ:
I'm sorry, I missed that.

MR GODDARD QC:
I'm sorry, Your Honour. So I'm in volume 1, it's the bright orange one, tab 3, Court of Appeal judgment, page 41.

ELIAS CJ:
Yes, thank you.

MR GODDARD QC:
And I'll just do these two references and then I think it will be one. So there's an accurate quote from *Mana Property Trustee* where it's not agreed expressly to be essential, the question becomes whether, "Unless the term in question was agreed at the time of contracting to be essential the cancelling party would more probably than not have declined to enter into the contract."

And I'll go to this after lunch but what's very clear is that the question's not would they have refused to enter into the contract in the absence of such a term, it's whether they would have refused to enter into the contract if the term was not agreed to be essential, and we see those two separate elements very clearly set out by this Court in *Mana.* The question is would they have said no unless there's a promise, it's would they have said no unless the promise was agreed to be essential, ie, so any non-compliance gives them a right to cancel. But that's not the question the Court of Appeal asked itself and that's one of the reasons in my submission they went wrong.

If we turn over the next page, paragraph 80, what we see – and this I think explains at least in part this error by the Court below – "In all the circumstances we consider it is more probable than not that the purchasers would have declined to enter into the ASPs if there were no positive obligation to complete stage 2 and 3." That's the wrong question. That doesn't tell you – that tells you that there was, you know, such a term, and that without it and the right to damages if it wasn't performed or the right to cancel if it was substantially breached they might not have entered into, but what we're asking about here is implied agreement that it's essential, and the question would they have declined to enter into it unless there was a positive obligation and an agreement that that positive obligation was essential so non-compliance entitled them to cancel. And that's a mistake that's often made, the Court of Appeal is not alone in this, but it's a mistake that significantly misconceives the requirement of the Contractual Remedies Act and distorts the framework for cancellation, so it is an important error.

It's 1 o'clock. I'll go to *Mana* very briefly after lunch and I am well on track to finish perhaps slightly before but, at the worst case, at 4 o'clock.

ELIAS CJ:
All right, thank you. We'll take the adjournment now.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.19 PM

MR GODDARD QC:

Your Honour essentiality. Item 4 on my roadmap. The Court of Appeal as I say, asked itself the wrong question and I think it's helpful just to go back to the *Mana* case for that reason and confirm that that is so. So if I could ask the Court to get out volume 1 of my authorities, it's the green volume. And the essential facts of this are summarised, helpfully, in the head note beginning at line 25, there was a contract for the sale and purchase of land in Cromwell so Central Otago theme continues. The contract, "The area contracted for," at line 25, "Was stated to be 4.7161 hectares more or less," and then some additional clauses contained a formula for compensation of the area were under or over. And also included clause 18.3, the one that was ultimately held to be essential which provided that, "The final area must not be less than 4.715 hectares." And on the day on which settlement was due the area shown on the title was indeed a little less than that, 4.699. And the questions about the essentiality both of the area term and about whether time was of the essence, I'm not too worried about the time issue here. But the discussion of essentiality is helpful so if we turn over and the judgment was delivered by Justice Blanchard for the Court, it's page 815 of the report. After setting out the history of the case below and the facts there's a heading "essentiality of minimum area." "20, it's not in dispute that *Mana* was on the settlement date in breach of contract because the area of the CT it was asking James to receive was less than the stipulated minimum of 4.715. The first question is whether that breach could ever have justified a cancellation by James." And then importantly, especially given my friend's attempt to reach back to cases like *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401. "The law on cancellation of contracts in this country was codified by section 7 as subsection (1) makes clear. This section has affected place of the rules of common or inequity governing the circumstances in which a party to a contract may rescind it or treat it as discharged for misrepresentation or as repudiation or breach."

And then, “Shorn of references to misrepresentation,” which are also not relevant to us, “Subsection (3) and (4) apply. Subject to this Act but without prejudice to subsection (2), a party to a contract may cancel it if (b) a term is broken or (c) it is clear that a term in the contract will be broken by another party and where (b) or (c) applies a party may exercise the right to cancel, if and only if (a) the parties have expressly or impliedly agreed the performance of the term is essential or (b) the effect of the breach or in is, or in the case of an anticipated breach will be substantial.”

So where we’re looking as we are at 3(c) to an argument that’s clear that a term will be broken, then that confers a right to cancel if an only if there’s an express or implied agreement that performance of the term’s essential or the effect of the breach is substantial, and then an explanation of how (b) and (c) work and their relationship was discussed at 23. “Professor Burrows observes that subsection 4(a) in essence preserves the common law concept of a “condition”, a term which is so important that any breach of it justifies the innocent party in cancelling. He notes too the subsection emphasises that it’s essentiality of the cancelling party,” of the common ground. “With that possible difference, the common law concerning identification of conditions continues to be relevant.” And there’s reference to Dawson and McLauchlan on that. Over at 24, “Subsection (4)(a) contemplates that the parties either have expressly agreed that a particular term in their contract is to be regarded as essential or must be taken to have impliedly so agreed. In both cases it is matter of interpretation of the contract. The use of words such as “performance being essential” or “strict performance being required” plainly fall within the former category, but no special form of words is necessary provided that it can be seen that the parties have indeed agreed that adherence to the provision in question is being treated by them as essential.” And I don’t think it could seriously be suggested that that’s the case here, there’s no language of that kind in the agreement. Quite the reverse as we will see. “The latter category, of implied agreement on the essentiality of a term which appears in the contract, may sometimes be more difficult to establish. But, again, it will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular

term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made. Of particular importance will be what must then have been in the contemplation of the parties concerning the likely effect of a breach of the term." So if it's a term that could be breached in small ways or great and small ways are unlikely to have been seen as justifying, bringing the whole country to an end, that points rather against essentiality, for example.

Then at line 34, "The Court must ask itself whether, without expressly stating that the term is essential – that is, using a form of words equivalent to the expressions of which we have given instances – the parties can be seen in context to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied. 25, "In the end the preferable approach is to ask whether unless the term in question was agreed at the time of contracting to be essential," not, "was included in the contract," but, "was agreed at the time of contracting to be essential," "the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said." And it's quite clear that there is that requirement to ask whether the parties would have declined to contract or the agreed party would have declined to contract unless it was agreed to be essential from the analysis that the Court then undertakes about the particular term.

Paragraph 26, after looking at the clause and the imperative expression, "must not be less than", notes, "that doesn't take the matter very far," I'm at line 15 and following on page 818, "since non-essential terms may well use such language of command, what is decisive is use of language of that kind in the overall context." Then at 29 it's suggested that because the figure was essentially arbitrary it can't be essential, the difficulties of that are discussed at the foot of page 818, and then over the page it said, "Well, if it weren't essential," line 4, "If that were all that clause 18.3 achieved, James would have no ability to rely on 4(a) and would have to fall back on 4(b) which would not apply unless there were substantial consequence from loss of area, would

lose any protection against being exposed to the risk of argument and perhaps litigation about whether the final area was so low that the bulk and location requirements affected future development or that some other matter had become significant and so the breach might then be regarded as having a substantial consequence. The avoidance of any such argument, with the purchaser having an ability simply to withdraw from the contract if the minimum area were not available to it, is a crucial feature of a provision of the type found in clause 18," and then two lines down, "It follows that unless a term of this kind had been included and agreed to be essential, it is probable that James would have declined to enter into the contract." So I don't think there's really any room either on the language of the Contractual Remedies Act or on this Court's explanation of how it works for the approach taken by the Court of Appeal which only asks the first of those questions, "Would the aggrieved party have declined to enter into the contract unless a term of this kind had been included?" The question is, would they have declined to do so unless it was included and agreed to be essential? And that's not surprising, because there are many terms in a contract which are not essential, which are not "conditions" in the old language, but which are important to a party because it wants the ability to claim damages if it's breached and it wants the ability to cancel if a breach has a substantial effect, but recognising that breaches may be minor or very serious rather than having a bright line any breach justifies cancellation term, what they've agreed is, "Here's the promise. Whether or not you can cancel depends on substantiality."

Then there's a discussion at 31 and following of whether substantial performance was enough, notes a suggestion by Dawson and McLauchlan that some essential terms rather than requiring exact performance may require only substantial performance. Professor Burrows doesn't agree, at 33, says, "The tests of essentiality and of substantial breach are independent and that it's quite possible to have a case where a term is found to be essential even though the consequences of breach in the particular case are relatively minor." The Courts agreed with that latter proposition. The Court doesn't dismiss out of hand the argument by Professors Dawson and McLauchlan, though it goes on to conclude at 34 that, "This is not a case in which

substantial performance of the essential term would suffice." In my submission the better view is that one has to work out the content of the terms, which either requires exact performance, in which case if it's essential you have to perform exactly, or substantial compliance, in which case you have to perform substantially. And it's obviously conceptually possible to say, have a term that says, "We will substantially do X," and to have that as essential, but that was not the case there. It's unlikely, you have to say, because of the purposes of a condition is to create a bright line test, and as soon as you're into substantiality inquiries you don't have that bright-line, and that's something I'll come back to in relation to our contract.

So two things, the first is that it's very important to be clear on what the essential term is said to be. What the Court of Appeal found is that there was a promise that stages 2 and 3 would be constructed and then they said and it was clear that stages 2 and 3 weren't going to be constructed. It's all over. There's nothing remotely like that of course in this contract as a term. If we turn back again to the clause that is at the heart of the purchaser's argument which is 5.7 in volume 6 on page 1079, the promise that –

ELIAS CJ:
Sorry what's the page?

MR GODDARD QC:
Sorry 1079 Your Honour.

ELIAS CJ:
Thank you.

MR GODDARD QC:
5.7. It's the bit that says, "The vendor covenants that it will or (will procure the that) a Precinct shall be developed in a manner consistent with the draft outline plans and specifications provided that any alteration or variation shall not such as to materially adversely affect the value of the unit." So if we look at that replacement page, one of the legible ones for example and we look at

a building like, I'm sorry I probably give Your Honours an indication of which pages those pretty pictures are on. So for example page 1111 and take for example one of the buildings that was in stage 3, take Kingston East way up in the south-east, not very good at compasses and directions but I think that's right, south-east corner. Was there really an essential term requiring Kingston East to be built? Well it's impossible to see how that could be contended for, what is absolutely clear from the contract is that at the most, at the most there was a promise that the Precinct would be developed provided that any alteration or variation and we saw that wide scope to alter and vary was reserved in 4.1. Even in 5.7 itself what the promise is that, "The Precinct will be developed unless," the, "Alteration or variation shall not be such as to materially adversely affect the value of the unit." So the enquiry, say if Kingston East was dropped would have to be, does this change, materially adversely affect the value of the unit. There's no basis for finding a bright line obligation to build all the contemplated buildings in stages 2 and 3. The contract's completely inconsistent with that. And when it comes to asking about essentiality, again the idea that it was essential that everything in stages 2 and 3 be built just can't stand, even with 5.7, never mind 4.1 because the extent of flexibility reserved clearly permitted significant change with the only, subject only to the constraint that alterations or variations not materially adversely affect the value of the unit. So what we have to ask ourselves playing *Mana* is would the purchasers have refused to enter into this agreement unless there was both a promise that stages 2 and 3 would be developed and agreement that that term was essential. So a departure from it, however slight, justified cancellation. Put in those terms, I think it's pretty obvious that there was no such obligation. So, I think my friend would say, "Well, that's actually not the obligation I'm contending for. I'm contending for an obligation framed along the lines of 5.7," a promise to develop the precinct subject to an ability to make alterations or variations that don't materially adversely affect the value of the unit.

What first is actually no finding that the deletion of stages 2 and 3, having completed stage 1, would have that material adverse effect. So if that's what's contended for rather than the very simple term accepted by the

Court of Appeal, actually there is no finding and no evidential basis for concluding that there was a breach. Again, if we look at the pure version, found to be required, a promise to complete stages 2 and 3 by the Court of Appeal, and we ask whether it was impliedly agreed to be essential, we actually have express agreements that it's not, you can depart from any promise there might be to complete stages 2 and 3 as long as the departure doesn't materially adversely affect the value of the unit and you can defer it and you can suspend it implicitly indefinitely. So that can't be the essential term. If we're looking at something else, however, then, as I say, there's no finding and, despite a contention in the High Court that there was a substantial breach as a result of non-completion of stages 2 and 3, that argument wasn't pursued in the Court of Appeal, the purchasers have hung their hats on essentiality. That is sort of half of my 4.3 in my road map.

There was express agreement that completion of stages 2 and 3, in the sense of doing everything shown on this picture, wasn't essential. It's quite clear that it could be modified, including in my submission by the omission of whole buildings, subject only to there not being any material adverse effect on value. So if the Court is not with me on there being some sort of obligation, then the obligation at its high point is the obligation in 5.7. Two ways of putting this: one, it's not an obligation to complete stages 2 and 3; another to say to the extent that there's an obligation to develop the precinct it can only be insofar as not doing that won't have a material adverse effect on value and that the existence of a material adverse effect on value from not doing stages 2 and 3 is no longer contended for.

Clauses 4.1(g) and (k), and the whole structure of this agreement, actually including 5.7 itself, point against an essential term that stages 2 and 3 had to be built, and that drops of the various acknowledgements in 4.1(g) and (k). It also drops out of the structure of the agreement. The vendor promised to deliver the unit in the building and the purchaser agreed to settle for that potentially many years ahead of anything else being built, and it's odd to see what purpose would be served by an essentiality term in those circumstances because there'd be no meaningful opportunity to cancel and unravel the world

years down the track if it ultimately became apparent that some building had been left out or several buildings had been omitted, the world would have moved on. It's much more likely that the approach of the parties was to say, "Well, that will sound in damages." My friend will say, "But what if before settlement it was clear that certain parts of the precinct weren't going to be built?" Well, again, what one has to ask is did the parties agree that the mere fact that those weren't going to be built was so important that the contract should be able to be brought to an end. And when one looks at the raft of ways in which there could be a departure from the proposed construction of stages 2 and 3 and the rest of stage 1 for that matter, it seems to me impossible to resist the conclusion that if you'd asked the parties if the official bystander, officious, not official bystander, the official bystander is probably the Court I suppose, the officious bystander had said to the parties –

ELIAS CJ:

Well they're pretty officious too. So just because I interrupted you, do you have in the resource materials the Contractual Remedies Act, is it _

MR GODDARD QC:

I do Your Honour, it's in my authorities –

ELIAS CJ:

Just tell me what volume it is.

MR GODDARD QC:

In volume 1 under tab 1.

ELIAS CJ:

Thank you.

MR GODDARD QC:

Where it ought to be. And sorry I just took a shortcut of referring to it in –

ELIAS CJ:

Yes, no I just, there was just something I wanted to check.

MR GODDARD QC:

It's in there because it seemed to me the starting point for the whole of this enquiry – is there a particular –

ELIAS CJ:

No, it's fine thanks. I'll ask you if –

MR GODDARD QC:

I thought of going to it then and thought I'd just go to the extract in *Mana,* it's a short cut –

ELIAS CJ:

No that's fine.

MR GODDARD QC:

– they're often not. So as I say the whole structure of this agreement, the order in which the various obligations failed to be performed, the express contemplation of referrals –

ELIAS CJ:

So the question I had is, there's a provision isn't there in the Contractual Remedies Act about cancellation after?

MR GODDARD QC:

So what the consequences of cancellation –

ELIAS CJ:

After.

MR GODDARD QC:

– after, yes. So I think Your Honour might be thinking of section 8 which begins on page 5, so, "Cancellation of a party doesn't take effect before the

time at which the cancellation is made known," it's the only point that's relevant here and then over the page subsection, "(3) (3) Subject to this Act, when a contract is cancelled the following provisions shall apply: (a) so far it remains unperformed no party's obliged or entitled to perform it further," but, "(b) so far as the contract has been performed."

ELIAS CJ:
Yes, that's what I was after.

MR GODDARD QC:
That's what Your Honour's thinking of isn't it?

ELIAS CJ:
I was thinking of the – because I was wondering about the asymmetry between if it became apparent that the Precinct wouldn't have been developed before settlement, the position might otherwise have been different if it had become apparent afterwards so there'd be an asymmetry just on the happenstance of when it became clear but I thought that probably would be answered by the ability to cancel –

MR GODDARD QC:
But it doesn't unravel what's been done.

ELIAS CJ:
– but it doesn't have that affect, yes.

MR GODDARD QC:
But what section 9 then goes onto say.

ELIAS CJ:
That's the part about relief, yes.

MR GODDARD QC:

Yes, so there is a power to relieve and unravel things retrospectively but the more time that's past obviously the less likely it is that that rather than damages will be the appropriate remedy.

ELIAS CJ:

Yes. But section 9 could be the answer to the query I had about it being odd if there was a very different result but you would still cancel to achieve that result.

MR GODDARD QC:

You would still cancel to achieve that result.

ELIAS CJ:

Yes, so if they had settled before it became obvious and then it became obvious they weren't going to complete the Precinct, they could have cancelled at that stage and sought relief under 9?

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes. Thanks.

MR GODDARD QC:

But it's extremely unlikely that some years down the track, having enjoyed it for some time and the building moved on that you would reverse the settlement so, and the extended period during which any stage development would take place is a strong pointer that in that scenario the remedy would be a damages.

ELIAS CJ:

Well that really aids your submission that the uncertainty about the timeframe here pushes you against –

MR GODDARD QC:

Pushes against essentiality, if there's such an obligation.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes. It also, so that's one factor in it and that's what was meant by my, I accept slightly clumsily expressed submission about the risk that they'd be taking by having to settle. My friend said well it's not their risk because the contractual promise is still to build if we've got this far down the track, and I accept that, but the practical risk that this is an obligation due potentially many years after settlement at a time when cancellation and section 9 relief would be extremely unlikely to unravel the deal, rather suggests that wasn't what was contemplated as the consequence of non-performance of this. But more importantly, as I say, what I think has got lost somewhere in the Court of Appeal reasoning, and I may have contributed to this by taking an unduly binary approach to the argument, is that we essentially argued in the Court of Appeal, "Is there an obligation to complete stages 2 and 3 or isn't there?" But actually the one thing that seems obvious when you – sorry, Your Honour – the one thing that seems obvious when you come back to the contract and look even at 5.7 is that there can't be an unqualified obligation to complete stages 2 and 3 because even at its high point the suggested promise to complete the Precinct is subject to an ability to make changes that don't have a material adverse effect on value.

ARNOLD J:

And that's true of stage 1.

MR GODDARD QC:

Yes, and what that tells us is that, two things. First, that it's not enough for the purchasers here to say, "And you couldn't complete stages 2 and 3 so you must be in breach of an essential term," because if there's a term it must be one that's qualified in the way that's explicitly made out in 5.7 and consistent

with 4.1, and they haven't shown that material adverse effect. But also what this brings home to us in my submission is the huge range of ways in which one could not complete stages 2 and 3. Some will be very minor. Suppose that Kingston East didn't have one of those grey squiggles, one wing of it was absent, suppose the whole of Kingston East way down in the south-east corner wasn't built, that would be a non-completion of stages 2 and 3 but it wouldn't have a material effect. It's inherent in the scheme of what the parties have agreed that there has to be an inquiry into the significance of any departure from these obligations, and either that forms an integral part of the term or it reflects the fact that it's a non-essential term but a sufficiently serious breach might justify cancellation or a sufficiently serious anticipated breach might justify a cancellation. But either way, what is very clear is that the mere fact that something's not going to be built is not enough. And that is why I put so much emphasis in my introduction to my written submissions on the fact that the purchasers no longer contend that not building stages 2 and 3 had a material adverse effect on the value of their units. They attempted to establish that in the High Court, the evidence of their valuer really didn't withstand cross-examination or any sort of scrutiny, Mr Schellekens' evidence was quite clear on this.

Now there wasn't a decision by the Judge, he didn't need to go there because he simply found there was no obligation. But the purchasers have chosen to pursue this case since then on the basis of a bright line obligation to build stage 2 and 3, a claim that that was essential. They haven't taken on the challenge of saying, "Well, there was a term to do that and there was a substantial breach," and it's difficult to see how they could have, given the way the evidence played out. And, as I say, because the Court of Appeal – and I accept some responsibility for this – was offered this binary choice, "Did you have to build it or not?" there was really insufficient attention paid I think to the wide range of potential departures, the fact that some of them on any sensible view couldn't be a breach of 5.7 and certainly wouldn't justify and weren't relied on as justifying cancellation here.

The other clause that, with respect, the Court of Appeal really didn't I think appreciate the significance of is 4.1(k) so if we rewind to page 1074 in volume 6. The essence of a term being essential is that the party to whom the obligation was owed would not have entered into the contract unless the term was included and was agreed to be essential, i.e., something the essentiality of which had to be agreed to get them to enter into the contract. But 4.1(k) says exactly the opposite. It says, "Save as expressly stated otherwise in this agreement the purchaser is not purchasing the unit in reliance upon completion of the development of the Precinct." And we can stop there and not worry about the rest I think. Now of course that identifies the potential for something to be expressly stated otherwise. But what has to be expressly stated otherwise is that the purchase is occurring in reliance upon completion of the development. A term, a promise of the kind contended for based on 5.7, to complete it subject to alterations or variations that don't have a materially adversely affect on value. It tells us nothing about whether the purchase of the unit relies on that in the sense that it's essential. This is precisely directed to the enquiry by essentiality and confirms that it's not. I think that's as much as I need to say about essentiality. I'm going to move onto the fact that these purchasers didn't cancel at any time before settlement was due under the settlement notice that was served.

So again while we've got the contract in front of us, if we just go back to clause 12.1, forward to clause 12.1 on page 1083.

ELIAS CJ:
Sorry so your submission really is that 4.1(k) is the answer to the claim of essentiality?

MR GODDARD QC:
By itself it would be a complete answer, there are others.

ELIAS CJ:
Yes.

MR GODDARD QC:
5.7 itself.

ELIAS CJ:
Yes I understand that.

MR GODDARD QC:
But I say that by itself (k) answers that and the High Court Judge was right to find that you can't reconcile the suggested reading of 5.7, that it's a term and an essential term. That stages 2 and 3 be built with what 74.1(k). You might be able to get to a term possibly although that's difficult in my submission, but essentiality is exactly what's precluded.

Section 5 of my roadmap says all of the stuff that I've troubled the Court with for the last two hours is interesting but irrelevant because even if there was an obligation to build some or all of stages 2 and 3 and even if it was essential, these purchasers did not cancel so we had a situation like *Holmes v Booth* where there may well have been a right to cancel but it wasn't exercised. The date for settlement, the time at which in fact settling and time was of the essence for settlement came, there had been no cancellation and the one thing they couldn't do was sit on their hands. They had to either cancel or settle. So the starting point again, the process contemplated by the contract, clause 12, again no dispute but that the settlement date as defined rolled round and the sale didn't settle so either party can serve a settlement notice, "But the notice is effective only if the party serving it is at the time of service either in all material respects ready, able and willing to proceed to settle in accordance with the notice," and that's the only bit we're interested in. So what you have to be to give a notice called for settlement, a settlement notice is ready, willing and able to settle. Not to perform some downstream obligations that might arise years after the date of settlement. And I accept absolutely that you'd have to be ready to settle in accordance with the contract, which was one point made by I think the Court of Appeal in *Holmes v Booth* and this Court and in *Property Ventures Investments Limited v Regalwood Holdings Limited* [2010] NZSC 47, [2010] 3 NZLR 231 if I

remember rightly. But that was the case, everything that vendor was required to do on settlement it was ready, able and willing to do.

5.2, the purchaser's obligation to settle was not concurrent with – I think I've caused some confusion by use of the interdependent language, so let's focus on "concurrent with" and "conditional on" – any obligation to complete stages 2 and 3. Settlement was always intended to proceed and was not conditional on completion of the proposed infrastructure and of other buildings in the precinct, and that settlement wasn't conditional on those things, this is accepted by the respondents in their submissions. It was always envisaged that settlement would take place before those things had happened.

Importantly, there was no breach as at settlement date. This fiction that the common law courts at one stage has developed that if you were not, if you were disabled from performing in the future you were in breach now, is a fiction that our section 7 has moved away from. Section 7 of the Contractual Remedies Act distinguishes very clearly between when you are in breach and when there is a future breach, and it deals with the level of certainty that's required in respect of a future breach, it must be clear, and then it makes provision for the consequences. So that way of thinking about it is no longer helpful. It's quite clear that there was no breach as at settlement date in relation to this precinct completion issues, put the issue to one side.

On its face, if we look at section 7 of the Contractual Remedies Act, and section 8, which Your Honour the Chief Justice took us to earlier, it's pretty clear that the right to cancel of itself has no impact on anyone's obligations under a contract. It's quite clear in section 8(1) that cancellation doesn't take effect until it's made known or overtly indicated, and that it's the moment of cancellation that draws the line after which there is no longer an –

WILLIAM YOUNG J:

I don't quite understand this argument. If it was the case that there is an obligation to complete stages 2 and 3 and if it is the case that that is essential, wouldn't the purchasers be entitled to cancel at any stage?

MR GODDARD QC:

Yes, but they didn’t.

WILLIAM YOUNG J:

But don’t they cancel, can’t they cancel after settlement notices are given?

MR GODDARD QC:

In theory, yes, but they haven't.

WILLIAM YOUNG J:

I thought they had.

MR GODDARD QC:

No. Not until after the date on which the notices fell due, so performance was of the essence.

WILLIAM YOUNG J:

Yes, yes, but couldn't they cancel then?

MR GODDARD QC:

No, because the vendor had already cancelled for their non-performance. So that's the point, their right to cancel, unexercised, doesn’t excuse ongoing performance.

WILLIAM YOUNG J:

Oh, I see.

ELIAS CJ:

So which case – was that *Mana* that was…

MR GODDARD QC:

No…

ELIAS CJ:

Well, one of the cases we…

MR GODDARD QC:

Holmes v Booth makes that point, *Property Ventures* makes that point.

ARNOLD J:

So why wouldn't the vendor's conduct be repudiation of the contract?

MR GODDARD QC:

For two reasons. Well, Your Honour I think made the point in *Kumar* that repudiation is probably best reserved to refusal to perform all your obligations, and that if you're talking about some then it makes more sense to analyse those in terms of 7.3 rather than 7.2.

ARNOLD J:

Yes.

MR GODDARD QC:

Because otherwise you have to bring substantiality and in to the code in a way, well, you know, it would end up being the same but you'd be reading all sorts of stuff into the statute in an unhelpful way. But again, even if it's a repudiation, the other party still has an election to make about whether or not to cancel, and these purchasers were extremely careful not to cancel or to take any action that might be understood as cancelling, and they don't plead that they cancelled before the date on which the settlement notice has expired, they plead that they cancelled in April 2002. Settlement under the settlement notices was due in January 2012 and the vendor cancelled in March based on that failure.

WILLIAM YOUNG J:

So the vendors cancelled in March. When did the purchasers purport to cancel?

MR GODDARD QC:

April, 17 April and ongoing.

ELIAS CJ:

I think it might be useful to take us to the chronology or well perhaps you don't need to, you've said, though I've just been thumbing through the chronology but you've answered the question anyway.

MR GODDARD QC:

I think that's a good idea Your Honour so what we see, if we turn to page 3 of the chronology which is at the back of my submissions. Unless Your Honour has a separate copy, mine's all stuck together.

ELIAS CJ:

I thought this was the agreed one, that's the one I was looking at.

MR GODDARD QC:

I don't know that it was, oh it is agreed, I'm sorry.

ELIAS CJ:

It is agreed.

MR GODDARD QC:

The agreed chronology. So on page 3 of that. If we look at the bottom, in November and December 2011 the purchasers' solicitors were still making a range of requisitions and objections in relation to the contract. They were clearly treating it as on foot. And indeed earlier in November they gave a notice purporting to make time of the essence in relation to provision of certificates of practical completion. So they were positively asserting rights under the contracts through this period.

ELIAS CJ:

Well is there some indication in this chronology of when it becomes clear, the stage 2 and 3 is not going ahead, is there –

MR GODDARD QC:

No, that is not something on which there has been agreement and in the Court of Appeal –

ELIAS CJ:

Right.

MR GODDARD QC:

– I argued that at the time of settlement that was not clear. I now accept and I'm not pursuing on appeal before this Court the argument that it was not clear that stages 2 and 3 would not be built or procured to be built by the vendor. So if there was an obligation for the vendor to build or procure the building of stages 2 and 3, then I accept that by the end of 2011 it was clear that the vendor –

ELIAS CJ:

Right.

ARNOLD J:

Well the vendor had transferred the rest of the land hadn't they?

MR GODDARD QC:

The vendor had transferred the land before a large number of the contracts were entered into so if that's the sign that actually some of the contracts were entered into at a time when the vendor had that ability only by virtue of informal relationships between the companies and a group –

ARNOLD J:

Yes.

MR GODDARD QC:

– but at the point where receivers were being appointed in relation to all these companies, those informal relationships were obviously rather less effective.

ELIAS CJ:

Where, when was the receivership?

MR GODDARD QC:

The receivership of – if we go back to page 2 of the chronology, top of the page –

ELIAS CJ:

Yes.

MR GODDARD QC:

MKFSI which was the vendor at that time went into receivership in May 2009. The owner of the stage 2 and 3 land PRL went into receivership about a year later.

ELIAS CJ:

Yes.

MR GODDARD QC:

But by the time we get to the end of 2011, you've got the land in separate ownership and each of the owners in receivership and in at least one case, also in liquidation. So –

ELLEN FRANCE J:

In the purchasers' actions that you say wasn't indicating that they're treating the contracts as on foot, are they all covered by that final box on page 3?

MR GODDARD QC:

There were more, perhaps let me give Your Honour just a few more references. They're found in volumes 14 and 15 –

ELIAS CJ:

Is this the requisition?

MR GODDARD QC:

– of the case on appeal. Yes but not just requisitions, perhaps the most striking example as late as 22 November is found in volume 14 at page 2821. This is a letter from Glaister Ennor, about half the purchases roughly speaking were represented by Glaister Ennor, about half by Anderson Creagh Lai and there was a lot of parallel correspondence, not identical but there's obviously been a measure of co-ordination. And if we look at the letter at 2821, this is sent on 22 November 2011 by Glaister Ennor in relation to its Kingston West purchases, and what we see from the heading is that this is giving notice, making time of the essence for settlement.

O'REGAN J:

This is 2822 is it?

WILLIAM YOUNG J:

The letter is 2822 isn't it?

MR GODDARD QC:

So the letter begins at 2821 sorry but…

ELIAS CJ:

That's the end of the previous letter I think.

O'REGAN J:

You must have a different page number. Anyway it's a letter dated 22 November 2011?

MR GODDARD QC:

From Glaister Ennor to Russell McVeagh and to Minter Ellison. That is really strange.

WILLIAM YOUNG J:

They were calling for a settlement.

MR GODDARD QC:

Yes, they were calling, they were giving notice making time of the essence for settlement and they were saying, they were working through, they said you're the recipients and the notice for services, "ASP provides for the settlement date to be the later of… We are instructed that practical completion was achieved many months ago." No copy has been provided, and they say the existing one doesn't meet it. So paragraph 6, "Accordingly we now give notice on behalf of and with the authority of the purchaser that the purchaser calls for settlement and the vendor is required to provide the purchaser with a copy of the certificate of practical completion."

Then paragraph 8, "Noting in this notice or in the purchaser calling for settlement in any way amounts to any waiver of the purchaser's rights in respect of or acceptance by the purchaser of," then there's a whole list of things that they're unhappy about, ending with misrepresentations and/or misleading and deceptive conduct. But what is quite clear is that positive steps are being taken on 22 November asserting that the contract is on foot and calling for settlement.

WILLIAM YOUNG J:

Is this a direction in the Court of Appeal judgment?

MR GODDARD QC:

This letter, no.

WILLIAM YOUNG J:

No, this point, because presumably if it were, it would have been apparent, assuming it was impossible for the vendor to complete stages 2 and 3, it would have been apparent by November.

MR GODDARD QC:

Yes. the whole of this argument about the failure to cancel and the consequences of that was simply not discussed by the Court of Appeal, despite having been extensively argued. It was one of those situations where

you get a judgment and you read it for how they dealt with one or your arguments and you get to the end and it's not there.

ELIAS CJ:
And it's not there.

MR GODDARD QC:
Which is never a good feeling. Now I was asked if I was arguing that the purchasers had affirmed and I said that I didn't need to. All that I needed to say was that they hadn't cancelled. But I was certainly saying that they were still treating the contract as on foot. Now I wasn't taking on the burden of saying they knew everything at that date, and they had positively affirmed, they had made a final election, it was all over, because in my submission I didn't have to go that far. All I had to show was that throughout this period they continued to treat the contract as if it was on foot i.e. they didn't cancel, and as long as they didn't cancel, they had to perform their obligations as and when they fell due. It's exactly what Justice Tipping said in *Holmes v Booth*, and what the whole of this Court said in *Property Ventures*, actually had always been the law and was put beyond any doubt now by the current form of agreement for sale and purchase, which is consistent with the one used here.

So some of the other letters that I think are helpful, Your Honour, if we go over to 2829. I'm puzzled by the page number. Is 2829 a letter from Anderson Creagh Lai dated 24 November 2011? Thank goodness, we're back on. Everything breaks down if you don't have the same page numbers. It's very short. Again this is the other firm saying, "Expiry of time of the essence notices. We refer to our 18 notices dated between 20 to 31 October making time of the essence to call for settlement." So this was the other firm, all the rest of the purchasers saying, referring back to notices they gave making time of the essence, and then saying, "Without prejudice to our respective Kingston West and Lakeside West clients' rights in relation to the expiry of their time of the essence notices," we will await your response. "Our clients' rights in respect of the failure to comply, including to cancel, are expressly

reserved." So again couldn't be clearer that they're not saying it's cancelled, they're reserving all their rights arising out of a positive assertion of obligations under the contract.

Then we turn on – and almost the whole of the back end of this volume and the next one is correspondence like this – let me pick two or three just for fun and then I'll stop. So if we go over to 2851, 2 December 2011, Anderson Creagh Lai are writing in relation to both Lakeside West and Kingston West, refers to a letter sending new certificates of practical completion issued by someone else because there have been complaints about who they were issued by before. And what they say is, "We challenge the validity of these second certificates on the following grounds," dah, dah, dah, setting out all the reasons why those certificates are no good, and then over at subparagraph (i), "We also note the second certificates are generic and based on sample agreements of units 101 and 505, units vary between floors, it cannot be said that practical completion in relation to one unit is sufficient. In addition to the points listed in (a) to (h) above, we will require practical completion certificates issues for each individual unit," and so again it's saying, "Contract's on foot but your practical completion certificates don't comply. We insist on getting one for each unit." So the contract's still being treated as on foot. Let me see if I can – and, as I say, almost all the letters after that are toing and froing about the same things. But if we go to the, yes, right through the end of this.

If we go then to the first time – oh, perhaps just looking at the last page of volume 14, it's one of a number of settlement notices given and it's just here by way of a sample. Here we can see –

ARNOLD J:
Could you give me the page number again?

MR GODDARD QC:

Sorry, 2900, last page of the volume. But not very helpful, particularly if you're working off the electronic one. So that's just one sample settlement notice given by the vendor, pursuant to clause 12.1.

What then happened was that settlement did not take place on the date specified, we see that in the agreed chronology, and the result is, if we go to volume 15 and turn to the first page in that, 2901, we see a letter to Anderson Creagh Lai enclosing the cancellation letters, and there's one sample one behind it, the vendor cancelling, and there's a couple of samples, yes. If we then turn over to 2904 and 2905, this is the first time that the purchasers purport to cancel or do anything inconsistent with the contracts being on foot. So at 2904, Anderson Creagh Lai in relation to its various clients with units in Kingston West and Lakeside West. It says, "We refer to your letter of 15 March and the individual letters enclosed, we refer to our previous correspondence. For the reasons stated in that correspondence your client was at all material times not willing and able to settle and was and remains in breach of the agreements. Your notice purporting to cancel are therefore in repudiation." Now notice that those can only be a repudiation if the contract was still in force. You can't repudiate a contract that's come to an end, that's elementary. So those March notices are treated as repudiations of a contract that's still in force and, the letter goes on, "Each of the purchasers who received your notices elects to accept your client's repudiation and to cancel each relevant agreement," and we see the identical letter, pretty much the identical letter but with paragraph numbers, from Glaister Ennor on behalf of their clients over at 2905. And that's the way it's pleaded.

If we go to volume 1 of the case on appeal and we turn to tab 5, which is the amended consolidated pleading, and we go to page 160 of the case on appeal – every time I give a page number now I have this feeling of anxiety. But page 160, and there should be a paragraph 75 on that. And again what we see here in the left-hand column, well, I suppose the second column, after the number 75, is the purchaser's pleading of when they say they cancelled, and they say they did that by letters dated 17 April, 9 May, 27 July and

1 August, because it's just different purchases as dates caught up, gave notice that the purported cancellation was a repudiation and cancelled. So they say that that chain of letters from 17 April 2012 onwards was when they cancelled. No suggestion, never been any assertion at any of the Courts that there was a cancellation before that.

WILLIAM YOUNG J:
Does the timing – I understand the argument your advancing, but can the timing really make that much difference? If in truth the vendors would not have been able to have obtained specific performance, can they really obtain damages that would be of any moment?

MR GODDARD QC:
Well, first they're entitled to cancel.

WILLIAM YOUNG J:
Sorry?

MR GODDARD QC:
They're entitled to cancel and bring their obligations to an end –

WILLIAM YOUNG J:
No – yes, I understand that, yes.

MR GODDARD QC:
And at that point they must be entitled to forfeit the deposits, the contract provides for that. So that's an express contractual remedy which trumps the Contractual Remedies Act.

WILLIAM YOUNG J:
Yes, irrespective of loss, yes.

MR GODDARD QC:
And then they have a right to claim damages subject to any offset for loss caused by their non-performance, and that was tried below and –

WILLIAM YOUNG J:
And it was total loss.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
Okay, no, well, I understand what you say. It's rather a technical argument though.

MR GODDARD QC:
It's not a technical argument, Your Honour, because it goes to the heart of the way in which the Contractual Remedies Act is intended to operate and the certainty that it's intended to provide it for parties about whether a contract is or is not on foot and, if it's not, what rights they have.

WILLIAM YOUNG J:
When is the – I support the Chief Justice might jump down my throat – but where is the first mention in the correspondence of a complaint about stages 2 and 3?

ELIAS CJ:
It's only the legal stuff, opinions, that I didn't want to see.

MR GODDARD QC:
That comes in the late 2011 correspondence packaged as a complaint about representations and breaches of the Fair Trading Act. So let me see if I can find that. The first –

WILLIAM YOUNG J:
So when is it first suggested that there was a contractual term requiring that stages 2 and 3 be completed?

MR GODDARD QC:

When the amended statement of claim was filed around August 2012. I'll get the juniors to check that overnight. But I don't know how much of the gruesome detail Your Honour's had a look at, but in mid-December 2011, realising that the vendors had called for settlement and that they were likely to ask Russell McVeagh, the stakeholder, to hand over the deposits, these proceedings were first filed by the purchasers.

WILLIAM YOUNG J:

Could those proceedings not be treated as an acceptance of a repudiation?

MR GODDARD QC:

They didn't assert that there had been a failure to perform any contractual obligations, they were brought – there were two causes of action. One was for misrepresentation and the other was for breach of the Securities Act 1978. And what we see from the correspondence is that throughout period, including beyond it, in December – well, no, yes, right through that period – what we see is correspondence that treats the contract as on foot, and while I can see how that argument might have been made it's very difficult to, in fact in my submission impossible, to reconcile it with other conduct of the purchasers.

ELIAS CJ:

So when was the claim filed, the misrepresentation and…

MR GODDARD QC:

The misrepresentation one? I wonder if it's in the chronology? Let me have a…

ELIAS CJ:

And breach of Fair Trading Act.

MR GODDARD QC:

I actually have copies of the claim as it was first filed, if that would be helpful?

ELIAS CJ:

I don't know that we really need to see it but…

MR GODDARD QC:

It's dated 13 December 2011. And what we saw in April 2012 were the letters on behalf of the purchasers saying, "What you did in March was a repudiation of the contract." That can only be the case if it's on foot. "And so we cancel." And there was no, "We think we have already cancelled but for the avoidance of doubt," and I've written a few letters like that in my time. But there was no suggestion of that here. So the contract was being treated as on foot subject to any rights there might have been to set it aside asserted in the proceedings that were filed, the purpose of which was to freeze the deposit so they wouldn't be disbursed, as indeed they then weren't. So Russell McVeagh was named as a defendant and they were restrained from parting with the money they held at stakeholder.

It's not difficult to understand why that level of caution or that reluctance to say it's all over might have been seen on the part of the purchasers because of course they risked, if they said, "We cancel," if there weren't proper grounds for it, themselves being treated as having repudiated, and that would clearly justify cancellation by the vendor. So they were walking, it's clear from the correspondence and the proceedings, a fine line if they said, "We think we have grounds under the Contractual Remedies Act and the Fair Trading Act for challenging these, but we are not asserting that we have a right to cancel and that we've exercised that." Well, actually they did say, "We have a right to cancel," but they said, "We're not telling you whether we're exercising it or not without prejudice."

O'REGAN J:

Well, they reserved the right.

MR GODDARD QC:

Which is explicitly not an exercise of it. And they didn't exercise it until April. Meanwhile, the settlement notices had expired unremedied. What is

absolutely clear from *Holmes v Booth* and from *Property Ventures* is that the one thing you can't do is say, "Well, I'm not telling you what I'm doing. I'm just going to sit on the sidelines and not perform." So that's the argument, Your Honour. It has at least heard it and there's nothing that makes one feel more inadequate as an advocate than to run an argument which one thinks makes some sense and then find it not turn up at all in a judgment.

WILLIAM YOUNG J:
Did Justice Gilbert deal with this argument or did he never, he never got to it?

MR GODDARD QC:
He never reached it. So I visited all these cases on His Honour but His Honour found a shorter route to the answer that this leads us to.

I will perhaps just go to *Property Ventures* because my friend suggests that that relatively recent decision of this Court rejected the very argument I'm making. So that's in volume 2 of my authorities, the lilac one I think, under tab 10. The problem here was the absence of a current building warrant of fitness at the time of settlement, and the critical paragraphs – so first of all we've got a judgment of Justice Blanchard which – sorry first of all we've got a brief judgment of Your Honour the Chief Justice concurring in the result but for slightly different reasons, and then a judgment of Justices Blanchard and McGrath and Wilson, which begins at paragraph 28 which contains passages which I rely on. So 28 there was a warranty that at the giving and taking of possession all obligations under the Building Act 1991 would be complied with. Then at 37 it's noted that Regalwood, the vendor, gave a settlement notice that got a response saying, at 38, "The breach is a mis-description, we are entitled to claim compensation, so the notice is invalid," and basically at the time that the settlement fell due the position was that the vendor was offering to transfer title but no building warrant of fitness and was not agreeing to any deduction from the purchase price by way of compensation for the absence of that warrant of fitness, and the purchaser was saying, "Well, I'm not going to settle on the basis of paying the full price," and the vendor cancelled and the question was whether that was justified. The Court found

that there was a right on the part of the purchaser to insist on an allowance being made for the cost of remedying the defects in the building which would prevent it getting a warrant of fitness. And after looking at the existence of a right to abatement the majority continued, at paragraph 72 on page 261, the subclause about not deferring settlement in the agreement, "Not happily drafted but both its language and certain policy considerations lead us to the view that Dr McMorland is correct and that 6.5 does no more than confirm the position under the general law, namely that while the contract remains on foot the existence of a breach of warranty is not a licence for a purchaser simply to sit on its hands refusing to proceed to settlement until the breach is remedied. To adopt Justice Tipping's metaphor from *Holmes v Booth*, 'A purchaser who has come to this fork in the road is faced with only two possible routes, cancellation or performance, and once the latter is chosen is bound to perform in accordance with the contract when called upon.'"

Just pausing there. It's quite clear that the reference to warranty isn't used in the old sense of a term that's not a condition, that doesn't justify cancellation, because they're talking about a fork in the road where one the choices is cancellation. I was confused when I read this once upon a time about whether that distinction was being drawn. It's quite clear it's not, and it's very clear from Justice Tipping's judgment in *Holmes v Booth,* His Honour says, I don't need to decide whether or not it was the right to cancellation as a result of the breach in that case, because it wasn't exercised. "There is no intermediate road available," His Honour continued, "nor can the purchaser suspend an election without risking default." So that's what effectively these purchasers tried to do, they tried to suspend making an election but they risked default, "risks being taken to have affirmed but defaulted in performance." Then there's a discussion of the old 6.5, I don't think we need to spend too much time on that. Then if we turn over to paragraph 80 under the heading, "The settlement and cancellation notices," "Clause 9.1(2) provides that a settlement notice is effective:…only if the party serving it is at the time of service either in all material respects ready, able and willing to proceed to settle in accordance with the notice," it's the same as our clause 12.1 on that respect. "This appeal is proceeding on the basis of an

assumption that the building did not have a building warrant of fitness at all relevant times. On that assumption, when Regalwood issued its settlement notice requiring payment of the full balance of the price, Property Ventures was entitled, as we have found, to assert a claim for a substantial deduction. But on the facts before us, on 17 May no claim for any deduction had actually been made. That did not happen until 20 May when Property Ventures' solicitors responded to Regalwood's notice. Because it is incumbent upon the purchaser to put forward its claim, it cannot in our view be said that Regalwood's demand on 17 May for the full price necessarily demonstrated an unwillingness to proceed to settle in accordance with its obligations. It was not at the time, in the absences of a claim for set-off, asking for more than it was entitled to receive in exchange for the transfer of title. Hence, the issuance of the settlement notice may well have been valid," and perhaps I should just emphasise that what His Honour is saying at the foot of page 263 and over the page is that it didn't demonstrate, "An unwillingness to proceed to settle in accordance with its obligations," the focus is on the obligations at settlement, and we see that continue.

82, "However, the position certainly changed as from 20 May when Property Ventures did claim a deduction. When Regalwood continued to insist on payment in full, it was no longer in all material respects ready, able and willing to perform its contractual obligations. Although clause 9.1 refers only to the position when the notice is given, it is well established that, even when time is of the essence, a party to a land sale contract may not cancel it unless," and this is critical, "unless that party is at the time of cancellation in all material respects ready, able and willing to perform its contractual obligations. In particular, unless there has been a waiver or dispensation by the other party, it may not cancel because of the other party's failure to settle unless it was at that time itself ready, able and willing concurrently to play its proper part in the settlement. Justice Brennan put the position in the way in *Foran v Wight* (1989) 168 CLR 3858, 'Where the respective obligations of parties to a contract are mutually dependent and current, the primary rule is that neither party who fails to perform his obligation when the time for performance arrives can rescind for the other party's failure at that time to

perform his obligation. Each party's obligation is condition on performance by the other; neither can complain of non-performance by the other when the condition governing the other's obligation goes unfulfilled.'" So if I have to do something and the other party has an obligation subsequent to that and condition on it, if I haven't done my part their obligation never falls due. And in the classic example of a property transaction, because delivery of title and payment of the price are mutually conditional and concurrent, if either is not wanting to do their part the other's obligation never falls due. But any obligation there might have been to build stages 2 and 3 was out in the future. The obligation to settle was not conditional on it, that the purchasers accept. And what that means is that they were required to settle provided that the vendor was ready, willing and able to do its part on settlement. If it was clear that an essential term would be breached in the future, then they would have a right to cancel. But if they didn't exercise it then the contract remained on foot for the benefit of both parties, *Holmes v Booth*, and a failure to perform was a breach, a serious breach, which entitled the vendor to exercise the remedies provided for in the contract and also as a matter of general law.

Submitted for Regalwood at 83, "That it was never shown to be unwilling to settle in accordance with its contractual obligations because Property Ventures did not actually put it to the test by initiating a settlement process and tendering the amount properly due. Fails for two reasons: Regalwood had made it sufficiently clear it would not accept anything less than the full price," its lack of co-operation not relevant here.

84, "Because Regalwood continue to insist on receiving payment in full after Property Ventures sought an abatement of the price, Regalwood was not in material respects ready, able and willing to settle," again I should emphasise that language, "in accordance with its contractual obligation. In those circumstances, assuming there was indeed a breach of warranty, Regalwood's cancellation would be invalid," because Regalwood being ready, able and willing to settle was a precondition for Property Ventures performing its obligations on settlement, so it wasn't in breach.

And then we come over to Justice Tipping's short concurring judgment beginning at paragraph 89. It's one of those judgments where one reads the first sentence and knows where the Judge is going, "Despite being in breach of a warranty in a way which substantially affected the value of the property it had agreed to sell, Regalwood insisted that Property Ventures, as purchaser, should pay the full purchase price. When Property Ventures declined to do so, Regalwood purported to cancel the contract for breach on Property Ventures' part," and importantly, "Notwithstanding the interdependence and concurrency of the obligations to pay and convey, both the High Court and the Court of Appeal upheld Regalwood's right to cancel. But how, it must be asked, was Regalwood ready, willing and able to settle in terms of the contract when, despite being in substantial breach," to settle again, "it demanded payment in full, rather than on a basis which properly reflected its breach?"

And then if we come down, perhaps just lastly, to paragraph 93. After dealing with the provision it says you can't defer settlement. His Honour said that doesn't mean you can't seek compensation. "The key word in the first sentence is the word 'defer'. The point of clause 6.5 is to make it clear that despite any breach of clause 6 by the vendor, the purchaser must still settle. The breach does not give the purchaser any right to delay settlement for any purpose," and we've got an identical clause in ours of course. "If the breach gives rise to a right to cancel but that course is not taken, the purchaser cannot simply sit on its hands. As the contract remains on foot, the purchaser must observe its contractual duty to settle," so that's the first point, it's on foot, the purchaser must settle, having not cancelled, and it doesn't depend on positive affirmation just on the failure to cancel, the contract's still on foot. Then His Honour goes on to say, "That however says nothing of what the purchaser's rights and obligations are on settlement in light of the vendor's breach," and His Honour deals with the concurrency issue, and at 96 explains his approach in *Holmes v Booth*, "I was the third member of the Court, took the view that having elected to keep the contract on foot the purchaser was obliged to settle or at least tender settlement, but on a basis which recognised the breach of warranty. What the purchaser could not do was simply defer

settlement on an indefinite basis. When the time for settlement arrived the purchaser was faced with the fork in the road to which Justice Blanchard has referred, could choose either the cancellation route or the performance route, but there was no third route available." Then there's a reference to the sale of land, Dr McMorland's text saying you can't just sit on your hands if cancellation is a right, and then if we just pick on the very last line of this page, "If cancellation is one of those," one of the purchaser's rights, "the purchaser must elect on or before the settlement whether or not to cancel," must elect. "There is no right to refuse to settle while threatening to cancel if the vendor will not reduce the price, a tactic sometimes employed. It is the purpose of clause 6.5 to make this situation, *which is the law in any event*, a clear and express term of the contract. A breach of any warranty," for which one can read "term", "does not defer the obligation to settle on the due date as required by the contract." 98, "I respectfully agree with this analysis." So it's quite clear, quite clear that, far from rejecting the argument I'm making, it is being confirmed by this Court that there is a fork in the road and that even as you as a purchaser have a right to cancel, at the point in time where a settlement notice has been given you have to make a choice: either you exercise that right to cancel or you must proceed to settle, and if at settlement the vendor does everything they're required to do as settlement then you have no excuse for not performing your obligations at settlement, and that was the case here.

I won't go to *Kumar* – actually, no, I might go to *Kumar* and the *Law of Contract in NZ* passage because it turned out when I read the late edition of Burrows, Finn and Todd that there seems to be what I apprehend to be a misunderstanding of *Kumar* out there in the world which might be relevant and which this Court might like to clarify. So *Kumar* is in volume 1 of my authorities, the green one, under tab 5, and I just want to jump straight to paragraph 101 in the judgment delivered by Your Honour Justice Arnold for the majority – actually I have to lead into this slightly. So there were three relevant purchasers in this case, as the Court may remember. At 100 there's a discussion of the position of Mr Selwyn, who had written saying, "I cancel, albeit for the wrong reasons," and the Court said, "Well, it doesn't matter what

reasons you give, if you've cancelled you've cancelled." Then at 101, "As to the Kumars and the Donaldsons, because it was clear from the July update that Station was likely to be in breach of essential contractual obligations, they had an election whether to affirm or to cancel, they had, as it was put in *Property Ventures,* reached a fork in the road. If they wanted to cancel they had to make their intention to cancel known to Station, either expressly or by conduct evincing an intention to cancel. Although they did not formally cancel they did make it clear they did not intend to perform them," the agreements. "The refusal of the Kumars and Donaldsons to perform in response to Station's calls for settlement in 2008 and subsequently were clear indications they did not regard the agreements as continuing in force. Station can have been in no doubt that the Kumars and the Donaldsons regarded the agreements as being at an end." Now as I understand that judgment what the Court is saying is they had cancelled. They might not have used the magic word, but section 8(3) makes it clear no particular language is needed. They had conveyed their view that the agreements were at an end. So that case is different from this one, where great care was taken by the purchasers not to do so.

If we go to volume 2 of my authorities…

ELIAS CJ:
So what's the misunderstanding?

MR GODDARD QC:
Let me take you to it. So it's in Burrows, Finn and Todd, and it's under tab 14 of volume 2 of my authorities. And paragraph 18.5.3, which is reproduced here, is helpful generally. It talks about interdependent and concurrent obligations, first in *Foran v Wight*, notes that if a purchaser refuses to pay and that's accompanied by a clear indication in regard the contract is at an end that's cancellation. If however they just refuse to pay until the vendor is, "Ready, willing and able to perform," the contract won't be cancelled. Then at the foot of the page, "The problem arose in a particularly difficult form in *Kumar*, the appellant purchasers refused to complete their purchase on a

mistaken understanding." Then it said at the foot of the page, "The Supreme Court in a judgment delivered by Justice Arnold doubted whether it could be said that the appellants had cancel the contract," then set out the passages went to. "The case appears to draw a distinction between a formal cancellation and a justified refusal to perform." Now I don't think that's what this Court was doing. I think the Court was saying they had cancelled, although they hadn't used the word. But what the authors of Burrows, Finn and Todd say, "Well, that was so even though the refusal did make it clear." "This distinction is likely to be productive of uncertainty. It can matter whether the refusal to perform is a cancellation or not because only if it is is relief available under section 9." So there's a view abroad, as reflected here, that this Court had said, "Even if you haven't cancelled –

ELIAS CJ:

Is there a three? There are three options, there are three forks in the road. I don't know whether you have…

MR GODDARD QC:

Yes, it's a three-pronged fork.

ELIAS CJ:

Yes, it's the three-pronged fork, absolutely.

MR GODDARD QC:

And I didn't understand this Court to be producing a third prong. I think what the Court was saying was that it was the same old second prong but it was being described as a tine, not a prong. Different language, same thing. I am right aren't I, tines are prongs? I hope so, that's was the intention.

ELIAS CJ:

I'm sure – well, I would have thought so.

MR GODDARD QC:

So there is still a two-pronged fork in the road, and what is clear beyond any doubt is that the cancellation prong, cancellation route, was not followed here, wasn't invoked till April. What that means is that when the settlement notices expired the purchasers should have settled, they didn't, they were in breach, the vendor's March cancellation was justified.

If this Court concludes that there was no obligation to build stages 2 and 3 or that it wasn't essential or that it was an obligation of the intermediate kind to complete the precinct unless the non-completion had no material impact on value, might not be necessary to go there. Otherwise it is, as it was in the Court of Appeal, and the argument needs to be confronted, which Their Honours below didn't.

I'm going to go extremely briefly in the remaining 15 minutes through the rest of my argument, because I'm really responding to a challenge by the purchasers to the concurrent decisions below. And I don't think I need to do much more than say I rely on the reasoning in both the High Court and the Court of Appeal and sketch very what I say that reasoning was. Is Your Honour happy for me to proceed in that way?

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

Right. Fly to the 6. The complain here is that Lakeside West at the time settlement was due had a gastro pub in it, had a hairdresser in it, had a hairdresser in it, and was subject to – and he had been rezoned to permit use for visitor accommodation. So each owner of a unit had the option, but not the obligation, to include their unit in a letting pool run by the Hilton. My friend in his submissions makes something of a suggestion that the receivers understood they needed the purchasers' consent to make these changes. I won't go to that material suffice to say that it's very clear, in my submission if one reads those receivers' reports, that what they're saying is that a

purchaser has to agree to their unit being in the pool for it to be included in the pool, which is obvious. They had no obligation to do so. They weren't suggesting that any other form of consent was required. But just zipping through my 6. I adopt the reasons given by the Court below. There is no contractual promise anywhere in the contract that Lakeside West would not contain any retail or commercial premises. So there's no promise that there wouldn't be a gastro pub or a hairdresser. I cross-examined Mr Moore about whether it was inconsistent with a suggested promise that he open an office and practice out of it, a well behaved solicitor, where's the contractual restriction on that. He, I think, resisted the suggestion that he was well behaved but couldn't point to any source of such an obligation. The Court will remember when we looked at the draft outline plan and specification that what the furthest the contract goes towards such a promise is on page 1243, the statement that Lakeside West is intended to be a luxury lakefront residential apartment building, but there's nothing about being a luxury lakefront residential apartment building that's inconsistent with having a gastro pub or a hairdresser on the street level on the building. There's extensive cross-examination about that driven off Clyde Quay, because it was the example most familiar to me.

What about visitor accommodation. Well at 6.3 I note was not only was there no contractual promise that Lakeside West could not be used for visitor accommodation, just nothing anywhere in there, but actually this stands the argument at trial on its head. The purchasers understood throughout that this building could be used in this way, and at trial the complaint made by Dr Ho, and pre-settlement the complaints made in the correspondence, were or about the restriction on only letting through the Hilton. So they were saying we're too restricted in our short-term letting and now suddenly we have a complaint that short-term letting was possible at all. Unsurprisingly given the nature of the complaint made, and I've provided some reference to correspondence and to Dr Ho's evidence, there was no pleading that it was a breach that Lakeside West could be used for visitor accommodation, the complaint was the other way around, and it doesn't matter which way you stand the argument on its head, both fail. The other point I make at 6.4, which

the Courts below accepted, was that even if the draft outline specification had said that it's not intended that there will be a gastro pub or a hairdresser in your building, even if that had been spelled out, an ability was reserved by clauses 4.6 and 4.9 to grant easements, 4.6 – sorry encumbrances, and to modify the draft outline plans and specifications, 4.9, provided the change didn't have a material adverse impact on value, and the finding in the High Court was that if this was a change, then there wasn't a material adverse impact on value, so the change could be made, and it's plainly not an essential term, if indeed it's a term at all, and that really is the main barrier that the purchasers encountered in the Courts below for the reasons I give in 6.18 of my submissions, I won't go through them.

The common property issue at Kingston West, this is the complaint that some of the areas that are not shown as – well they're just not identified, either as principal units or as common property in the draft outline plans and specifications, were incorporated in a management unit which was transferred to KVL and leased to the hotel operator. Again, I adopt the reasons given by the Courts below for finding first that there was no contractual provision for the unallocated space to be common property. And just in case it assists the Court, Mr Moore accepted that he couldn't tell from the plans for the buildings what was common property and what wasn't, that you just don't know, and the references to the cross-examination are in volume 2, tab 12, pages 424 to 428. But even if the draft outline plans and specifications had written "common property" in big black letters on these spaces, what is clear is that clause 4.9 permits changes, reductions in areas designated as common property, provided only that there's no material adverse effect on value. And again we have a positive finding in the High Court that there was none. So the changes were permitted, and such a requirement against the backdrop of those changes can't have been essential. You can't say, "It's essential to have this as common property but you can make changes."

And then the lease term. Again, I adopt the reasons given by both the High Court and the Court of Appeal for finding that this was not an essential term. And the most – my friends suggest at paragraph 192 of their

submissions that the maximum 30-year term would have been seen as important by purchasers. But the most striking evidence that that wasn't the case, which is referred to in the Court of Appeal judgment at 153, it's also discussed in the High Court, is that otherwise identical units in the building, which permitted the maximum 30 year and the maximum 40 year, sold at exactly the same price at the same time. So the idea that this was seen as important to purchasers is dramatically disproved by the evidence that it made not a jot of difference to the willingness of purchasers to buy or to the price they paid. I won't go into more detail on that at this stage. I'll deal with anything that's raised in reply, if necessary, unless the Court has any questions?

ELIAS CJ:
No, thank you, Mr Goddard.

WILLIAM YOUNG J:
Should we be taking a view?

ELIAS CJ:
Is that what you were doing?

MR GODDARD QC:
I wondered why Your Honour was smiling.

WILLIAM YOUNG J:
I was taking a virtual view of the resort to see where the hairdresser's was.

MR GODDARD QC:
The smile suggested Your Honour wasn't completely focused on my argument but had something else in mind.

WILLIAM YOUNG J:
I was trying to contextualise it

MR GODDARD QC:

I wish we were there.

ELIAS CJ:

Any questions? No. Thank you, Mr Goddard. We'll take the evening adjournment, Mr Mills, and start with you tomorrow.

COURT ADJOURNS: 15.53 PM

COURT RESUMES ON FRIDAY 7 APRIL 2017 AT 10.03 AM

ELIAS CJ:
Yes Mr Mills.

MR MILLS QC:
First, just on the issue about the way the argument will be divided up, I'll address the Court on the Precinct argument and the Lakeside West essential term argument. Mr Barker will deal with the common property and the lease term issue.

I want to begin by revisiting the way in which my learned friend framed the issue at the outset of his oral argument. He said the single issue here is whether, is KVL's entitlement to call on settlement, and in my submission that is not the right way to frame the issue, and it has led into a series of arguments yesterday afternoon which I will be saying are essentially a distraction. They're wrong in law and a distraction from where the central issue ultimately is here, which is about whether there is a term and whether it is essential.

So my riposte to that framing of it as whether it's KVHL's entitlement to call on settlement, that the issue is whether KVHL or the vendor had a right to cancel. That's the issue. Was there a right to cancel. And it frames the issue, in my submission, the way it should be framed, and leads to going through the issues differently.

WILLIAM YOUNG J:
Didn't they both have rights of cancel, rights to cancel?

MR MILLS QC:
Yes, but the issue here was whether when the vendor cancelled it had the right to do that. Now it's been framed because of I think yesterday afternoon's discussion and argument, because it's been framed as an issue about the vendor's right to settle, we've been taken through a succession of cases about

the effect of the settlement notice. My contention is that the real issue here in terms of whether there was a repudiatory breach and a right in the purchasers to cancel, is whether the vendor at the point at which it cancelled had the right to do that, and the issue about the settlement notice is a distraction.

ELIAS CJ:

But doesn't its right to cancel arise out of the failure to fulfil the settlement notice by the purchasers.

MR MILLS QC:

No in my submission, Chief Justice, that's not correct, and that's where I think the argument yesterday afternoon took the Court into a different focus from what at least I will be submitting is the correct focus. I'll take you to the authorities, and they're authorities of this Court in part, that –

ELIAS CJ:

Sorry, well just tell us what you say the entitlement to cancel could have turned on, apart from failure to fulfil the settlement, or to settle.

MR MILLS QC:

I say that at the point at which the vendor purported to cancel, it had to be ready, willing and able to perform the bargain, and if the bargain is that the vendor was required to provide a unit in a building that would be part of the Precinct on settlement, then it is not being disputed here –

WILLIAM YOUNG J:

But it was never a requirement, because it was never required for the building to be part of the Precinct on settlement.

MR MILLS QC:

Well that's where we differ, and I'll need to persuade you to that.

WILLIAM YOUNG J:

Sorry, we may just be differing on a point of semantics, but as I understand it, it was clear under the contract the Precinct didn't have to be completed by the time of settlement.

MR MILLS QC:

No, and that's accepted.

WILLIAM YOUNG J:

Okay, just pause there so I can follow through my line of logic.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

So it follows that the purchasers were not entitled to have a precinct up and running of which their building and their unit would be a part at the time of settlement.

MR MILLS QC:

Yes, that's accepted.

WILLIAM YOUNG J:

All right. So when you said they were entitled to have a building as part of a precinct on settlement, you used language in a slightly unusual way.

MR MILLS QC:

Let me put it again then perhaps more precisely than I perhaps did. The contention here is that it is of course a term of the contract that the vendor was required to complete the Precinct. So that's step 1. Although it is an obligation that doesn't need to be fulfilled at the date of settlement, nonetheless at settlement the vendor must be in a position to deliver a unit in a building that will be part of the Precinct, and here it's not disputed that at the point of cancellation by the vendor, the vendor was no longer able to do that

because it had disabled itself from being able to carry out itself, or procure from somebody else, which is the way the contract is worded, the completion of the Precinct.

WILLIAM YOUNG J:

Can I, are there any – I mean the unusual feature of the case is that the obligations you rely on are ones to be performed after settlement. Are there any cases involving the sale of land that you'll be taking us to that involve that situation?

MR MILLS QC:

No, there are none specifically that I've been able to identify but the proposition in principle, in my submission, is entirely standard in other contexts, and the analogy that was the subject of discussion between Bench and Bar in the Court of Appeal was for example there's a contract for the sale and purchase of a business, where it is made a condition, or it's a term of that agreement that a key employee will remain available for a certain period of time, as part of that transaction, and for these purposes it was discussed in terms of it being an essential term. So it's a future obligation. But at the point at which settlement is required on that sale and purchase agreement it has been made clear that they purchaser will not perform those functions. That in my submission, and the Court of Appeal was persuaded of this, is a future performance, but it carries with it a current obligation that must be capable of being performed at the date on which settlement is required, and if it cannot be then the vendor is not ready, willing and able to perform on its part of the bargain.

WILLIAM YOUNG J:

Well, that may be, but the fact that the obligations are so loose, buildings can be taken out and added and so on, and are to be performed in the future, might suggest that it's not essential to the transaction.

MR MILLS QC:

Well, I agree that there are issues around that –

WILLIAM YOUNG J:

Which is a slightly different issue from the one you…

MR MILLS QC:

It is, and those are issues I will need to address the Court on and need to persuade you on. But what I would say to that, just at this point, is that the level of discretion that's available to the vendor under this contract is of course entirely for the benefit of the vendor, and it is in there because it makes it entirely, in my submission, entirely commercial and practical that the vendor would assume the fundamental obligation which is that it will complete or procure the completion of the precinct. There was evidence given at trial – I didn't do the trial but there was evidence at trial which I can either take you to, or I don't think it'll be a matter of dispute – that these long-term developments of this kind, and examples were given at trial of Sanctuary Cove for example, which most of us are probably at least aware, familiar with, in Queensland, that it is the ability of the vendor under the contract to allow the market to lead those long-term development rather than being compelled to effectively lead the market that makes them successful, and that is what this contract is doing. It doesn't make it, in my view, non-commercial, it actually does the opposite, it's exactly because of that level of flexibility that the assuming of this obligation makes good sense and it is why, and I will develop this further of course, but it is why the centrality of the obligation is so important. And that doesn't take us immediately into many of the issues my learned friend raised about uncertainty and so, it is because of that long-term highly discretionary nature and flexible nature that the vendor has given to itself that that core obligation remains so important, that it will be completed, albeit, as the contract says, over time with, able to make various changes and so on, and I'll come into those provisions again later.

O'REGAN J:

But wouldn't the contract say that if that were so?

MR MILLS QC:

That it will complete?

O'REGAN J:

Yes.

MR MILLS QC:

Well, in my submission it does say that.

O'REGAN J:

Well, if it does it says it in an agreeably oblique way. I mean, if somebody was claiming this to be an essential term, wouldn't their lawyers ask for the contract to specifically say so?

MR MILLS QC:

Well, conversely, Your Honour, Melview is contending principally on the basis of 4.1(k) that it's not an essential term, and that too is a very oblique way of saying that an obligation which in my submission –

O'REGAN J:

Well, that may be so, but that doesn't answer my question, which is if you are a property lawyer advising buyers and it's essential to your buyers that the whole precinct be built, why wouldn't you put a clause in the contract saying it must be built?

MR MILLS QC:

Well, in my submission that is what it says. First of all it says it specifically in clause 5.7. Now I resist the proposition that been put repeatedly by my learned friend that the purchaser's argument is built solely on that clause, it is not. But nonetheless that clause is very specific that it will complete. The other clauses that in my argument are part of a package, leaving aside the wider contextual context of the contract itself, which I will go to, but the package really is the ones my friend took you to, which are principally 2.9 and 4.1(g) and 4.1(k) and 5.7. As I say, there are, I think, are the core elements, particularly in section 5, which deals with the role of the Precinct Society, which I think needs to be gone through more carefully, but none of these, putting to one for a moment 5.7 which says specifically will complete, those

other clauses which give the vendor significant discretions and flexibility about when and how, if there was not an obligation to complete there would be no need for those clauses.

WILLIAM YOUNG J:

But couldn't they apply if there's an intention to complete? If it's very likely that there'll be a completed development, and these set up what will happen if what is anticipated eventuates.

MR MILLS QC:

Well that is to say then that the, what the contract was saying, which is the way my friend puts it, was that all it was saying to purchasers is that you are buying a unit in a single building. That's all this complicated contract is about.

WILLIAM YOUNG J:

No, it talks about what will happen if, as we anticipate, the Development will be much broader.

MR MILLS QC:

But ultimately the position that's been taken by my friend on behalf of the vendors is that the only contractual obligation –

WILLIAM YOUNG J:

The only core obligation of the vendor is to provide a unit in a building.

MR MILLS QC:

A single unit in a single building and the need for those various clauses that you were taken to yesterday, saying that there is this flexibility to defer and so on, my submission, if there was no obligation in the first place, there would be no need to say that.

WILLIAM YOUNG J:

Why wouldn't there be a need for them, if it's anticipated that the events they address will occur?

MR MILLS QC:

Well that would be with great respect an odd way to use those clauses because if there is no obligation at all to complete, why would you reserve to yourself those provisions, and the other factor on this which His Honour Justice Arnold referred to yesterday, is what's conspicuously absent from all of those clauses is the word "abandoned". It's a single word that would have made it entirely clear to the purchasers that the term that my friend contends for is indeed the term that they were buying into this development on. That it could be abandoned and all they would have an entitlement to would be to insist that there'd be a certificate of practical completion for the unit otherwise the vendor could walk away.

ELIAS CJ:

It cuts both way, doesn't it though, the absence of abandonment. It indicates that, well, maybe that's not right. Okay, I withdraw that.

MR MILLS QC:

Yes well with respect I don't think it does cut both ways because I think that if the contract meant that the obligation which I think emerges very clearly both from the specific clauses and as the Chief Justice you mentioned yesterday, it's not just reliant on 5.7. The Precinct – well not, the importance of the Precinct is really throughout that contract, that if it was, really was intended that there be a right to walk away at any point, subject only to not being able to require a purchaser to settle unless their unit is available with a certificate of practical completion, it'd be very easy to have said that, just as it would have been very easy to say, and this term is not an essential term.

So that's taken me into issues that ultimately I think are the ones that really matter here, but because of the way in which the argument went yesterday afternoon, with its focus on the role of the settlement notice, and whether irrespective of the view the Court might come to on the arguments that we've just been discussing, the purchasers has lost the right to cancel because it didn't do so before the expiry of the settlement notice. That's my friend's argument and that's the issue I think I should deal with now because I'm going

to be saying to you that that's not correct as a matter of law. it's very similar to the argument that was run in the Court of Appeal. My friend says the Court of Appeal didn't give adequate attention in its judgment to –

WILLIAM YOUNG J:
He said they didn't give any attention.

MR MILLS QC:
Well –

WILLIAM YOUNG J:
There are some references.

MR MILLS QC:
Well, with great respect to my friend, the response to it that I made in the Court of Appeal –

WILLIAM YOUNG J:
Well, it was so devastating that it was unnecessary to refer to it.

MR MILLS QC:
My submission in the Court of Appeal was this has made a simple argument very complicated and that the short point is that the settlement notice does nothing other than make time of the essence and that the issue is not whether the vendor would have been ready, willing and able to perform at the date of the settlement notice, I say it wasn't there either but it doesn't matter, because the critical issue is when it cancels, because if it isn't ready, willing and able to perform when it cancels then it had no right to cancel, it can't deliver on its part of the bargain, and I don't think my friend argues against the proposition that if they didn't have the right to cancel it's a repudiation and the purchasers were entitled to cancel, which is exactly what the Court of Appeal said and I was certainly encouraging the Court of Appeal to take the view that this complicated argument that we've heard again yesterday afternoon is

unnecessarily complicated by this focus on the settlement notice, and that's wrong.

WILLIAM YOUNG J:

So in a nutshell you say the vendor's obligation was to offer on settlement a unit which would be eventually part of a bigger precinct and they were never ready, willing and able to offer that?

MR MILLS QC:

That's correct, Your Honour, and more fundamentally at the date of cancellation in order to avoid this what I say is a red herring really about at the expiry of the settlement notice date. It's a cancellation really that the vendor acts, and it must –

ELIAS CJ:

And do you draw a distinction in terms of the facts between the position when the settlement notice was delivered and the date of cancellation?

MR MILLS QC:

No, I don't, no. The inability of the vendor to perform what I say is this core obligation doesn't change between those dates.

ELIAS CJ:

All right.

MR MILLS QC:

I make this point only because of my friend's argument yesterday that it is the settlement notice and the last date for performance under that which requires the purchaser to have exercised its rights to cancel, and if it didn't by the end of that date then irrespective of whether at cancellation the vendor was ready, willing and able to perform, it doesn't matter any more, and in my submission that is simply wrong it's a matter of law.

So I repeat my point that I made, just to come back to it, that all the settlement does is to make time of the essence, and I don't think I need to take you to it because it's such a well-known proposition, but my note here is that it's in this Court's decision, I refer to it as *Regalwood*, I find it a more interesting title, *Regalwood*, which is in the bundle of authorities, volume 2, my friend's bundle, and paragraph 62 is where His Honour Justice Blanchard confirms that point.

Now what I do want to go to then on this issue of the function of the function of the settlement notice is first of all this Court's decision in *Kumar*, and that's in my friend's bundle at tab 5. Now my friend has taken you through the facts and this Court is obviously well familiar with them so I don't need to spend time on that. The paragraph I want to take you to is paragraph 94, which is on page 131 of the judgment.

WILLIAM YOUNG J:
Sorry, 129?

MR MILLS QC:
131, paragraph 94, Your Honour.

ELIAS CJ:
Sorry, 121?

MR MILLS QC:
131, sorry. It's page 131 of judgment, paragraph 94.

ELIAS CJ:
Sorry, I was going to the paragraph numbers. I thought you were about to cite Justice Young to us.

MR MILLS QC:
I might do.

WILLIAM YOUNG J:
It probably would have been better.

MR MILLS QC:
If I find I'm having difficulty with His Honour that's exactly what I'll do.

So paragraph 94. So it's referring to the settlement notice and then says, "Only one of the appellants, Mr Selwyn, purported to cancel his agreement in this period, by email dated 29 August 2008. But even if the appellants did not formally cancel their agreements at this point, they were not obliged to perform when Station called for settlement. A party who is in breach of an essential terms of a contract is not entitled to enforce its rights under the contract," that's the significant point that these cases make, that the critical issue is can the party seeking to assert rights perform its obligations under the contract, and the settlement notice does not derogate from that in any way. "Station had made it clear that it would not be able to meet its essential contractual obligations of providing furniture packages and a management agreement. In those circumstances it was not entitled to call for settlement on the basis that it was ready, willing and able to complete. On the face of it, the appellants were entitled to refuse to perform, subject to what we say below," and then the Court goes on to discuss that at length. So that's the first reference on this key issue, that it's the obligations under the contract, and they are not simply determined by the settlement notice, you ultimately ask what was the bargain and is the party seeking to assert able to fulfil that bargain, it's not ready, willing and able and it can't cancel.

Next I want to go to *Regalwood*, which is in volume 2 of my friend's bundle, and that's at tab 10. And this very specifically in His Honour Justice Blanchard's judgment on behalf of most of the Court deals with this specific question of the settlement notice. But I want to go first to your judgment, Chief Justice, which is at paragraph 19.

So this is the building warrant of fitness case, just to refresh memory, if that's needed. So we had the dynamic, if it was, that the purchaser was saying,

"Look, you need to confirm that there's a building warrant of fitness for this building." So it wasn't that the purchaser wasn't willing to settle, it was only willing to settle on those terms that there was, that the warranty was fulfilled. And the vendor continued to demand settlement, saying, "Irrespective, you must settle," and it's essentially a reliance on the ADLS forms referencing the settlement notice. Now just in your judgment, Chief Justice, at paragraph 19, you diverge I think from other members of the Court, not in the outcome but in the method of analysis. But I do just want to reference this because in my submission, respectfully, it's certainly right on this core issue of the ability to perform the bargain. So you refer to *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA) and then go on to say, "In circumstances where the contract … the vendors are not entitled to give something less than they promised while insisting on payment of the full price without adjustment," and then quoting from the case, "It follows that a vendor is unable to compel settlement where the parties do not agree on the amount of compensation or on some sensible arrangement," and so on. And then going on with the Chief Justice's judgment, "In the present case too the vendor, 'Asked for more than it was entitled to demand.' The notice was invalid because the vendor was not ready, willing and able to perform the contact according to its terms." Now that's the same result by a different route that Justice Blanchard comes to, but it is the core concept that in my submission is right, that if one party is not ready, willing and able to perform the bargain it can't require the other party to perform its party of the bargain, and the settlement notice has no effect on that. So you can have a stand-off and then if one party decides, as here, that they're going to end that stand-off by cancelling, then they take the risk that they weren't themselves able to perform at the time and, if they weren't, then the law is very straightforward, it's a repudiation which entitles, as here, the purchasers to cancel on the basis of that repudiation.

So turning next then to paragraph 69, Justice Blanchard's judgment, which is at page 260 of the judgment. So the analysis here proceeds on the basis that there was an equitable set-off which was being raised by the purchasers saying, "If you won't confirm the warranty then I am not going to, I'm not prepared to settle," so it's analysed in that way. And then down towards the

end of that judgment or that paragraph, beginning at about line 32 it will be, I think, His Honour says, “These factors in combination provided property ventures with an equitable ground on which to raise a claim for set-off,” this is the part that has wider implications here, “They impeached Regalwood’s demand for the full price. Subject to the matter to be considered in the next section of these reasons, it was not therefore ready, able and willing to settle as the contract required.”

WILLIAM YOUNG J:
The difference here, I guess, is that the breach didn’t impair the value of what was being sold at all.

MR MILLS QC:
Well, that's what my friend says. I don’t actually accept that.

WILLIAM YOUNG J:
I thought the Judges accepted that?

MR MILLS QC:
Well, the issue here at trial, and of course my friend knows more about that than I do, but the issue at trial was damages, so that was being considered at the date of cancellation. But there was undisputed evidence that at the date of purchase that there was a resort premium paid.

WILLIAM YOUNG J:
Yes, but what we’re really interested in is whether for the purposes of abatement of price there wasn’t an abatement of price established.

MR MILLS QC:
Yes, well that – yes, I refer to this not because I’m basing the argument here on an abatement of price, but rather the fact that there had been a challenge in this case in that way, it meant that the vendor was not entitled to require performance.

WILLIAM YOUNG J:

Right, well, your argument is simply that what was to be delivered on settlement was a unit which was part of contractual obligations which would result in due course in it being part of a precinct and what you were being offered wasn't that –

MR MILLS QC:

That's right, yes.

WILLIAM YOUNG J:

–at least so far, and I think on that basis if the obligation's there and if it's essential then you're probably right.

MR MILLS QC:

Yes, thank you, and that is exactly the argument. It's the argument that was put in the Court of Appeal and the Court of Appeal accepted, for better or for worse.

The other passage I wanted to take you to here, which goes more directly to the point about the settlement notice, is paragraphs 80 to 84, which begin at page 263, and it starts by setting out the term that my friend has been dealing with here as well from the ADLS standard form, and then His Honour goes on to say, "This appeal is proceeding on the –

ELIAS CJ:

Sorry, is this the same clause?

MR MILLS QC:

It is, as I understand it, it's just different numbering I think

ELIAS CJ:

Right, thank you.

MR MILLS QC:

"This appeal is proceeding on the basis of an assumption that the building did not have a building warrant of fitness at all relevant times. On that assumption, when Regalwood issued its settlement notice requiring payment of the full balance of the price, Property Ventures was entitled, as we have found, to assert a claim for a substantial deduction from the amount otherwise payable on settlement. But on the facts before us, on 17 May no claim for any deduction had actually been made." So in other words, like the vendor's argument here, the point at which the settlement notice is issued it is being said that no claim had actually been made for a deduction at that point, and, "That did not happen until 20 May, when Property Ventures' solicitors responded to Regalwood's notice. Because it is incumbent upon the purchaser to put forward its claim, it cannot in our view be said that Regalwood's demand on 17 May for the full price necessarily demonstrated an unwillingness to proceed to settle in accordance with its obligations." In other words, because there hadn't been this impeachment at the point at which they issued the notice, it couldn't clearly be said that they weren't ready, willing and able to perform at that point. Now the facts of course in the case in front of this Court now will, in my submission, lead to a different answer on that. But in any event that's where he got to here. But then His Honour goes on to say, at the end of paragraph 81 –

ELIAS CJ:

Will you come back to that, why it's different on the facts here?

MR MILLS QC:

Yes, I will.

"Hence the issuance of the settlement notice may well have been valid." And lest I forget I'll do it now. The reason I say it's different is that here, at the point at which the settlement notice was issued, as I read these facts, the purchaser had not clearly stated that it was making this demand in relation to the failure to provide the building warrant of fitness, and because of that Justice Blanchard I think is saying, "Well, it's possible, but I don't actually in

the end have to decide this, that when the settlement notice was issued, because that impeachment had not yet take place, that it might have been valid," because at that point the purchaser hadn't said to the vendor, "You're not ready, willing and able to perform." Here, on the other hand, the fact of disablement by the vendor, at least on my submission about the core term, was clearly established, and I will take you to correspondence which I think puts it on the table as –

WILLIAM YOUNG J:
But was the complaint that was being advanced one of misrepresentation in the marketing material?

MR MILLS QC:
In part it was, for reasons that I don't know anything about, the issue about the non-completion of the precinct was put as a breach of the Fair Trading Act, and that will of course, to the extent that anything turns on that and I say it doesn't, it immediately raises the well-established principle that I think is repeated in *Kumar*, about a party being entitled to rely on a good ground for cancellation, which is exactly *Kumar* on its facts, although it wasn't the ground they relied on at the time. But in my submission the difference between saying it was a representation that the precinct would be completed and pleading it is a breach of the Fair Trading Act and saying it's a term of the contract that you're required to do that for the purposes of challenging the vendor's ability to perform, is neither here nor there. But if it were, then I would rely on the good ground/bad ground line of authority repeated in *Kumar* and endorsed, which is a long-established principle of contractual breach.

So just then to go on after that discussion about the possibility of the settlement notice might have been valid at the point it was issued, His Honour then goes on to say at [82] –

ELIAS CJ:

I'm just thinking about policy reasons behind that approach here and how the parties close on the contractual dispute between them which impedes settlement if the matter is not flagged as a breach of contract.

MR MILLS QC:

Well, the answer I would give to that is that on the authorities it's enough first of all that the purchaser here had clearly raised a number of grounds with the requisitions that had been issued, of which there were many, that it did not accept on a whole range of grounds that the vendor was the position to perform the bargain. The one about the Precinct, even if that was never raised at all, and it was, would in my submission come squarely within the principle that if they had a good ground for refusing to settle that they were unaware of at the time, then if there was a good ground that they became aware of later –

WILLIAM YOUNG J:

But they were aware of it.

MR MILLS QC:

Yes, they were. I'm just following a hypothesis, trying to respond to the Chief Justice's question, at least as I understood it. Maybe I didn't understand it.

ELIAS CJ:

No, well, I'm just really slightly worried that the Contractual Remedies Act, which was intended to simplify things, seems to be causing practitioners all sorts of anxieties and putting them through dances, and I'm just wondering whether there is in fact very good policy in suggesting that people have to be very clear about the reason that they're not settling and, if they have flagged that they have claims under enactments to compensation, whether that is properly treated as sufficient to raise this principle that they're not really willing and able to settle.

MR MILLS QC:

Yes. Well, then I'd better just complete the circle then on the Fair Trading Act claim. So it is a misleading and deceptive conduct matter. But the relief that was sought – and a copy of that pleading can readily be made available, I think my friend offered it yesterday and the Court didn't think it wanted it but it may, if that changes we can certainly provide it – a declaration was –

ELIAS CJ:

Well, if you're relying on it I think we probably need to see it.

MR MILLS QC:

All right, well, we'll do that.

WILLIAM YOUNG J:

The trouble is you're relying on a – was this claim rejected at trial or not pursued?

MR MILLS QC:

The relief that was sought in the Fair Trading Act claim was the declaration that the contract was void in its entirety.

WILLIAM YOUNG J:

Yes, but this is a retrospective order, this is relief from the Court not resulting from acts of the parties.

MR MILLS QC:

Correct. But it's a party to the contract saying that because inter alia there was a representation that the precinct would be completed and it will not be, that an order is sought, in my friend's terms, "Avoiding the agreement in its entirety."

WILLIAM YOUNG J:

Was this claim pursued at trial or was it –

MR MILLS QC:

It was – again my friend can give you the detail of this – my understanding is, and he'll correct me if I'm wrong I'm sure, my understanding is that this was triggered by endeavouring to stop the deposits being released which were being held by the deposit holder, Russell McVeagh, and that was successful. But for these purposes, at least in my submission, and think it'll become clearer in the next paragraph in *Regalwood*, the critical issue is was the vendor at the point at which it cancelled ready, willing and able to perform its part of the bargain?

So in response to the Chief Justice's concerns about these issues which ought to be clear under the Contractual Remedies Act around, particularly, contracts of sale of land, which will be the most common contract of all in New Zealand, in my submission they are clear, and these arguments around whether or not the settlement notice is the relevant time, that is not what the cases say, the cases are very clear on this, that it is at cancellation that the vendor here has to be ready, willing and able to perform, and I'll just go to this next paragraph so that it's His Honour's words, not mine, which might carry more weight. So he says, His Honour says, "However the position certainly changed as from 20 May when Property Ventures did claim a deduction." So now we're shifting from the focus on the settlement notice where His Honour had said, "Well, it's possible that that might have been valid to issue," but it changes on the 20th of May, which is after the settlement notice is issued, when Property Ventures did claim a deduction. "When Regalwood continued to insist on payment in full it was not longer in all material respects ready, able and willing to perform its contractual obligations. Although clause 9.1 refers only to the position when the notice is given, it is well established that even when time is of the essence a party to a land sale contract may not cancel unless that party is at the time of cancellation in all material respects ready, able and willing to perform its contractual obligations." And then a couple of lines down, "It may not cancel because of the other party's failure to settle unless it was at the time itself ready, able and willing concurrently to play its proper part in the settlement," and His Honour then refers to the High Court of Australia in *Foran v Wight,* and then paragraph 83 and this relates to the

exchange we've just been having about five lines down. "Regalwood had made it sufficiently clear that it would not accept anything less than the full price," this is the vendor, "And it's a lack of co-operation had made it impossible for property ventures to assess the consequences of the non-compliance with the Building Act and hence to make a sensible estimate the amount it should properly tender. Because Regalwood would continue to insist on receiving payment in full after Property Ventures sought an abatement of the price Regalwood was not in all material respects ready, able and willing to settle in accordance with its contractual obligations. In those circumstances assuming that there was indeed a breach of warranty, Regalwood's cancellation would be invalid." And that would mean in our terms it would be a repudiatory breach.

WILLIAM YOUNG J:
That is a different case because it's dealing with the term, it's not essential –

MR MILLS QC:
Yes.

WILLIAM YOUNG J:
– and where the problem was abatement of price. Here you have to say because you can't rely on abatement of price, the term was essential. Does it matter in terms of deciding whether it was essential, that it was an implied term effectively that breach of it would warrant cancellation, that it didn't occur to any of the 90-odd purchasers or their lawyers that there was such a term and let alone that it was a term that was essential to performance of the contract?

MR MILLS QC:
Well in my submission and with –

WILLIAM YOUNG J:
With, what about, to what extent is the conduct to parties after an agreement relevant to an implied term. If parties say "crikey it was so obvious" that

anyone would have said it was implicit, they themselves go blithely on as though there isn't such a term, is that really not material?

MR MILLS QC:
Well in my submission based on the authorities, no.

WILLIAM YOUNG J:
What are, are there any authorities directly on point; *Kumar* might be a bit because this was one of my complaints about the majority judgment in that case?

MR MILLS QC:
Well certainly the test in *Mana Property* which is a decision of this Court –

WILLIAM YOUNG J:
But it's an implied term. So it's a question of, sort of question of construction.

ELIAS CJ:
It's similar.

WILLIAM YOUNG J:
I think they say it is an implied term don't they.

ELIAS CJ:
Yes.

MR MILLS QC:
Well –

WILLIAM YOUNG J:
Is it implicit in the agreement?

MR MILLS QC:
It's implicit in the agreement –

WILLIAM YOUNG J:

– that breach of this contract would, that breach of this term would justify cancellation irrespective of loss?

MR MILLS QC:

Yes and of course it can be an essential term without being stated specifically as an essential term that.

WILLIAM YOUNG J:

What's the Court, what's the judgment of this Court that deals with after contract conduct? *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277?

ELIAS CJ:

Gibbons.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Might it not be admissible under that that both sides act as if there's no term that's asserted, what that – is not suggested, it's not quite as obvious as is later asserted when it all turns to custard.

MR MILLS QC:

Well I certainly don't think either of us are contending, my friend nor I –

WILLIAM YOUNG J:

No but I am.

MR MILLS QC:

– for post-contractual –

ELIAS CJ:

I think Mr Goddard is constituently unable to mount an argument like that.

WILLIAM YOUNG J:

But I'm not.

ELIAS CJ:

No I know.

MR MILLS QC:

But you're not. Well look Your Honour –

WILLIAM YOUNG J:

I've never really thought much of *Gibbons* but it's beginning to –

ELIAS CJ:

Did we overturn it?

WILLIAM YOUNG J:

No, no.

MR MILLS QC:

Might I suggest it's beginning to fester?

WILLIAM YOUNG J:

It's become more attractive.

MR MILLS QC:

But can I just try to avoid that, come back to *Mana*, the test in *Mana* as I understand it –

ELIAS CJ:

Have we got *Gibbons*?

MR MILLS QC:

– this Court's judgment, not – it's in *Mana* is in determining whether a term is essential, it's not asking what individual parties may have thought, it's a matter of the objective bystander which for real purposes is a court, standing back and looking at the contract in its entirety.

WILLIAM YOUNG J:

Isn't that what we always say about interpretation too and if *Gibbons* is right, one can look at how the parties later acted?

MR MILLS QC:

Well there's nothing before the Court really on the evidentiary base that I think would allow that to be done properly here.

WILLIAM YOUNG J:

Well I think there is, it's the dog that doesn't bark, the vendor happily goes along issuing settlement notices and your people extremely unhappily go along resisting them but it doesn't occur to them that there's actually been a breach of contract that would warrant cancellation.

MR MILLS QC:

Well I think what I need to do and if you'll bear with me, I'll just refer this to the detail?

WILLIAM YOUNG J:

Sure.

MR MILLS QC:

There are a number of items of correspondence between the two sets of solicitors acting for the purchases and MinterEllison who are acting for the vendor which do put specifically in issue the question of the Precinct, they're the ones my friend didn't take the Court to so I do need to take you to that but I think this might work more with respect, more coherently if I could do it a little later.

WILLIAM YOUNG J:

Well I've been assuming that the only complaint was a breach of, a misrepresentation complaint.

MR MILLS QC:

The proceedings certainly were issued as a Fair Trading Act claim is my understanding, yes but we'll look at the correspondence itself I think is probably the next step. But I do maintain my submission that the critical issue as the Court is saying here is not the settlement notice. The settlement notice, to put it bluntly in my submission, is a red herring in this argument. The issue is cancellation. Was the vendor at the date of cancellation ready, willing and able to perform, and so that will take us back despite the extensive and detailed argument yesterday afternoon, to where my friend was at before we went there, which is, is this a term of the contract and is it essential because if the answer to both of those questions is yes, then I do not understand there to be any dispute with my friend that then the vendor would not be entitled to have cancelled. It would be in the simple and classic operation of this area of the law, it was be a repudiatory breach on which the purchasers would be entitled in turn to cancel as they did. So this, on this wider question which you raised Chief Justice about concerns about complication here, I don't think this is complicated at all which is exactly the submission I made in the Court of Appeal that this is a, these are very clear rules and they apply right across the board with cancellation in any area including this but all others. You must be able to perform your part of the bargain before demanding that the other side do the same or the other party do the same. If you can't, you can't demand it. If you then cancel, you're rejecting in effect, repudiating the contract and that gives rise to the other parties' right to cancel.

So I think I've taken you through paragraph 84, just the last two lines. "It could not make time of the essence which is what the settlement notice does, if it was itself unwilling to perform the obligation." I mean it could not be

clearer with respect what the Court has said here and with great respect it's classic law in this area.

The only other judgment I want to take you to here is Justice Tipping's briefly, it's at page 265 and I do this because of my friend's related but slightly different argument about the fork in the road in which Justice Tipping is largely the author. And I will come back to that in *Regalwood* as well in Justice Blanchard's judgment. But if you go to paragraph 89 on page 265 he, you'll see that he refers there in a nice pithy little phrase, he refers to it, it's not withstanding but it's about six lines down, "The interdependence and concurrency of the obligations to pay and convey," and in a very pithy form that is exactly what we're talking about, the interdependent obligations to pay on the purchasers' part and to convey what was promised on the vendors' part. And then it goes onto say, "But how must it be asked, was Regalwood ready, willing and able to settle in terms of the contract when despite being in substantial breach it demanded payment in full rather than on a basis which properly reflected its breach." Now His Honour then goes onto come to this in a different way but that part of it we're on common ground.

The next judgment I need to take you to is *Holmes v Booth* which is always a horrible judgment to try to read to you because of the way it's printed. But that is in the purchasers' bundle, I think that one with a lot of material we don't need, I think, at tab 7. And it's probably easier to find a page by reference to the numbers that have been put on at the bottom right-hand corner rather than trying to work through the page numbers that they use and it's at page 110 the passage I was going to take you to here. And again it's directly on this question of the notice versus the contract itself determining the bargain. Tab 7 Justice Young.

WILLIAM YOUNG J:
Sorry what page?

MR MILLS QC:

Page 110 on the right-hand corner. And then when you get there it's on the right-hand column in the middle of that page where His Honour says, "Although the wording of general condition 8.1 speaks of settling in accordance with the notice, I do not think that the notice can alter the obligations of the party serving it under the contract. The question therefore becomes whether Dr Holmes," and you remember this was where they were all on weekly tenancies and one of them turned out to be three yearly one and that where the standoff was occurring, "The question therefore becomes whether Dr Holmes was in all material respects ready, willing and able to settle in accordance with the contract." So again it's the contract that defines the obligations and that can't be affected by the settlement notice. That just puts times, makes time of the essence. Now he goes onto a different conclusion ultimately because of the fork in the road analysis and it's a dissenting judgment here but I will deal with that again in a moment when I come to the fork in the road proposition that my friend I think is putting some weight on. So all this just circles back to the same simple point, emphasis of a term and it was essential then the vendor was not entitled to cancel.

So I want to come now to this fork in the road argument and as I understand my friend's argument is it this. That unless the purchaser cancelled before the end of the time period specified in the notice, it lost the right to do so. In other words it had come to a fork in the road as a result of that settlement notice being served and it then had to make its election prior to the running of the time period specified in the notice, that's my understanding of the argument. The short answer to that in my submission is that the fork in the road is a question of election and whether or not a party has affirmed by not acting or by acting –

WILLIAM YOUNG J:

Where does the expression "fork in the road" appear?

MR MILLS QC:

It comes from a bit further on I think.

WILLIAM YOUNG J:

So you're addressing the bit at the top of 19648/111?

MR MILLS QC:

I am, but if the fork in the road issue which Justice Tipping refers to, you'll find that I think on the next page, yes the bottom right-hand corner –

ELIAS CJ:

Bottom right.

MR MILLS QC:

– I think my friend took you to that as well. I had noted it in the margin as the fork. And it says, "In my judgment the purchaser Mr Booth came to a fork in the road on that date." Now I will be saying to you this is a dissenting judgment and to the extent that His Honour treats the fork as though it leads by operation of law to an election being made, that is with great respect wrong. What it does is put a party to an election. If they don't elect but sit on their hands they always run the risk that they may have inadvertently been seen to have affirmed by a Court looking at this, but it is not an election that is imposed by the operation of law which is the way His Honour presents it here, that you simply have to act and I'm going to go back to Justice Blanchard's judgement in *Regalwood* which makes it clear that it's a risk if you don't act and in here on the facts when I take you to the correspondence that I alluded to a few minutes ago, I will be saying to you that it was very clear that there was no affirmation here and in addition to which, and I'll have to develop this a bit more, there is no affirmation being alleged here by my friend but on the basis of the discussion we had last night about what I thought might have been a slightly confusing picture about affirmation, we have agreed what the position is and I will be taking you to that momentarily.

ELLEN FRANCE J:

In *Regalwood* when the purchasers raised the complaint, that's prior to the end of the period before the notice?

MR MILLS QC:

Yes it was, yes I think that's right in fact, but not material on the analysis that I was taking you through in Justice Blanchard's judgment would be my submission. So back then to *Regalwood* and initially to paragraph 72 of Justice Blanchard's judgment.

ELIAS CJ:

Where is that again?

MR MILLS QC:

It's at tab 10 of volume 2 of my friend's bundle.

ELIAS CJ:

Yes, thank you.

MR MILLS QC:

Sorry, I should have told you to keep it open. You'll see when you get there he's referring to Justice Tipping's judgment in *Holmes v Booth*. Paragraph 72. And the point that's being made here that I just want to draw your attention to is this. So he's referring to the rather unhappy drafting of clause 6.5, "Both its language and certain policy considerations lead us to the view that Dr McMorland is correct and that cl 6.5 does no more than confirm the position under the general law, namely that, while the contract remains on foot, the existence of a breach of warranty is not a licence for a purchaser simply to sit on its hands refusing to proceed to settlement until the breach is remedied. To adopt Tipping J's metaphor from *Holmes v Booth*, a purchaser who has come to this fork in the road is faced with only two possible routes, cancellation or performance, and once the latter is chosen to bound to perform in accordance with the contract when called upon." When it's chosen. This is a positive –

ELIAS CJ:

I'm a little confused about all of this, because these cases are cases about breach of warranty. Your case turns on this being an essential term.

MR MILLS QC:

It does.

ELIAS CJ:

So why are you bothering really with all of this?

MR MILLS QC:

Because my friend has said to this Court yesterday that the purchaser, irrespective of what the vendor's position might be when it cancelled, has to act within the period specified in the settlement notice.

ELIAS CJ:

But this is all on the basis that you are wrong. I mean the real contention between you surely is on the essentiality of – well the existence of the term, but on its essentiality, isn't it?

MR MILLS QC:

Well I wish it were. That is, in my view, quite clearly where the issue turns, but my friend, while we disagree on that, is raising this additional point, that at the point at which the purchaser, the vendor sorry, cancelled, it doesn't matter whether the vendor was ready, willing and able to perform at that point in the language we've been looking at because the expiry of the period specified in the settlement notice has run and on the basis of this fork in the road argument, as I understand it, my friend is saying that the purchaser must act within that window that is specified in the settlement notice, and in my submission that is clearly wrong, that all the settlement notice does is make time of the essence. The critical issue is the date of cancellation and the fork in the road argument which my friend relies on Justice Tipping for, as though it were a self-executing fact supportive of this view that you must act within that settlement notice window is not correct. That is consistent with and has always been the law that affirmation can be inadvertent but it's an election that's been made and it's not been, I'm not arguing whether the proposition which is repeated by Justice Blanchard that when there came a point at which the purchaser needed to elect, whether it was going to settle or whether it was

going to cancel. But it's an election. If it's – it could be made inadvertently and that's why His Honour goes onto say, "Reach this fork in the road, is faced with only two possible routes. Cancellation or performance. Once the latter is chosen –

WILLIAM YOUNG J:
You say there's a third route, actually sitting on one's hands?

MR MILLS QC:
No, no I don't say that Your Honour. I say that the, there are only two choices, to cancel or affirm and sue for damages but the purchaser is not compelled by operation of law –

WILLIAM YOUNG J:
Can do so within the time constraint by the settlement.

MR MILLS QC:
That's my point.

WILLIAM YOUNG J:
Okay.

MR MILLS QC:
And that as His Honour goes onto say, "There is no intermediate road available, nor can the purchaser suspend an election without risking default." Now that's the correct in my respectful submission, that is the correct analysis of this. It doesn't operate by operation of law that you have to do it within the settlement notice period, it doesn't alter the cases which we've been looking at or the principles we've been looking about, the cancellation is the point where the vendor must be able to perform the bargain and all that's at risk here if a purchaser sits around and doesn't make up its mind, is a Court might say, you have inadvertently made your election, you've affirmed that you're seeking damages instead. But that's a question of fact and many years ago I spent four months in the High Court with the Robert Jones Tower, was there

an affirmation over ceiling heights, that was a question which ultimately the trial Judge, Justice Henry said an election had been made inadvertently, to affirm that that ceiling height was acceptable and that's the correct analysis in my submission. So to the extent my friend is saying, as I think he is, that there is an automatic election which is made if you don't act within the notice period, in my submission that's wrong.

Now coming then to this question about affirmation not being an issue and the discussions my friend and I have had about this last night. A couple of points, the principal one is that affirmation in terms of the Contractual Remedies Act definition of affirmation under, I think it's, 7(5) is not in issue here. The vendor is not putting it in issue. Now just to start that little narrative so there's no misunderstanding about this, that was conceded in the Court of Appeal and it's recorded in the Court of Appeal judgment at paragraph 98. It was a matter of a specific exchange because of the purchaser's concern that it wasn't pleaded, that was raised and a concession was made, affirmation is not being alleged here and it's recorded in the judgment at paragraph 98 and if you want the reference to that, of course that judgment is in the volume 1 of the case on appeal at tab 3 and I think the bundle reference is 0047 but any rate it's paragraph 98. Now in the exchange my friend and I had last night about this, my friend confirmed that there is no argument regarding affirmation in the sense referred to in the Contractual Remedies Act section 7(5), no argument being made on that. But I agreed I would confirm and he's correct, that it's common ground that prior to the expiry date in the settlement notices the purchasers haven't cancelled; that's common ground.

O'REGAN J:
Sorry that the purchasers had not?

MR MILLS QC:
Had not cancelled prior to the expiry of the time period. My friend wanted me to accept that and I without hesitation accept it. It's the facts that they didn't cancel before the expiry of the notice period so to the extent my friend wants to make this argument that, as he has, that it had to be done within that notice

period, the affirmation point doesn't affect it but there is no wider affirmation issue being raised there.

Now because it's really dropped away I just note very quickly in passing, before I go to the correspondence I said I would take you to, that it's also clear from both *Kumar* and *Regalwood* that any risk of an election having been made is very easily dispelled and my friend took the Court yesterday to the passage in *Kumar* that deals with that. It doesn't take much in the way of a protest by one party saying well you're not doing what you're supposed to do, to mean that there's been no election.

So let me take you then to some correspondence which you weren't taken to previously, and this is volume 14 of the case on appeal. I'm going to take you initially, there's no tabs in here so we'll just have to turn until we find it, to page 2853, top right-hand corner.

O'REGAN J:
And what are we going to derive from all this. What's the point of this?

MR MILLS QC:
Well His Honour Justice William Young was asking me about whether the question about the Precinct had been put in issue and how and –

O'REGAN J:
And you're saying yes it was?

MR MILLS QC:
You'll form, you'll take your own view from it. It's consistent with what I said before about how it was put but in any event this is the first of the letters that bears on this. So this is 2 December 2011 and just to remind you that the proceedings that I refer to, the Fair Trading Act claim, was issued on the 13th of December, and that's prior to the settlement notices being issued. So what we've got here then is paragraph 3, "We draw to your attention, without limitation," and of course it's referring to all the copious previous

correspondence, some of which my friend took you to yesterday, "the following representations – "

ELLEN FRANCE J:
Sorry, did you say that was prior to the settlement notices?

MR MILLS QC:
That's my understanding of the chronology, I'm being told yes that's correct.

ELIAS CJ:
Those were the proceedings to stop the deposits –

MR MILLS QC:
That was their function –

ELIAS CJ:
– being paid out?

MR MILLS QC:
Yes, they sought to have, they sought an order that the contracts were void in their entirety.

ELIAS CJ:
So in the chronology that doesn't feature. What was the date.

WILLIAM YOUNG J:
I think it might.

ELIAS CJ:
I don't think it does anyway.

MR MILLS QC:
I'm just having that checked for you now Chief Justice but the, what I'm told, and I don't, I think it's been confirmed as I look across, that the proceedings issued on the 13th of December –

ELIAS CJ:

Oh it is.

MR MILLS QC:

My friend is confirming that.

ELIAS CJ:

Yes it is, of course,

MR MILLS QC:

And it's prior to the issue of the notices, and we will arrange, I think you want a copy of that don't you?

ELIAS CJ:

It's just that we have November/December 2011 settlement statements.

MR MILLS QC:

Well I think that's because they were not all on the same date, they were running successively.

ELIAS CJ:

No, I understand that, but 13 December maybe after some of them.

MR MILLS QC:

Can I just check?

ELIAS CJ:

Yes.

MR MILLS QC:

It's the distinction being drawn between settlement statements and settlement notices.

ELIAS CJ:

Oh.

MR MILLS QC:

You know how initially the settlement statements get issued and then when you want to make time of the essence you serve the notice.

ELIAS CJ:

Yes. I see.

ELLEN FRANCE J:

And the date from that point of view is the 16th of December.

MR MILLS QC:

That's what it –

ELLEN FRANCE J:

That's the expiry date.

MR MILLS QC:

Yes.

ELIAS CJ:

But the date of the settlement notices is 19 and 20 December according to the chronology.

MR MILLS QC:

That's correct, and my friend is saying that's right.

ELIAS CJ:

I see. Yes. Sorry I hadn't appreciated that.

MR MILLS QC:

No, I didn't make that clear to you. so coming back then to this letter to Minter Ellison from Anderson Creagh Lai who were acting for one of the groups of purchasers and then as you know Glaister Ennor were acting for the other and the letters largely, as my friend said yesterday, largely parallel each other on behalf of the different groups of purchasers. So this one says, "We

draw to your attention, without limitation, the following representations which have been made for an on behalf of your clients to our clients," and the without limitation is obviously a reference back to the earlier correspondence which have raised a lot of other requisitions and so on, detail property type stuff. "It was represented to the purchasers prior to entering into the agreements that the whole of the Kawarau Village (ie all three stages) would be developed, and that they would therefore own a unit within a large completed development having use of all common facilities, not just the use of stage 1 facilities. (This representation was further reinforced by the specification annexed to the agreements…," which I had to say is a contract document so form your own view about all this. But, "… which represented that the Development as being, 'part of a 17 acre master plan development comprising a variety of individual buildings set amongst landscaped parks, squares, plazas, avenues and roads'.)" So they're referring to a contract document but characterising as a representation. "It was represented to the purchasers of the Lakeside –

O'REGAN J:
Well except it says that the representation was prior to entering the agreement. It doesn't say the agreements require it.

MR MILLS QC:
No, no it doesn't. But the bracketed reference to the representation is derived from the contract.

O'REGAN J:
But it doesn't say the contract requires it either.

MR MILLS QC:
I can't go beyond what's –

O'REGAN J:
No I know you can't rewrite history.

WILLIAM YOUNG J:

Well I think we are reasonably aware that they were complaining that it wasn't going to be a precinct.

MR MILLS QC:

I thought there was some doubt about that.

WILLIAM YOUNG J:

But the complaint was that it was not, that was effectively inconsistent with primarily the representations that had been made presumably in their marketing material?

MR MILLS QC:

Well that too and I do intend and I expect my friend, I don't know whether my friend will object to this but I think there are good reasons for at least a look at the marketing materials as part of the context and also the resource consent which goes directly to one of the issues that I'm about to come to which is this was all so vague, how could there be any kind of term or let alone an essential term, this is all so vague. But when one looks at the consented resource consent plans, what becomes absolutely obvious is that from the vendor's perspective this was not vague at all, this was incredibly detailed, the plans were consented in enormous amount of detail but, as I said before, the contract was drafted to give maximum flexibility to the vendor in terms of the commitment it was entering into, not because it didn't know what it was going to do.

WILLIAM YOUNG J:

What it had hoped it was going to do –

ARNOLD J:

The other point about this letter is paragraph 4 I guess because it does talk about, "Reserving all rights to cancel, the truth of the representations were central to the purchasers and have a substantial effect on the benefits and burdens under the agreements," so although it's not put in terms of explicitly a

contractual obligation, it is certainly linked to the right to cancel and the importance.

MR MILLS QC:

It is, and it's referred to as being central. But it's a representation. "Representation is made for essential purchasers." So in my respectful submission there's, I wanted you to see this because you weren't shown it before, but the – and it's the same letter from Glaister Ennor on behalf of its purchasers but it does, if there is any quibble over whether this has squarely put on the table prior to the settlement notices being issued and prior to their expiry, that the purchaser was saying, you're not in a position to settle because you're not providing this and we're not going to settle because you can't; then that quibble would be answered by the reiteration by this Court in *Kumar* that the good ground/bad ground is a answer to, as I say I doubt that it would be really even seriously argued in light of this but if it were still being said that, well they didn't say it was a term of the contract and so they, and the Fair Trading Act ground is not a good one because of the no representations clause or something like that; then the answer would be the shift from this, to saying it's a term if this Court were to accept as the Court of Appeal did that it is a term, the contention that that had not been, that that was fatal, in my view, would be easily answered by the good ground/bad ground line of authority which is well established in contract that you –

ARNOLD J:

Well also the letter of 8 December at 2874 explicitly links, it says that, "The vendors are unable to call for settlement as they're not willing and able to settle, having failed to remedy the matters," and one of them, the third one is to remedy the misrepresentations.

MR MILLS QC:

Yes.

ARNOLD J:

So it is all linked.

MR MILLS QC:

Yes. So I don't think I need to take you to the other references I have. I did give them to you if you wanted to look at them. They're 2867 and 868, and 2876 were the other ones I had noted.

Now I think that other than just perhaps one final comment on the fork in the road, just to try and pull it together and reiterate my submission on this, my submission is that to the extent, and I think it does, that my friend's fork in the road argument relies on Justice Tipping in *Holmes v Booth* and *Regalwood*. I say first that in *Holmes v Booth* it's a dissenting judgment which is not supported by the other members of the Court of Appeal and then in *Regalwood* to the extent that he is treating it as a sort of a self-executing consequence of not acting within the settlement notice period, that is again a minority view, and the correct view with respect is that I took you to in Justice Blanchard's judgment, that election and failure to elect creates a risk of affirmation, but doesn't, it's not an automatic function of not acting within the notice period.

So that does bring us back to where I think the key issues lie, which is was it a term of the contract that the vendor would complete the Precinct. If it was it would follow from that, in my argument at least, that on settlement the vendor had to be in a position to be able to deliver to the purchasers a unit in a building that would be part of the Precinct, and it's not disputed that here the vendor was not in a position to do that. It had in that traditional language disabled itself from the ability to perform. The evidence on that is very clear, I will give you the references in case you want to cross-reference –

ELIAS CJ:

So what was the disablement. It was that they'd already sold the land?

MR MILLS QC:

The land had been separated and there was, as the contract says, I think the language is that the vendor had to carry out or procure. It was acknowledged in cross-examination in a very important cross-examination by, of Mr Garrett,

who was the initial KordaMentha receiver, that, and I will take you to it, that at the point at which they were calling on the purchasers to settle, if the vendor was required to complete stages 2 and 3, they were not in a position to do it, and I don't understand my friend to argue to the contrary. I think my friend has accepted that if it was a requirement that the vendor be ready, willing and able to perform in the way in which I've articulated it, a unit in a building that would be part of the Precinct before they could require settlement, then they were not in a position to require settlement, and that would meant that the subsequent cancellation was a repudiation which on conventional law the purchasers were entitled to accept as their own basis for cancellation, which is exactly what they did.

O'REGAN J:
But the land ownership had already been separated some time before, hadn't it?

MR MILLS QC:
Yes it had.

O'REGAN J:
So does that mean they, do you say from the moment the land became owned by a different entity that was the end?

MR MILLS QC:
Well, it may be, I don't know. The –

ELIAS CJ:
Well was it a repudiation?

MR MILLS QC:
It's possible.

ELIAS CJ:
Is that what you're effectively arguing?

MR MILLS QC:

I'm saying the inability to deliver a unit in a building that would be part of the Precinct, that they were not able to do that because of the acknowledgement in cross-examination, that they couldn't do that anymore.

WILLIAM YOUNG J:

It's treated in a case as an anticipatory breach, isn't it?

MR MILLS QC:

It is, yes. I have had this ongoing debate with Mr Barker about whether it is a breach currently of a term, or whether it's an anticipatory breach. I think it can be framed as saying a term, it was a term that on settlement they'd be able to deliver a unit in a building and so on, but it matters not. The Court of Appeal dealt with it as an anticipatory breach under the Act. It probably is the right way to deal with it. But there's no debate based on the evidence that they couldn't.

ARNOLD J:

The original sale which took place a year or two earlier I guess wouldn't have been a breach because it was to a related company and if the vendor procured the company to develop it that would have been fine, so it's really the intervening receivership and so on.

MR MILLS QC:

It is and in fact it was interesting that looking at the transcript of the trial and the cross-examination around this and my friend raised this in the Court of Appeal to try and I think, fairly, soften the impact of the passages that I was relying on for disablement, where initially there was some resistance to this proposition by the receiver that they couldn't do it and it was only really when the cross-examination really came to the sharp end that there was this acceptance that if the contract did require that this be able to be performed at the point at which settlement was demanded and which cancellation occurred, they couldn't perform. And that means that the rest of it is all very straightforward so it is, the key issue is, is it a term and was it essential, which

I know that members of this Court have been saying for some time but I needed to go back around this because of this side argument that I've been having to deal with.

So we come back to then, is it a term of the contract that the vendor will complete the Precinct and if yes, was this an essential term. Now before I, to some extent, go back into the contract itself my friend did take you through that and I have no issue with the way he did that. There are some things not surprisingly I will want to place more emphasis on but generally I think a lot of that ground has been covered but before doing that and just I think in time before the morning adjournment, I just want to comment on these criticisms that my friend has made about the lack of detail in the contract itself and I think he referred to lack of detail about what was to be built, when it was going to be built, where it was going to be built and I think that then runs into two different arguments, first of all how could it be a term when it's all as loose as a goose and secondly, how could it be essential? Now my friend also referred to all these possible future scenarios that might arise about how long could someone delay for and what sort of changes could be made. Now I don't need to take issue with any of that. It certainly is possible that on the interpretation, on the correct reading of that contract that the level of flexibility given to the vendor might at some future stage lead to a scrap between someone who's bought a unit who says that isn't what you promised me. That's for the future; it's not an issue that we've got now. On my argument what would never be in dispute is the simple proposition that the vendor had promised and was obliged to deliver a unit in a building that would be part of the Precinct. If they can't do that then there is a breach, in my submission, of the most critical and central feature of this contract based not just on the specific clauses my friend's taken you to but read as a whole and I will do that exercise perhaps more sensibly after the adjournment if that would, if I could stop it there.

O'REGAN J:

So do you say any unit holder could have sought specific performance requiring the other buildings to be built?

MR MILLS QC:

I don't think that the definition of the Precinct is as specific as at for the very reasons we've been looking at and that's why I said before that it's the very flexibility and level of discretion that the, clearly it's the vendor has given to itself under this contract, that makes the core obligation so critical because that's what the purchasers are absolutely entitled to. Outside of that they may take a risk on some of these other issues around delay, deferral and so on but what they're not taking a risk on is that they were, in my friend's interpretation of the contract, end up on the far side of the lake in Queenstown with a single building and a unit in it.

WILLIAM YOUNG J:

Like, see I think they were taking that risk because if the developers had struggled on past 2012, on the findings of the Court to date you would have been stuck with settlement, and they would have taken the risk that after they'd paid all the money over, the developer would have defaulted, and may have had no practical ability to get their money back. So they were taking that risk.

MR MILLS QC:

They were taking, I'm sorry I must be missing something. You say on the findings of the Court to date if –

WILLIAM YOUNG J:

As I understand the decision of the Court of Appeal what's really critical here is that as at the date of settlement the vendors were not in a position to complete the development of the Precinct.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Say that hadn't been apparent as at the date of settlement, the developers were still talking big, but then two days after settlement, or two months after settlement they went into receivership.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Your clients, in the form of the contracts they entered into, took the risk that they would have to settle, and then later there would be a default in circumstances where it would be practically impossible for them to get their monies back, given the way that the securities would be working.

MR MILLS QC:

Well I accept that –

WILLIAM YOUNG J:

But it was a risk.

MR MILLS QC:

I accept that in a long-term contract, like buying off the plans, there will be a level of risk in doing that. The question is what risk did the purchasers take, and in my submission there's no inconsistency between saying that the primary risk here was on the vendor in the sense that it had entered into a long-term, it had entered into an obligation which had long-term consequences. Now I will come back after the adjournment to what I think is a very relevant discussion in *Arnold v Britton*, a very recent decision from the UK Supreme Court, about the judging, what we're really asking, I think, is at the time this contract was entered into, 2006/2007 is when most of the individual contracts were entered into, is it credible that this vendor was accepting this obligation. My friend says no. I say when you ask that question you have to also look at it from the other side, is it credible the purchasers would have agreed to just buying into this on the basis all they

were entitled to was a unit in the building, but also it has to be looked at in the context at the time, and the evidence which my friend actually supported in broad terms from the Bar, about the very buoyant nature of the economy during the period when these critical decisions were being made by the vendor, but there was evidence given at the trial by one of the vendors' witnesses about the extraordinary level of confidence and building that was going on around the world really prior to the GFC at the time that these contracts were entered into, and I will be saying, just as they did in *Arnold v Britton,* that in looking at this as to whether it is objectively viewed, is it the case that the vendor has been willing to take this on, giving himself or itself all the flexibility that we've been looking at over the last day and a half, and judging that one of the things that is relevant in my submission is the economic climate at the time and the fact that funding appears to have been in place, that significant sales of both stages 2 and 3 had been achieved before this was all brought to an end, so on this –

ELIAS CJ:

I'm not sure that answers, though, the question that's been put to you, which was the risk assumed by the purchaser which was clearly, clearly existed. It's the happenstance point that I put to your learned friend yesterday.

MR MILLS QC:

Yes I remember that.

ELIAS CJ:

That things are very different because it was clear at the, you just say well that's the luck of the draw.

MR MILLS QC:

Well that's very often the case, isn't it, with all sorts of contract disputes. When did certain things happen. But it doesn't, in my submission, alter the enquiry into whether it's a term and whether it's an essential term. It might mean as a practical matter, which is partly what His Honour –

WILLIAM YOUNG J:

You're probably right as to the first, that it probably doesn't matter about whether there's a term, but it may bear on essentiality.

MR MILLS QC:

Well it might but the fact that it becomes more difficult at a later stage to be able to rely on an essential term as a basis for practical cancellation, doesn't alter the fact that, doesn't of itself alter the fact that at the time the contract was entered into that term might have been essential.

ELIAS CJ:

All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.51 AM

ELIAS CJ:

Yes Mr Mills.

MR MILLS QC:

Thank you. Just before I move on I just wanted to make one further comment in response to the exchange just before the adjournment about the risks, the allocation of risk in this. And it's a simple point really that there is risk for a purchaser in any contract that involves future performance. It may get greater as it gets longer but if there's any contract involving future performance, there is a risk on the purchaser and if you go back to the example that I said previously was the subject of an exchange in the Court of Appeal about the sale of business with a key employee as an essential term of that bargain so if we have a situation where on settlement that employee is available and the contract settles and all the complicated, potentially complicated integration of this new business takes place and two months later that employee says I'm going fishing, well then it doesn't alter the fact that it was an essential term at the point of which it was contracted.

WILLIAM YOUNG J:

Well there might be a question about that. I mean I just wonder if there are cases where obligations to be performed post-settlement have been held to be essential. Conceivably there might be and I accept there's nothing theoretically impossible about it, it's just the fact that performance is deferred until after settlement might suggest that they're not essential to settlement.

ELIAS CJ:

Yes.

MR MILLS QC:

Yes, well my response to that is really the same as the one again I suppose which is essentiality is determined at the time of contracting and the fact that essential term might require performance over a period of time, if it's essential at the time you entered into, think about building contracts with long-term performance, but if it's essential as it was in the Robert Jones Tower that the ceilings be a particular height then that remains an essential term throughout the period of performance and so it's tested at the time of contracting would be my core submission.

Now the next thing, the one other case I was going to refer to, that I got distracted from just before the break is, may be of some interest to the Court, I just will mention it to you. It's on this question of a court being asked to decide whether a term is an essential one or even I suppose even whether it's a term at all, doesn't have to redraft in detail the clause that might be in the contract already, that all the Court really needs to decide is is the term that's being contended for, does it, do we think it's an essential term and the authority that I noted on that when I was preparing for this hearing is *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [2009] 1 AC 1101 and I'll just give you the reference to it and leave it with you but it's in the bundle of authorities, so it will be the respondent's bundle at tab 3. It's really as we all know an interpretation case but on this issue you'll find at paragraphs 21 to 25. It started with Lord Hoffman's well-known judgment that I had not previously really noticed as part.

WILLIAM YOUNG J:
Sorry what paragraph?

MR MILLS QC:
Paragraphs 21 to 25. So on the numbering that's been put on it's 32 to 33 in that bottom right-hand corner and I really just draw it to your attention that the view there is that this is not a drafting exercise that the Court has to engage in, it's really deciding is the term being contended for to broadly meet the requirement of essential term.

WILLIAM YOUNG J:
Is it sensible to approach that in terms of whether it's implicit in the contract that it was essential?

MR MILLS QC:
Yes indeed. I mean a term, an essential term, I suppose it could be in a technical sense of that terminology an implied term but that's not what is being contended for here.

WILLIAM YOUNG J:
No I know that. But aren't you, are you contending for in effect that there isn't a term that the Precinct be developed broadly as proposed and an implied term that performance of that is essential?

MR MILLS QC:
Yes. At this stage I just want to take you –

ELIAS CJ:
Sorry what were you taking us to *Chartbrook* for?

MR MILLS QC:
It's the discussion in there about, what I think is referred to, I better find it then, about the, whether a court being asked to address, to find a term, whether it has to actually engage in effect in a rewording issue and I think –

ELIAS CJ:
I see, that's fine.

MR MILLS QC:
– what it's saying is it's just confirmed what a reasonable person would have thought the parties would have intended so it's not, you don't have to get out your pens and say well we'd better take this contract and rewrite a particular provision in here or anything of that nature.

So I want now to take you at least briefly into the consented plans document on this issue about lack of detail. Too loose, how could this possibly be something the vendor would agree to, and it's in volume 11 of the case on appeal. And it's in fact the entire volume. These are the consented plans when you get there. And with almost no exceptions they are stamped by the Queenstown Lakes District Council as the approved plans upon which the consent was given. And so I don't need to take you through it but what is readily apparent from this is the very, very high level of detail that had been engaged in by the vendor before it triggered the contracts. This is very, very detailed.

O'REGAN J:
But it is common ground that they intended to build the whole kit and caboodle, it's just the real issue is did they –

MR MILLS QC:
Yes, yes Your Honour this is really responding more to the point that's been made several times that the contract reflects such a loose concept of what was in issue here, that the vendor could never have been regarded as having

entered into a contract with the term that I'm contending for, let alone an essential term.

O'REGAN J:
But you're accepting that they could have substantially amended this and still completed the Precinct?

MR MILLS QC:
I'm drawing a distinction, I think, for these purposes between the discretion that the contract gives to the vendor which as I said before is for the vendor's benefit and part reflecting the need for market to lead the Development but in terms of any inference from the way in which the contract is worded that it could never have been the case that a vendor would have entered into an obligation of this kind, when you look at how loose it is in the contract, I say look at the consented drawings for which the consent was given and that in my submission –

O'REGAN J:
But that begs the issue of whether a contractual commitment was made to the, to your clients when they bought their units. I mean there's two different –

MR MILLS QC:
There are, I agree with that.

O'REGAN J:
– I think everyone accepts they did intend to build the Precinct and this is what it was going to be.

MR MILLS QC:
Yes.

O'REGAN J:
And presumably if they hadn't gone broke they would have done it but you know the question for us is what did they have to do, you know did they – was

it a term or was an essential term and if so, what did they have to do? I mean did the fact that they completed these two buildings plus, I think you've got to accept two or three others, I mean is that a Precinct –

MR MILLS QC:
Yes.

O'REGAN J:
– or is that a bare imitation of a Precinct that's not good enough?

MR MILLS QC:
Yes, well as defined it's not a precinct. But look I agree Your Honour that this isn't answering this question but it's in my submission relevant context given that this, you know the consents are in the contract, they're referred to in the contract and they were certainly known by or available to the purchasers, just as the marketing materials were which I want you to just briefly be aware of next. And so they go to the context in judging, in my submission, whether it can be seen as sensible; my friend says it would never be commercially sensible for the vendor to have entered into this and I say well in judging that this material is relevant to that assessment by the Court.

ARNOLD J:
Well it's also, I think you said earlier and I think there's material in the record anyway that simultaneously with marketing stage 2 they were marketing, sorry stage 1 they were marketing stage 2 and 3 so –

MR MILLS QC:
They were and sold substantial parts.

ARNOLD J:
– they had got themselves to the position of being satisfied that you know, to that point of if they could meet the preconditions in two they would be going ahead.

MR MILLS QC:

Yes, I think that's very clear from the record, yes. We know from the trial evidence that the stage 2 and significant parts of stage 2 and 3 had been sold and deposits had to be returned and there was a bit of an issue around that but eventually they were. So you know this is not, again I say these issues are all being determined at the time the contracts are entered into and it's important to put that in the context of the time just as it was done in *Arnold v Britton*.

ARNOLD J:

And these plans you say are, these plans predate the contracts do they?

MR MILLS QC:

They do, now on that –

WILLIAM YOUNG J:

Well don't they predate some of them?

ELIAS CJ:

No, some.

MR MILLS QC:

Well I then need to deal with this. My friend will have to be specific on this because I've had it rechecked overnight against the schedule that's attached to my written submissions which lists all the purchasers and the dates on which they purchased and that's been checked and double checked overnight, it's probably been checked again now, and the date of the consent is 28 July 2006 and subject to the fact that I think there are one or two in that schedule which came out of the trial and I think it was pleaded, there might be one or two with no date; all of these are entered into after the consent's issued.

WILLIAM YOUNG J:

Are they attached to your submission?

MR MILLS QC:

They are.

ARNOLD J:

So is it July 2006 you said?

MR MILLS QC:

28 July 2006 is the date of the consent.

O'REGAN J:

And presumably the plans were in existence well before the consent was actually given?

MR MILLS QC:

Well yes, the application would have gone and I think the application is in volume 10 if you want to, at some stage, look at that. So this is the consented plans and the application for consent and the consent itself are in the previous volume, I'm sure that would be right. So unless there's anything more on that I'll just then take you again, just really to show you it's there, to the marketing materials and they're in two volumes, volumes 8 and 9 and the evidence that was given and it's in part derived from the agreed statement of facts at the trial, is that all of the marketing was done offshore and so our purchasers here I think are all from Singapore or Malaysia. And they were all marketed by a company called Austpac, they had the contract to do the marketing.

WILLIAM YOUNG J:

Sorry what was that name again?

MR MILLS QC:

Austpac, I suppose it's an abbreviation for Australia Pacific or something like that I would think. And there is evidence in Mr Ho Kok Sun's brief, there's only two witnesses for the purchasers who gave evidence at trial but he was one of them, as I think you know already from my friend's trawl through the documents, that he was at these marketing meetings run by Austpac and

most of these documents in the marketing material brochures that you've got in these two bundles were discovered by the purchasers. So we know that these are the ones that were marketed, with perhaps one or two exceptions. So again, now this is the 17 acre master planned alpine village with, in full glory, and very detailed and it's pretty hard I think not to come away from this if you'd been the objective viewer of what was being contracted, as being a contract for a unit in this very, very beautiful alpine village that would be the subject of the contract. But beyond that I don't think I need to take you to anything specific but I do say that it's relevant context and meets the test for that.

Well I think that enables me now to cycle back, and obviously I've got to get weaving on this, to the contract again, and to a large extent I think I can coattail on my friend but not entirely. So volume 6 again of the case on appeal and I'll go to the Lakeside West one because there's a particular aspect of that that I want to deal with, and that's at page 1207. Now I don't need to go carefully through the interpretation provisions again because my friend did that, but it is, I think, just immediately noticeable the extent to which the Precinct simpliciter, or the Precinct in relation to the infrastructure, or the Precinct land, or the Precinct in relation to other aspects that are referred to in the definition, the Precinct rules and so on, the extent to which it features very dominantly in the definitions, which in my submission is just part of the context.

Then if I could turn through to section 2 and just to reiterate or emphasise a couple of things about section 2. The first one is what it's about. It's about conditions, rights of cancellation and force majeure and the first part of it, 2.1, and my friend has focused in particular on 2.1(a) and has made the argument that surely on the basis of that the vendor could not be triggering an obligation to do the entire Precinct. But what I say to that is it is, two things I suppose, first it is significant that 2.1(b) refers to the consents. So this is also conditional on getting the consents for what we've just been looking at. So that's at the heart of this from the beginning. If he doesn't get the consents the vendor doesn't have to trigger this and it's all for his benefit, it can be

waived from the vendor and so on. And it is entirely a decision for the vendor as to when in effect he's going to pull the starter gun. That in my submission once the vendor does then the vendor has accepted the obligations that go with that under this contract.

WILLIAM YOUNG J:
Presumably, were the contracts for stages 2 and 3 in evidence?

MR MILLS QC:
I don't know the answer to that.

WILLIAM YOUNG J:
It's highly likely they would have had something equivalent to clause 2 in it, in them.

MR MILLS QC:
That they wouldn't have?

WILLIAM YOUNG J:
They would have.

MR MILLS QC:
I don't know. I don't know. I didn't do the trial. All I know is that they're, you know, pretty much in this form, I suppose, you're probably right, probably the contracts just continued to roll over, and in fact for example Mr Ho Kok Sun, or Dr Ho Kok Sun, he purchased the building in stage 2 as well. He says he was told he had to, that he couldn't get Lakeside West without buying another one, so he really wanted Lakeside West that he bought the other one as well as I understand it, so yes the Escarpment, yes. So there were –

WILLIAM YOUNG J:
So he would have known that the vendors were not committing to the construction of stage 2 until they had funds, enough presales to warrant it?

MR MILLS QC:

I'm not sure that follows, am I missing something here?

WILLIAM YOUNG J:

Well if he's got a contract for stage 2 which is in exactly the same terms as this and has got a 2.1(a) in it, he would know that the vendors did not intend to trigger any obligations to complete stage 2 until they had enough presales?

MR MILLS QC:

I don't think, I mean the contracts themselves are not – I'd better just check this, yes the contracts themselves just as with the resource consent were not drawing a distinction between different stages. They are drawing –

WILLIAM YOUNG J:

This is, justifies completion of the building.

MR MILLS QC:

That's right.

WILLIAM YOUNG J:

Yes so but the building here means the building in stage 1, the similar provision in the stage 2 contract would have referred to the particular building in stage 2.

MR MILLS QC:

But I don't think it would, I don't think there'd be any reference, as there isn't here, to whether it's in one stage or another, it's just a building in the, on the Precinct land –

WILLIAM YOUNG J:

Yes.

MR MILLS QC:

– and it is relevant I think in thinking about that aspect of it that the "as consented" you'll see if you look in there at the way in which the application was made for resource consent and the way the consent was granted, it was not for stages, it was for a single development. The evidence at trial, again my friend will correct me if I'm wrong, but my understanding is the evidence is that the staging was a decision by the vendor for funding purposes so that they could have different financiers with priority under the different stages.

WILLIAM YOUNG J:

It's pretty common for a development like this to proceed in stages.

MR MILLS QC:

Indeed. But –

WILLIAM YOUNG J:

But I wasn't talking – wouldn't it have been marketed by reference to when different buildings were expected to be completed?

MR MILLS QC:

Well again the marketing materials we've just looked at and it's presented, I think, it's presented as a coherent development, it is the Precinct, it's the 17 acre master planned alpine village, that's what it's sold as if you look at this. As to how it was going to be actually constructed, I don't think there's anything in the contracts themselves or in the marketing material that would say that before we start this we have to do that, it may be that as a practical matter you would expect that but I don't think it's got any contractual –

WILLIAM YOUNG J:

I think your friend might be about to help you about.

MR MILLS QC:

Yes I'll draw this to your attention. I might have a question around it, my friend has just drawn my attention to volume 2 of the case on appeal at tab 11

which is the evidence from the planner who was called at trial by the purchasers, a Mr Giddens, and he deals in here and it's relevant to the Lakeside West argument as well his evidence, with the resource consent and you'll see that discussion in his evidence beginning at 0280 of the Supreme Court numbering and my friend is right that he says in here that it was consented to on a stage basis. I think I might want to go back, if it matters, to the consent itself and look at that.

WILLIAM YOUNG J:

Well I'm not sure it does matter and the point maybe a bit peripheral but presumably Dr Ho would have realised that he had contracts for buildings, for units in two different buildings and that the, each was subject to sufficient presales for each building in the opinion of the developer before the developer would commit to the development of that building?

MR MILLS QC:

Well I don't know the answer to that Your Honour. All that I know from his evidence, and from the materials that we're all looking at, is that this was sold and in my submission this was the term that it was to be a 17 acre master planned alpine village. A total development. As to how long it would take to get there, we've seen the flexibility given around that, but this wasn't being sold to people as well if the vendor doesn't go any further beyond stage 1, tough luck for you. That's the, absolutely not what this contract is doing in my submission.

ELLEN FRANCE J:

Well clause 5.7 envisages development in stages.

MR MILLS QC:

It does but that's a – certainly my submission on the contract generally is all these discretions are put in for the benefit for the vendor, and so the vendor is among other things warning the purchasers that it may be staged but that's not, with respect I don't think, taking the point further which His Honour might have been suggesting, that somehow that means that a purchaser has

accepted that it might not go beyond a particular stage. They're just being told it's over time and in stages. So for example the evidence at trial I think was that the big convention building that was going to go in here, might well have been crucial to the viability of the Development as a whole, certainly for the hotel apartment complex, but there was no, nothing in here that said, and it might not be built, it was just going to be a staged process, it would have to be, for a development of this complexity and size. You couldn't possibly do it all at once.

ELLEN FRANCE J:

But might this all suggest that something less than the 17 acre, or considerably less than the 17 acre, masterplan might meet the requirements of clause 5.7.

MR MILLS QC:

Well certainly not in my submission Your Honour. I don't think there's any inconsistency between saying I, the vendor, will, over time, subject to my rights under the contract to stage, to defer, to delay, to make some changes, I will develop the Precinct in, as this 17 acre, 17 hectare I suppose it was, masterplan development which is what these people were buying into, and the fact that it will be developed over time, we're really back to this argument I think about whether when there is a future performance obligation, whether that means that there couldn't be at the time it was contracted, a contractual obligation that subject to the discretions in here, and the flexibility, it would be delivered, and so that's really the only issue here. Did it have to be delivered, because here we know it couldn't be delivered, And at the same time the vendor was saying settle. You must settle.

WILLIAM YOUNG J:

Dr Ho's evidence makes it clear he knew about stages 2 and 3.

MR MILLS QC:

Yes, right, yes. So I want to be then back into the, very rapidly I can see, into the contract itself. So of these various clauses in 2, 2.9 is obviously the one

that's had the most attention, and I largely don't need to go over this again except to reiterate it and emphasise a couple of things. So again it's the purchasers being asked to hear and acknowledge. The purchaser acknowledges and accepts. So this is very similar in its structure and purpose to section 4, which is the purchaser had been asked formally to acknowledge and accept and what's been accepted is that the Precinct amenities and infrastructure will, but not all of them, will be completed at the settlement date, so it's, that's all it's saying. You have to settle, this is what becomes clear later, even though they're not completed at the settlement date and you need to acknowledge that.

WILLIAM YOUNG J:
It also says that, "The vendor can omit any facilities –

MR MILLS QC:
Yes.

ELIAS CJ:
"From time-to-time proposed to be installed or constructed," which is a further layer of contingency.

MR MILLS QC:
Yes, look there's no doubt that the vendor consistent as I said before with the evidence of trial about a success of these sorts of big developments being able to be led by the market was giving him, itself all of that flexibility.

WILLIAM YOUNG J:
But you say not all facilities?

MR MILLS QC:
Not all, no but clearly I think there might be potential for an argument in the way this is worded but what it doesn't do is that the, it does not say as Your Honour just said that the purchaser can also, the vendor can also decide not to do any of it. It never says that.

WILLIAM YOUNG J:
But say it's done buildings?

MR MILLS QC:
Well of course the Precinct amenities and infrastructure, it's defined as you will recall I think, as being the land intended for common use. The Precinct as I read this contract is a broader more encompassing contract, it is the development on the Precinct land.

ELIAS CJ:
But this clause is concerned, as you say, with the defined term which is about the areas for common use from time-to-time –

MR MILLS QC:
Yes.

ELIAS CJ:
– again that indeterminacy.

MR MILLS QC:
Well, sorry – I suppose I was going to say that –

ELIAS CJ:
So it's not about the building of different buildings unless there is some common use by all owners which is associated with it?

MR MILLS QC:
Yes well I think if you look at the consented plans and at the marketing materials you can see what's being referred to as the draft outline plans, sorry the Precinct amenities and infrastructure, it's the plazas, you know the tree lined areas that everyone's going to enjoy, the Wakatipu Steps have been mentioned previously. This is all part of the infrastructure. If the developer or the vendor sought to interpret 2.9 as relieving itself of any obligation to do

essentially what has been consented and promoted, I could see, might well be a scrap over that but I just for my purposes all I reiterate about 2.9 is that it's focused on settlement date and that the fact that these things will be done over time; the purchasers need to acknowledge and accept that it's not all going to be done when they're asked to settle and in that sense it's exactly a mirror of –

ELIAS CJ:
But the fact that it's confined to the common use, it's not the Precinct as a whole, surely impacts on the essentiality and also what you can take, you know from the flavour of the whole contract?

MR MILLS QC:
Well of course I'm bound to resist that. Certainly my submission is that it is, as I think I've said before, it is the very flexibility that's given under this contract that makes a core obligation –

ELIAS CJ:
Yes but what's the core obligation if this is looked at and I accept there's more that you point to but if you're looking simply at this clause it's only about areas of common use.

MR MILLS QC:
Which is a very substantial part of the Development obviously when you –

ELIAS CJ:
Yes. Although quite a lot has been delivered, hasn't it?

MR MILLS QC:
Well stage 1 has been delivered, mmm.

ELIAS CJ:
Well but in terms of the common areas –

MR MILLS QC:

For stage 1.

ELIAS CJ:

For stage 1 and of course the land has gone so presumably there's not access to that land.

MR MILLS QC:

No, no it's all been – stage 2 and 3 is now gone.

ELIAS CJ:

Yes.

MR MILLS QC:

So I just, for my part, my reading of this is this is –

ELIAS CJ:

But it is a fairly fluid thing.

MR MILLS QC:

Yes.

ELIAS CJ:

Whatever, the amenities and infrastructure and associated works are from time to time within the Precinct intended for common use by all owners.

MR MILLS QC:

Yes, indeed as part of my argument that the contract, building around a core obligation which is –

ELIAS CJ:

What's the core obligation?

MR MILLS QC:

To deliver the Precinct.

ELIAS CJ:

Well what do you mean by the Precinct?

MR MILLS QC:

I mean the 17 acre alpine village concept.

ELIAS CJ:

All right.

MR MILLS QC:

That is described and, defined in here and described very specifically in the way in which was promoted as sold, and which is reflected in the Precinct rules in section 5, which I do want to come to in the short time I've got because I think that, section 5 of this contract embeds the Precinct concept and the Precinct rules at the heart of this contract.

WILLIAM YOUNG J:

It's just that, I mean you are going to deal with 4.1(g) and 4.1(k) too?

MR MILLS QC:

I am. So turning then to section 4 and the first thing to just emphasise about this, or note about this, is what section 4 is dealing with, and it's development and issue of title, and principally when one looks through this it seems to me that what it is doing is again it's a disclosure and acknowledgement. It is a disclosure to the purchasers as to what they can expect and not expect, and what they will be committed to and not committed to when they're required to settle. And that's the focus of these 14 points. So the vendor discloses and the purchaser acknowledges and agrees that subject to any express provision to the contrary herein, these things apply. And so it's principally protection for the vendor I think when you read it through. So that the purchasers can't be complaining about these things or raising these issues at settlement. And the one that's had the most attention as we've gone through is 4.1(g), but you will note that 4.1(c) the unit purchaser has to be, the unit has to have attached to it the memorandum of encumbrance Precinct. Under (d) the purchaser must

be a member of the Precinct Society and any subsequent owner must be an owner. Under (e) you enter into these utility supply agreements on behalf of the body corporate of the Precinct Society, all the way through here it's Precinct repeatedly. That's very prominent here.

I'll come back to (g) in a moment. Now it's worth just comparing (g) and (h) and I think the Chief Justice you might have made a point about this yesterday, but (g) is about the Precinct and (h) is about the building itself, and of course not surprisingly under (h) there's no need for it to say, but as it does in (g), but will be completed because of course unless it's completed the owner can't ever be required to settle. So it doesn't need that there. But other than that it's very similar to (g) that it may be deferred or suspended and may be subject to change from time to time.

WILLIAM YOUNG J:
But it's a pretty odd obligation, essential obligation, which can be at the discretion of one party suspended.

MR MILLS QC:
Well it depends what you say that obligation is and so that's why I come back to say –

WILLIAM YOUNG J:
It does also say the Precinct is to be completed in stages.

MR MILLS QC:
Yes, that's right, and that's why I say the core obligation here is will complete the Precinct. Around that, like penumbra, around that core there are these fairly wide discretions given to the vendor which makes the commitment to do this a commercially practical thing to take on, because it is, as I keep saying it allows the market to lead the Development.

WILLIAM YOUNG J:

I understand the rationale but it's just, I don't think you've addressed the point.

MR MILLS QC:

All right.

WILLIAM YOUNG J:

That your contention is that the obligation to complete the Development is essential for the contract?

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

Yet this is an obligation that under 4.1(g) is one which can be suspended, deferred or suspended?

MR MILLS QC:

The Development can be suspended but the obligation to complete can't be suspended.

WILLIAM YOUNG J:

Yes I know.

ARNOLD J:

But that's true, as you pointed out, under (h) –

MR MILLS QC:

Yes.

ARNOLD J:

– and there can't be any doubt about the obligation to complete the building but you can suspend it.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

But under (k) you can't defer settlement of a completed unit because other buildings haven't been completed.

MR MILLS QC:

Yes and that's, that is exactly the position that I've taken throughout, that the fact that these things are not done at settlement does not mean that the purchaser can refuse to settle and that's what the vendor is making crystal clear through here. You can't at settlement say, well you haven't done the Precinct or you haven't done all the Precinct infrastructure and so on.

WILLIAM YOUNG J:

Or you've actually suspended all works.

MR MILLS QC:

Yes, can't complain about that.

WILLIAM YOUNG J:

You've got no, there's nothing happening on the side, you're not marketing them, you're not building them, you're sitting on your hands and you'd still be stuck with it.

MR MILLS QC:

Well then they'll be into a contract interpretation issue potentially but it's not the issue that, in my submission, this Court is confronted with here. What we have here is the complete abandonment prior to requiring settlement and the vendors saying you must settle even though there's never going to be anything more done here. And so that's why I keep saying the core element here is not inconsistent with and indeed in my submission is required by the levels of discretion that have been given here to the vendor to do this over time and to give room to deal with –

WILLIAM YOUNG J:

Looking at it sort of rationally away from the way the events were panning out in 2012, what would be wrong or unfair about an interpretation under which completion of the Development was an obligation in general terms; a failure to comply with it would sound in damages, if there was a material impact on the value of the units to be sold you could either abate the price or cancel. But if there's no effect you have to settle. I mean is there anything unfair about that?

MR MILLS QC:

Well there's going to be an effect if people have believed that they were buying into –

WILLIAM YOUNG J:

I know but that's an effect in the mind, we're talking about – I mean these are investments and we're just talking about money really, it is just about money.

MR MILLS QC:

Well Lakeside West was not an investment.

WILLIAM YOUNG J:

Sorry?

MR MILLS QC:

Lakeside West was not an investment. Lakeside West was sold and bought as a residential, a luxury residential building that would benefit from the –

WILLIAM YOUNG J:

But these are all people who live in Malaysia or Singapore.

MR MILLS QC:

Yes.

WILLIAM YOUNG J:

What were they going to do with them when they weren't there?

MR MILLS QC:

Well Mr Ho Kok Sun says that he has anticipated using it in his retirement, I think is what he says.

WILLIAM YOUNG J:

I thought there were leasing arrangements discussed in that evidence?

MR MILLS QC:

He says that he believed he would be entitled to rent it when he wasn't using it and then we're going to get into the Lakeside West argument now which I want to avoid because I feel pressed for time.

WILLIAM YOUNG J:

Okay, we'll just leave it at that, I'm sorry. I've made the point.

MR MILLS QC:

The –

ELLEN FRANCE J:

He says, "Intended when purchasing to use it as an investment property many years later after I've retired to use it as a holiday home."

MR MILLS QC:

Yes well that's the evidence. The other point I just wanted to make quickly about this is 4.2 and 4.2 of course confirms that the focus of 4.1 is settlement because that's what requisitions relate to, requisitions relate to issues that come up at settlement. 4.2 is specifically connected through to 4.1 so it underscores if necessary that what 4.1 is concerned with is issues at settlement and specifically that the purchaser cannot refuse to settle because of the various things that maybe required under 4.1 or the various things that may not have happened under 4.1 and that in particular is (g) which enables

the Precinct to be deferred or suspended. But though it has been said, I think, by Your Honour Justice William Young, it says, "The Precinct, or parts of it, may be deferred or suspended and the development of the Precinct will be completed."

ELIAS CJ:
Well it says it will be completed in stages.

MR MILLS QC:
Yes, yes, but I don't think that derogates at all from the fact that saying it, "Will be completed and subject to change from time to time, in whatever manner and for whatever reason the vendor deems necessary." So a very broad discretion on these matters but it will be completed. Then these other provisions my friend went through. Purchaser must co-operate with the development of the Precinct, and can't complain about noise and so on and so forth, presumably, and so on down.

Now 4.1(k). That clause, as you will have seen I expect, three times says that it is to be read subject to other clauses to the contract. It's the only clause in this entire contract that has three references to that and it starts at 4.1, which applies generally to all of these provisions in 4.1, subject to any express provision to the contrary. Then when you get into 4.1(k) itself, "Save as expressly stated otherwise," and then, "(subject to any other term of this agreement)." So for that reason, in my submission the correct way to interpret this contract and the role of 4.1(k) in it is to interpret the rest of the contract, setting 4.1(k) to the side, decide what that contract says without it, and then decide what 4.1(k) means given that it has to be read specifically as required to be read against the meaning of the contract without it. That's the way it works.

WILLIAM YOUNG J:
Against the meaning, any meaning expressly conveyed by the contract, otherwise expressly conveyed.

MR MILLS QC:

Well it says express at the beginning and then it says express in 4.1(k) and then it says subject to any other term of this agreement. So I think, I agree with the comment that it says "express", but in my submission what it's doing is it's making it very clear that this is a subordinate clause. This is not a clause that controls the interpretation of the contract. it is a –

WILLIAM YOUNG J:

Well say the other clause is ambiguous, it could be construed one way or the other, you say you construe that irrespective of 4.1, say, and if the meaning is inconsistent with 4.1 you ignore it, you ignore 4.1?

MR MILLS QC:

No, I don't go quite that far. I say that this is requiring, in its own terms, that before it can be interpreted the rest of the contract needs to be interpreted, because until you've done that you can't determine whether it's expressly contrary to or subject to. So this is an order –

WILLIAM YOUNG J:

But the word, it's just the word "express". I'd just be looking for something very specific.

MR MILLS QC:

Yes but, I'm not disagreeing with that Your Honour. My point is simply that it sits in a position where it's been made a subordinate clause to the rest of the contract, and so you first have to decide whether there are other clauses in the contract which do make, which do have the effect of whatever conclusion you come to on what effect they have. It's only after that exercise has been completed that it's possible to look at 4.1(k) and see where it sits in the correct overall interpretation of this contract specifically here in relation to whether there is a term requiring the Precinct to be completed albeit not at the date of settlement. So I'm really just putting a structure on it which in my submission is the one that the contract itself calls for.

So I'm going to come back then to 4.1(k) then for that, consistent with that approach to it, and –

ELLEN FRANCE J:
What meaning then does 4.1(k) have given your approach to 5.7?

MR MILLS QC:
Well on my interpretation of it I support completely what the Court of Appeal said about it, which is that it is concerned with settlement and it is reiterating the point that the purchaser cannot resist settlement because the unit at that point is not part of the completed Precinct. And I think that meaning is required in what is, I think we've all agreed, is an oddly worded clause in some ways, it's required because it is expressly stated in 5.7 that the Precinct will be completed. It also is my interpretation of 2.9 and it is also I think clear from the context of the contract as a whole, that that is what is required here and so in –

ELIAS CJ:
Are you saying that the whole of 4.1 is concerned with settlement?

MR MILLS QC:
Settlement issues, yes.

ELIAS CJ:
Even though it's not expressed in that way?

MR MILLS QC:
Yes I am saying that.

ELIAS CJ:
I see.

MR MILLS QC:

And you can see that, it's supported I think by the cross-referencing to 4.2 that the requisitions provisions are all aimed at 4.1 and it says, "Any of the matters referred to in clause 4.1 and requisitions are settlement issues."

ELIAS CJ:

Yes but it – well –

MR MILLS QC:

And we, look I don't dispute the fact that this clause is not without its difficulty but it must be read in a way that fits it into the context of the contract as a whole.

ELIAS CJ:

And so you say that all of these paragraphs are referable to settlement?

MR MILLS QC:

One way or another they are, as I read them they are the vendor disclosing –

ELIAS CJ:

The supply of body corporate, secretarial services.

MR MILLS QC:

Yes I mean I don't mean in that very literal sense. I mean that the vendor is disclosing and requiring an acknowledgement from the purchasers that this is being disclosed to them so that either there are things here that they have to accept they're going to do on settlement or things they won't get on settlement, which nonetheless they have to settle.

O'REGAN J:

But I mean how does that relate to paragraph (i) for example which is not about opposing future moves in relation to the Precinct, I mean that must be post-settlement mustn't it?

MR MILLS QC:

Yes and some of these things are post-settlement but they're requiring the purchaser to give up these things at the point of which they settle and clearly I –

O'REGAN J:

Well they're imposing a positive obligation for the purchaser before and after settlement to go along with the Precinct?

MR MILLS QC:

To not oppose – they are. But you see it means, on my submission that's consistent with the fact that the Precinct will be done but the vendor is ensuring that there will not be issues raised after they've begun to settle these purchases which will get in the way of that.

WILLIAM YOUNG J:

But look, but say they'd settled quite happily and then the developer had downed tools and the purchasers had sued on what you say is the obligation to complete, couldn't the developer say that hold on 4.1(g) says we can defer or suspend work, so isn't that – wouldn't it then be focused on a post-settlement situation?

MR MILLS QC:

Well it might well be but what is –

WILLIAM YOUNG J:

But I mean is it really credible to say this is all pre-settlement stuff?

MR MILLS QC:

It is drawing a line at settlement. And once the purchasers settle they've got rights and this is defining the rights that they don't have. They don't have a right to obstruct and complain about things. They don't have a right to complain that on settlement and thereafter that these things described in 4.1(g) may occur. That seems to be exactly what this is doing, the vendor is

protecting its position and ensuring that once the purchasers have rights, as they will have, that they are constrained and defined by what they're accepting here which is why it's referred to as disclosure, the purchaser, the vendor discloses, the purchaser acknowledges and agrees, I think that's the function of the clause. I don't think I can take that further but I do reiterate that the word that is once again singularly absent in 4.1(g) is "and abandoned", such an easy word to put in if that was what was intended. It does not say "or abandoned". It says it will complete subject to this. Can I go through then before I come back, I'm quite concerned about the time –

ELIAS CJ:

Well can you just tell me how you're proposing to address us, what topics you are intending to take us to and in what sequence because we are perhaps running out of time and I'm not for one moment blaming you for that Mr Mills.

MR MILLS QC:

Well, I want to take you now to the very important section 5 which I think has been not sufficiently engaged with, which is about the Precinct Society.

ELIAS CJ:

Yes.

MR MILLS QC:

Not just 5.7, but the structure of it, and then very quickly in passing I was going to take you into the key terms that are required to be part of the Precinct Society, which you haven't been taken to, which is an annexure to the agreements. Those have to be part of the Precinct Society terms and it is, there is evidence at trial that this effectively had to be replaced when the full development didn't proceed. There's evidence from Mr Garrett, which I was just going to give you the reference to it, that they had to draw up a new Precinct Society, different rules, because we no longer had any more than stage 1, and so in that context what this requires, at the date of contract in relation to the Precinct, as contrasted with what had to happen when the rest of the Development was abandoned, has some relevance to interpreting –

ELIAS CJ:

But the vendor, I think I am right in saying the vendor has the right to change the rules, doesn't –

MR MILLS QC:

Well yes they do but again we're getting into an interpretation argument here, but the contract says that these key terms that are an annexure to must be included in the Precinct Society rules.

ELIAS CJ:

All right.

MR MILLS QC:

So I was going to take you to that and then I will, I was going to make a couple of comments which I can probably just make on the run really right now, that the various criticisms that my friend has made about how loose the draft outline plans and specifications are. That in fact they are seen in the contract as being sufficiently specific to be a benchmark for a number of quite important things, and given I'm on that, if I could just quickly flick through this and say to you that the definition of the "unit plan" in 1.1 is benchmarked off the draft outline plans and specifications. So is 4.9, so is 5.7, and so is 6.1, so I was just going to draw that to the Court's attention. That these loose draft outline plans and specifications actually are seen to be sufficient as a benchmark.

Then I have to come back to 4.1(k) which, the issues, my friend has raised arguments around this, is so non-commercial. There's probably a few more points that could be said about that, but the law on this is clear. This Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 *has* spoken to that. More recently the UK Supreme Court in *Arnold v Britton* has spoken to commerciality. I think I can –

ELIAS CJ:

Sorry, you are going to say this –

MR MILLS QC:

Yes, I was just trying to tell you where I'm going.

ELIAS CJ:

And all I'm asking you to do is to give – so is it a case that your submissions from now on are about the interpretation of the contract.

MR MILLS QC:

They are, yes.

ELIAS CJ:

And you don't, there is nothing else you're going to develop apart from that?

MR MILLS QC:

No, it's all going to be related to that. There may be some bits of evidence I'll refer you to, but that's what I'm dealing with.

ELIAS CJ:

Yes, that's fine.

MR MILLS QC:

I would have liked to have been able to do this earlier, but I felt I had to deal with the settlement notice issue and get that out of the way.

So could I take Your Honours to section 5, the Precinct Society. Now my friend has criticised the Court of Appeal on saying that this was premised on the completion of the Precinct. In my submission the Court of Appeal was absolutely right on this. This Precinct Society is premised on the completion of the Precinct and that's confirmed by Mr Garrett's evidence that they had to do a different Precinct Society set of rules when we were down to stage 1. This issue of the Precinct Society sits at the heart, in my submission, of this contract, and that also bears on why 5.7, which my friend says it's an odd place for it to be there, it's absolutely an appropriate place to have it.

So we start out at 5.1 with an acknowledgement by the purchaser that the unit is part of the Precinct. It's not just a building, it's a part of the Precinct, and again it's really drafted to give some protection to the vendor. The purchaser acknowledges that the public will have access to the Precinct via public roads and so on. So we're telling you this is, you know, this is going to this village and you need to be accepting of this. The purchaser shall not be entitled to object to such uses of the Precinct and so on. And then we've got a series of acknowledgements in 5.2 about the Precinct Society itself and what it will be, when it will be incorporated and that the unit holder must become a member of the Precinct Society. Then it goes through in the usual way with covenants binding one purchaser to another and so on.

Then we look at 5.5 which is, "The role of the Precinct Society and the parties acknowledge that the Precinct Society has a key role in the following," and there they are, "Management of the Precinct", providing services and note significantly value enhancement. It is intended to enhance the value of this Precinct. And this Precinct is the development on the Precinct land which is the entire 17 acre area. And is to "maintain and achieve quality branding" for this. I'll just pass over 5.7 for a moment. Then we've got the Precinct Management Agreement and the various provisions about that and 5.9, "The Precinct Management Agreement shall be on terms and conditions to be agreed et cetera, and incorporating the key terms set out in annexure 1," and I'll come to that in just a second because I now want to go back to 5.7. What's 5.7 doing? Well on my submission it's doing what it is says it's doing which is disclosing. It's disclosing again similarly to 2.9 and 4.1(g) that, "The Development of the precinct is an evolving concept which the developer will develop in stages and over time. The concept and development of the Precinct maybe altered or varied as the vendor determines and the vendor shall not be obliged to consult with or give notice," and so on, "Except that the vendor covenants that it will or will procure that, the Precinct shall be developed albeit in stages in a manner consistent with the draft outline plans and specifications," and so on. So it's a very specific statement. Why is it here? Well far from it being an odd place to put it, it seems to me that when you look at the level of emphasis that is in section 5 on the Precinct and the

role of the Precinct Society, it's all confirming standing alone this Precinct and that it will be there. What 5.7 is doing is making quite sure that purchasers understand that despite the centrality of the Precinct Society and its rules and its purpose of creating an alpine village with adding value and so on that the purchasers understand fully what is set out in 5.7. So in my submission it's not an odd place to have it at all, this is an absolutely critical thing to disclose when on the one hand it's saying so much about the Precinct and on the other hand the vendor needs to avoid the risk that there is any argument open that the purchasers didn't know what they were entitled to.

So that's my, that's probably all I've got time to say specifically on that but I wanted to go then through to the key terms which are at 1236.

ELIAS CJ:
1236?

MR MILLS QC:
Yes Your Honour, 1236. And these are the terms that must be included. And you'll see that (2) is the nature and purpose of the Precinct Management Agreement, this is a key term. "Kawarau Falls Station is a unique location and is being developed as an integrated world class village resort precinct. The Precinct will comprise of a variety of buildings with different uses and a significant amount of infrastructure and will in effect function as a village. As such it is necessary that a body is established to perform a role akin to a city council," and so on. 2.3, "The Society will be established as the responsible 'Council'," et cetera, "to achieve more by collectively sharing a common focus on desired outcomes for the Precinct," and so forth.

Now you'll note 3.1 refers to the initial agreement being for 10 years. It's interesting, the initial resource consent, relevant possibly to the vendors willingness to contract to develop the Precinct was for 10 years, it had to be completed in 10 years. You'll see that in the resource consent materials. Subsequently it was amended to allow it to only needed to be commenced within 10 years, but as originally consented this development had a 10 year

window on it. Then again you'll see in the Precinct objectives, 4.1(c), "Value enhancement."

WILLIAM YOUNG J:
Sorry, why do you say these are mandatory. I don't quite follow that.

MR MILLS QC:
I say that because the 5.9 says that it must, and incorporating the key terms set out in annexure 1.

WILLIAM YOUNG J:
Oh I see.

MR MILLS QC:
Now I accept my friend keeps saying to me, subject to modification, but that's a separate issue from the one that I am on. So in my submission the Court of Appeal was right to see the section 5 as being an important part of the contract in confirming the central importance of the Precinct, and supported the more specific textual references that we've been going to, that the vendor was committing to proceeding with the Precinct.

ELIAS CJ:
But this is principally about people within the Precinct behaving and keeping things tidy and so on.

MR MILLS QC:
Mhm.

ELIAS CJ:
It's difficult to extract from it more than that and as the Precinct eventually was developed so the role would adjust in providing those sort of responses, whatever Precinct. These are the rules for those admitted whoever they are.

MR MILLS QC:

Yes, that's, I accept that Chief Justice but the – and to a large extent as it is, as it says, we're like a council, and these set out the rules of the local council, but it does go further than that because this is the Precinct as defined at the date of entering into the contract, which was the entire 17 acre development. That is the definition of the Precinct at the time they contracted, is the Precinct on the Precinct land, the Precinct land was the entire area, and it then says, Kawarau Falls Station is a unique location and is being developed as an integrated world class village resort Precinct, and the Precinct is the one we were talking about at the time of contracting, and then it will comprise a variety of buildings and so on –

ELIAS CJ:

Well that's the reason why it's necessary to have this sort of social compact.

MR MILLS QC:

Yes it is, but it's, but the fact that it requires that social compact comes after the fact, in my submission, that that is what will be done, which is consistent with many of the other provisions that we've been looking at. There is an obligation to do it, subject only to the various provisions that we've probably looked at ad nauseum by now, but the Precinct sits at the heart of this, is my submission, and section 5 addresses that and there's no oddity about the fact that 5.7 is sitting there and I might say if that's an oddity then the fact that in section 4, which is dealing very clearly with issues at settlement, there would be on my friend's argument a clause which says, this is not an essential term, that would be truly an odd place to put that, and I'm going to come back to that in relation to the very helpful case that my friend referred to yesterday –

ELIAS CJ:

That is all premised on acceptance that 4 is about settlement?

MR MILLS QC:

Of course.

ELIAS CJ:

Yes.

MR MILLS QC:

Yes, yes. So I just give you the reference to Garrett if it's of interest where he says that they have to have a new Precinct Society set up because it was now only stage 1. You'll see that in the case on appeal, volume 3, at page 0465, paragraph 50, I think it's in cross-examination, I'm not sure offhand. But I don't think I need to take you to it, I just give you that reference for what interest or value it might have.

The other thing I just note about 5.7 of course is that 5.7, unlike 2.9 and 4.1(g), are not aimed specifically at issues at settlement. It is a general statement about it will be developed over time and so on. Now shall I stop?

ELIAS CJ:

Yes. I wonder whether we shall resume a little earlier. Is that all right?

MR MILLS QC:

Can I just say, what I thought I might do, to help Mr Barker, is his argument around the common areas does require a little bit of developing. The lease term argument as we agree can be dealt with in very short order, and the Lakeside West one, while ideally it would have more time, it is capable I think, for the purposes of putting my core points to the Court of being dealt with reasonably quickly.

WILLIAM YOUNG J:

This is the 30 or 40 year term?

MR MILLS QC:

No, this is the exclusively residential argument. I think that's capable of being dealt with, not ideally, but capably dealt with pretty quickly. But the common property one does require some room and so I thought what I might do, if the Court will accept this, is let Mr Barker do that argument after this, and also his

30/40 year lease argument which can be dealt with very shortly, and I'll just fit in as best I can on the Lakeside West argument.

ELIAS CJ:

Well you might like to think a bit more about it. For myself I would really prefer to finish this argument but if you think that it will expand to fit the time available then perhaps we better do it the other way around.

MR MILLS QC:

Well the Lakeside West argument is not the Precinct argument, it's the discrete issue over whether there was an exclusive –

O'REGAN J:

So you're going to finish this argument first?

MR MILLS QC:

Finish this argument, yes.

ELIAS CJ:

I see. I'm sorry, yes, finish this argument. I hadn't appreciated that.

MR MILLS QC:

Yes, and then just move the rest of it around a bit.

ELIAS CJ:

Yes, we'll start at 2 if that's convenient to counsel.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.02 PM

ELIAS CJ:

Yes Mr Mills.

MR MILLS QC:

Thank you Your Honour. I thought it would be useful if it just quickly recapped where I'd got to by way of a series of brief submissions that are drawn from where I think I've gotten to by here, by now. And essentially it is that based on the material I've taken the Court to so far principally textural material in the contract. That the natural and ordinary meaning of this contract based on that text is that it does contain an obligation on the vendor to complete the Precinct and the Precinct infrastructure. And that is to be done substantially in accordance with the draft outline plans and specifications and of course the resource consent that I took the Court to earlier just briefly imposes its own set of very specific obligations on the Development as well and if you want to see more about that, I'll just give you the reference again to Mr Giddens who I took you to briefly before, it's a case on appeal volume 2 at 0276, tab 11 and it's paragraphs 3.1 to 3.6 where he talks about the obligations that the resource consent imposed on the Development.

I also submit to the Court that none of clauses 2.9, 4.2(g) or 5.7 would be needed if there was no obligation of the kind that I have just described to complete the Precinct. In my submission they were all premised on an obligation to complete which then has in effect curtilage around it to allow some freedom to the vendor as to how and when it has to be completed. It needs to be there because the vendor needs to clarify the nature of that obligation to complete. In asking or setting up as some of the leading authorities, including from this Court, suggest should be and considerations questions of interpretation in what is undoubtedly not the easiest of contract to work one's way through, the contending interpretation should be considered. And the contending interpretation that my friend has put forward is that all that this contract imposes on the vendor by way of obligation is a single building and its curtilage was the way it was put in oral argument at any rate, it maybe put slightly more generously in the written submissions but that's the contending interpretation of this contract. The vendor had no obligation other than to complete the single building and the unit it and the curtilage. So those are the contending interpretations and in my submission when one stands back as one must do, and considers the contract and the text that you've been

taken through both by me and my friend, that that is not the natural and ordinary meaning of this contract text and that the submission that I have made to and the Court of Appeal accepted is the preferred interpretation. Just before I leave it, there is one other matter you haven't been taken to that I think is useful in thinking about this alternative interpretation my friend has put up and if you could just go back again, if you've put it away, get out volume 6 again, which is where we had the Lakeside West agreement. There's one matter in that that I don't think the Court's had pointed out to it and I think it's relevant. So 1243 in volume 6 of the case. These are the outline specifications for Lakeside West. And you'll see there, so you know where I'm going with this, this relates to this point that all is in issue here is all that the term requires of the vendor is a single building. And you'll see that what it says in 1.1, clause 1.1 of the outline specifications is that, "Lakeside West is intended to be a luxury lakefront residential apartment building providing between 40 to 45 residential sites that will have the option of benefiting from the amenities and services provided by the adjacent hotel."

WILLIAM YOUNG J:
But they do don't they?

MR MILLS QC:
Yes, but on the contending interpretation they never had to. All they had to do –

WILLIAM YOUNG J:
Okay.

MR MILLS QC:
– I'm just testing the contending interpretations of the contract. It has turned out that way but this says that they will have it and this is a contract document and so the proposition that the correct interpretation of the contract is one my friend contends for runs into this apart from other issues that I've been dealing with. So I just wanted the Court to be aware of that. If I get time to deal with

Lakeside West of course I will also take you to some other aspects of what's in here.

WILLIAM YOUNG J:
Do we know when the developer committed to the construction of the Hilton, what's now the Hilton Hotel?

MR MILLS QC:
Did I know when?

WILLIAM YOUNG J:
Do we know when?

MR MILLS QC:
I don't know when. My friend might but I don't know when. So now I need to go back I think to 4.1(k), coming at it the way I have and inviting the Court to come with me on forming a view on interpretation and then seeing where 4.1(k) fits within that. And of course the vendors' argument is almost entirely reliant on this, not totally but almost entirely reliant on it for whether it's a term and is entirely reliant on it, as I understand it, for the contention it's not an essential term. So to go through this as quickly as I can, on the interpretation the Court of Appeal accepted which is set out at paragraph 49 of the Court of Appeal judgment and on the interpretation for which the purchasers contend, the, what 4.1(k) is doing is confirming that all the purchaser is entitled to require at settlement is completion of the unit and the building and not entitled to expect anything more than that. So it's focused again on what the entitlement is at settlement and saying the purchaser couldn't refuse to settle because the Precinct wasn't completed. So that's the interpretation that the Court of Appeal was, came to and on the other issue of awkwardness in this clause that's been touched on by my friend, the reference to that Development with an upper case "D" for Development, there are he has said to the Court contending versions of this. For whatever it matters the view for which I would contend is that it's the Development, it does mean Development in the defined sense, with an uppercase D, which is very scrupulously used

throughout the contract, uppercase D when it means the defined Development, and that seems to me to fit within the context of section 4. (j) just above it talks about co-operating with completion of the Development and the Development of the Precinct, and if you don't it's likely to expose the vendor to substantial loss or damage, and then (k) is talking about reliance on the purchase of a unit and the completion of the Development of the Precinct or of any part of the Development, and that seems to me to fit better, given you've got a reference to the building, the unit, the Precinct. What you don't have a reference to in (k) is the defined term Development, so I would certainly read that the "that" as a "the". Now, and that's developed in the written submissions, as so much of what I'm saying is, I think at paragraph 68 to 73.

Now I made the point before at lunch, and I just make it again quickly now, that (k) is three times made subject to both express clauses to the contrary, although in one case it just says in 4.1(k), "(Subject to any other term of this agreement.)" So in my submission it's a subordinate provision. It's not intended to change everything about where this contract might otherwise might take this Court on a stand back interpretation of it, and on the purchasers' interpretation, and the one the Court of Appeal came to, 4.1(k) fits very comfortably within the overall interpretation. It is concerned with the purchaser only being entitled to require at settlement the unit in the building. Then they must settle.

Now on the other hand if the vendors' interpretation is that even if there is an obligation to complete, in terms that I've been submitting for, that 4.1(k) takes away any essential term and leaves only a right to damages, which I think is one of the submissions that's been made, or one of the interpretations that's been placed on it, then a couple of comments on that. First of all, the effect of 4.2 is that there can't be a damages claim because 4.2 says, "The purchaser is not entitled to… raise any objection or make any requisition or delay settlement or claim any," et cetera, damages for any matter arising out of 4.1. So if you, if we're reading text, the claim that there's an alternative under

4.1(k) is not an essential term, can't cancel, but you can have damages, 4.2 says you can't.

WILLIAM YOUNG J:
I mean, isn't, I think this is a pretty full submission. If you can't, if 4.2 covers what's happened, then you're out of luck anyway.

MR MILLS QC:
Well I say it doesn't cover it.

WILLIAM YOUNG J:
Yes.

MR MILLS QC:
I'm only responding to the alternative interpretation that is being given, as I understand it, on behalf of the vendors, that 4.1(k) should be read either as preventing a term, or if it doesn't do that is preventing it being essential, and as I understand the argument an adjunct to that is that you wouldn't be able to cancel but you would be able to claim damages, and that, in the way in which I have just referred, seems to run into difficulty with 4.2, but not on –

O'REGAN J:
But doesn't this run against your argument that clause 4 is about settlement only?

MR MILLS QC:
I'm inviting expansion from Your Honour so that I can –

O'REGAN J:
Sorry?

MR MILLS QC:
I'm just wondering if you could expand on that a little bit so that I could –

O'REGAN J:

Well we're being asked to interpret all these clauses that are only relating to settlement.

MR MILLS QC:

Yes.

O'REGAN J:

But now you're saying the clause also deals with damages claims, which have nothing to do with settlement.

MR MILLS QC:

Well it's talking about avoiding the agreement so that's where it starts, as a result of any of these provisions that are in here and these are all provisions which at least as I have read them and as I have put it to this Court, are provisions which are identifying issues that the vendor is ensuring at the point at which settlement occurs that they are in effect tucked away for the future and this is reiterating that you can't, you the purchaser can't raise any of these issues that are listed out in 4.2, you can't requisition –

O'REGAN J:

But that to me means it's not likely to be an essential term. If you can't avoid the agreement and you can't sue for damages it seems pretty unlikely that it's an essential term doesn't it?

MR MILLS QC:

This is related, I must be, I must not be putting this too clearly. 4.1 is not the source of, it's certainly not the principal source, of where I say the essential term comes from.

WILLIAM YOUNG J:

Well it's part of it because you say that 4.1(g) incorporates the obligation that the Development of the Precinct will be completed in stages.

MR MILLS QC:

Yes, but it is the argument that there is a term and it comes from the clauses but from the contract read as a whole. The argument that's an essential term subject to meeting the argument that my friend has raised about 4.1(k) preventing it being an essential term, on my submission, at any rate, comes from the application of the test this Court has laid down in *Mana Property* which is to stand back and ask would a, would the objective bystander looking at this contract, read as a whole, consider that the answer or what answer would be given by that objective bystander when asked. Would these parties, and it's a purchaser focus, would the purchaser have entered into this contract on the basis that this was not an essential term?

ELIAS CJ:

But what we're doing is construing 4.1(k) –

MR MILLS QC:

Yes.

ELIAS CJ:

– which on its face is capable of being a acknowledgement of general application which is against that implication.

MR MILLS QC:

Yes I accept that.

ELIAS CJ:

Your response to that is that 4.1 deals only with matters relevant to settlement?

MR MILLS QC:

Yes. At settlement I suppose I should say.

ELIAS CJ:

At settlement. Well the answer, well what is being put to you is 4.2 isn't so constrained and really probably supports the argument that 4.1(k) is a general, is a provision of general application and acknowledgement of general application which is against this term being either significant or indeed a term.

MR MILLS QC:

Well it certainly would be in the way in which my friend seeks to have it interpreted. But my submission is that read in the context that that's not the correct interpretation for it and that the, that what it is concerned with as the Court of Appeal held, there is that it's focused once again on issues at settlement and saying that subject that, "The purchaser is not purchasing the unit," I'm going to skip some part out, "Other than subject to any other term of this agreement, completion of the unit and the building and the issue of a separate certificate of title." So that's, in my submission, the correct interpretation of that clause. That the interpretation of it that my friend is contending for that is actually saying that irrespective of whether this is a term of the contract in the nature that I've been contending for, that this clause specifically says it can't be an essential term, it's not an essential term –

ELIAS CJ:

I think we understand that that's the interpretation you're contending for. What is being put to you is that 4.2 is against you, and if you have a reason for saying why it's not, we'd like to hear it.

MR MILLS QC:

Well to me, at any rate, 4.2 isn't because what it's confirming is just a follow on from 4.1 saying that these matters that are dealt with in 4.1, as I described it, sort of tucked away to ensure that they won't come back to haunt the vendor after settlement, they don't allow any of these things that are generally described as requisitions, and that is an issue that relates to what happens at settlement, but doesn't seem to me to be contrary to a wider argument that it's not taking away obligations elsewhere in the contract that aren't in 4.1, which continue to be obligations that continue after settlement.

ELIAS CJ:

All right, but is there, 4.2 does not, is not something that is limited to the position on settlement. It's, you're not entitled to avoid the agreement or any of its provisions, so it's referring to any of the provisions in the agreement, so it's not tucked away, is it?

MR MILLS QC:

Well I have read it that it is because it says, "In respect of any of the matters referred to in clause 4.1," and that's why I've described it as a, and as it describes itself, it's a requisition, no requisitions clause, and no requisitions are, by definition, issues that arise at –

WILLIAM YOUNG J:

But doesn't it really mean if something's permitted under clause 4.1 you can't make a complaint about it.

MR MILLS QC:

That's right.

WILLIAM YOUNG J:

But is it the sort of claim that a pike staff means that so I'm not sure why we're sort of detaining ourselves, or to put it more clearly, being detained by you over it.

ELIAS CJ:

Well perhaps detained by me but frankly I do see 4.2 as of more general application and I think it supports the argument that 4.1 is also of general application. But I think we've probably exhausted it.

MR MILLS QC:

Yes, but the principal point I make about it is that it rules out a claim for damages. So if 4.1(k) is read as ruling out a claim for cancellation then there's no remedy that arises as a result of 4.1(k). That's all. That's, in my submission, not a probable interpretation and I will come to the wider issue –

ELIAS CJ:

But you have already said it and we do understand the point.

MR MILLS QC:

Yes, well that's all I care about at this point I suppose really, unless I can help further.

ELIAS CJ:

All right. We'll hear Mr Barker.

MR MILLS QC:

Sorry, I haven't finished.

ELIAS CJ:

Sorry.

MR MILLS QC:

Sorry, I didn't mean to say that. So now I'd like to go on to this essential term issue a little further, and I do say that in relation to 4.1(k) if it's ambiguous in relation to provisions such as 5.7, which say there will be a completion of the Precinct, then of course the contra proferentem rule applies and the ambiguity must be read against the vendor whose contract it is.

Now of course we only arrive at this point of whether it's an essential term if the Court is persuaded that it is a term and it again a point I made earlier is that it would be, in my submission, very odd to find a clause 4.1(k) specifically here, tucked away in section 4, which deals with disclosure and acknowledgement of matters that will need to be dealt with prior to settlement, a clause that says that despite what might be taken from the rest of the contract about an obligation to complete the Precinct, that there is, it is not an essential term. It could have been said very clearly, it doesn't say it clearly, and in the same way that my friend made that comment about 5.7 I say that it's even, if it would be even more surprising for that clause, given it's made subject so many times to other clauses in the contract that might be to the

contrary, or have a different purpose, for it to have that effect, and in my submission if one was just looking at this under the *Mana* test, if it is a term of the contract that the developer must complete, the vendor must complete the Precinct, then if you stood back from that as an objective bystander would and asked, is it an essential term this term that the developer must complete the Precinct and in my submission the answer to that would be a clear yes based on the way in which other cases have dealt with that. And of course *Kumar* is a good recent case. And so we really are looking at whether this clause has an effect that reaches a different one, forces a different one than I think would be reached on the application of the *Mana* test.

Now I just want to go to the *Sigma* case briefly which my friend helpfully put to the Court yesterday, a recent Supreme Court decision in the UK and just draw your attention to a few passages there which seem to me to be much more relevant to the interpretation of 4.1(k) than they are to 5.7 which was the reason my friend put it in. And the relevant, I'll just see where my own note is, yes the paragraphs I just want to draw Your Honours' attention to are first of all paragraph 9 and the passage there where the Court says referring to *Charter Reinsurance*, Lord Mustill underlined the danger of focusing too narrowly on a critical phrase (in that case, a phrase defining the term "net loss" as meaning "the sum actually paid et cetera.)" And going onto that quote, "The words must be set in the landscape of the instrument as a whole. Once this is done the shape of the policy and the purpose of the terms...become quite clear." And then further down still I think quoting from Lord Mustill, referring to the fact that, "Clear words would be required; and it would to my mind be strange if a term changing so fundamentally the financial structure of the relationship were to be buried in a provision such as clause 2, concerned essentially with the measure of indemnity, rather than being given a prominent position on its own." And then at paragraph 12 analysing, proceeding to the analysis of the facts about, just about near the end of paragraph 12 with a passage beginning, this is at line g. "Of much greater importance in my view, in the ascertainment of the meaning that the STD would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its

individual sentences and phrases which places them in the context of that overall scheme. Ultimately, that is where I differ from the conclusion reached by the courts below. In my opinion, their conclusion elevates a subsidiary provision for the interim discharge of debts 'so far as possible' to a level of pre-dominance which it was not designed to have in a context where, if given that pre-dominance, it conflicts with the basic scheme of the STD." And then finally at paragraph 14 at line c, again making much the same point talking about the risk, "Identified by Lord Mustill in that identified in *Charter Reinsurance* that of giving to a sentence, buried in a provision like clause 7.6 concerned essentially with a different situation, the effect of changing fundamentally the apparent financial structure of the relationship." And Your Honours in my submission that applies very aptly to the argument that's been made here that the effect of 4.1(k) is to accept that there is a term that the Precinct must be completed, we're working on that basis when we get to the essential term but is taking away what, as I said in my submission, I think would be the inevitable result of applying the *Mana* test; would these purchasers have entered into this if this had not been an essential term in the contract and in my submission when you looking at the Precinct and the attention it gets and the focal place it plays and everything that we looked at, the answer to that is no they would not. So unless there's anything more I can help with on that I think that's all I can say usefully about that.

The only other issue that I think that my friend has raised, which needs a little bit of attention but not much because it overlaps with other arguments, is this argument that it's not commercial for an obligation of this kind to have been assumed by the vendor. That's still within our written submissions at 74 to 79 and probably can pretty much carry the carriage of this, but I just note, the two points relied on by the vendor are that the Precinct is so poorly defined and uncertain that it could never be something that would be entered into by a vendor in the way in which the purchasers contend, and secondly that the allocation of risk under it would be uncommercial to a large extent I think those issues have been addressed under other heads of my argument, but they do both need to be tested against what this Court has recently said in the *Zurich* case, that viewed objectively by a reasonable bystander was it all so

poorly defined and uncertain that the parties could never have intended that it was a term and was it really such that this could never have been a commercial risk allocation. I've already addressed that, and that given the nature of the contract, and the times in which it was entered into, this is an entirely commercial transaction and it is subject to the very cautionary note in *Zurich* about the Courts deciding that something is not commercial.

And that, of course, has now been reinforced by the very tough case, and I think we would probably all find it a very tough case, the decision of the UK Supreme Court in *Arnold v Britton* where the Court said it's very hesitant intervention into finding something is non-commercial and as I've said earlier in that case, with the enormous effect of it having, the multiplier effect was having on the payments that this contract led to, which the Court still wouldn't interfere in, the circumstances at the time of contracting via the high levels of inflation were seen as very relevant in determining, in thinking about this question of commerciality, and I've said before and I'll just give you a reference to the evidence, in 2006 and 2007 when most of these contracts were entered into, there was an extraordinarily buoyant economic climate. My friend referred to it as being buoyant all the way through 2008, which is helpful, but in the evidence, rather than with the co-operation of my learned friend, I just give you the reference to one of the vendors' witnesses at trial, it was Mr Schellekens, that's spelled S-C-H-E-L-L-E-K-E-N-S, and the reference in the case is volume 5, at 1057 to 1058. I think it's at line 19. If there was time I would go to it but I don't know whether you want me to. I can tell you what it says. But if you'd like me to actually take you to it I will do that.

ELIAS CJ:

No, I don't think we need to, tell us what it says.

MR MILLS QC:

What it says is that in response to a question in cross-examination the short point that he makes, that it was unbelievable development was going on worldwide in 2006/2007 and he, because the focus at trial was on the damages end of the cancellation in 2012, he was really saying, that was then,

this is now. But what we're interested in here is the "then" because that's when the contract was entered into. For the purposes of the interpretation argument the damages end of this case doesn't matter, it's what was it like when this contract was entered into. I think on the, I think it's very sensible with respect, but the *Arnold v Britton* approach which says look at the economic climate when this was entered into, and the evidence at trial was it was a time of enormous optimism, property developments going on all over the place, and the evidence as I understand it was that funding was in place. As I said before the vendor had initially accepted a 10 year window to complete under the resource consent, and there's no doubt, it was accepted, the developer intended to finish it all and we know that substantial sales in stages 2 and 3 had already, had actually been achieved s well before this all fell over. So in my submission any conclusion that this was non-commercial, particularly in light of the approach this Court and others have taken is not one that should be accepted.

Just a few final points then, I've almost finished, about the essentiality of the term. Just to reiterate the way in which that test has been applied by this Court and first to emphasise that the focus in determining essentiality is on the purchaser not the vendor, that's the perspective from which the essentiality of the term is to be considered. It's at the date of contracting, not the date of breach. It can be expressed, it can be implied. And if it's essential the consequences of breach are generally not relevant. That's the benefits burden limit of the Contractual Remedies Act not the essential term one. And ultimately the question is, would a party more probably than not have not contracted if this was not an essential term? And if I set up a counterfactual for my friend's argument, would they have contracted if they had been told that all they are entitled to is a unit in a building?

The one other factor that I think does give support to the essentiality of the term is the resort premium that the purchasers paid on contracting and the, I need to just deal with this briefly because the evidence is I think a little different from the way my friend put it. The key witness on this is Mr Humphries and you will find his evidence in the case at volume 4.

There's a number of pages that it goes through dealing with a resort premium. The first one I've got is –

ARNOLD J:
Sorry I didn't pick up the reference?

MR MILLS QC:
Sorry, it's the case on appeal volume 4, and the first page I've got is 0692.

ARNOLD J:
Volume 4 thank you.

MR MILLS QC:
And then 0693 to 0695, this will be part of his evidence-in-chief and then 96 to 98, also at 0730 and then under cross-examination at 0915 to 0918 and again at 0925 to 0928. And just to summarise that what he does is he relies on a valuation that was done by a company called Fright Aubrey. This is – my friend alluded to this I think. That valuation was done for Reserve South and Reserve Central, that's why my friend was saying it wasn't for Lakeside West and Kingston West. That put a 20% premium on being part of the resort complex, the finished master planned alpine village. But what Mr Humphries did was to say I agree with that in relation to Kingston West and Lakeside West as well so there is unchallenged evidence on the resort premium at the time of entering into the contract. The challenge was or to the effect of it at cancellation, where the argument was that a cancellation at premium was different but on the evidence that at the time of contracting these purchasers paid a 20% premium over what they would have paid elsewhere in Queenstown for a standalone unit in a building was not challenged and so in my submission that too is relevant to answering, asking and answering the *Mana* test about essentiality.

The only other thing I need to do, I think there were a lot of other points that will just be picked up in the written submissions, the only other thing I wanted to do Your Honours is to just give you the evidence references to the key

parts in the transcript where the acceptance was given by Mr Garrett that the vendor was no longer in a position to continue with the Precinct. It's in the Court of Appeal judgment but I'll give them to you as well. So it's the cross-examination of Mr Garrett, two Rs and two Ts, in volume 3 of the case at tab 13, and it is at pages 0493 to 0494, and then after a little pause another round of cross-examination on this point at 0495 to 0496, and the combined effect of that, as the Court of Appeal accepted, I think it puts beyond doubt that at the doubt on which the vendor cancelled that the vendor had disabled itself from performance. It could not perform.

O'REGAN J:
But that's not in dispute is it?

MR MILLS QC:
Not now I don't think, but that's why I'm just giving you the references, in case the Court itself wants to see where it comes from. So the other issues around repudiation and so on, because they're not in dispute I don't think they need to be dealt with any further here, so unless there's anything more I can help with that's all I have to say.

ELIAS CJ:
No, thank you Mr Mills.

MR MILLS QC:
Thank you and I'll let Mr Barker do the next phase.

ELIAS CJ:
Yes.

MR BARKER:
So I've handed up, as Your Honours will see, I suppose a guide, not quite a roadmap, sort of a more succinct summary, I hope, of the argument I intend to develop today. I'm dealing with the arguments on behalf of the Kingston West purchasers and there are two arguments. The first one is the common

property argument and the second one is the one that's the lease term argument, the 30/40 year lease term issue. Just to note on the second one that only applies to around 23 of the respondents who are listed on the schedule to the submissions with the V1 beside them being the first version of the lease. So it's not a general application to all Kingston West but a number of them.

Now given the time constraints I thought I might change slightly the order in which I wanted to deal with these issues, and deal first with the lease term one for the reason that I think I can probably deal with that, subject to questions from the Court, reasonably discretely because the primary submission is going to be this is *Mana Property*. That the lease term is really not that different from what *Mana Property* was, and I'm going to invite the Court to, probably at its own leisure rather than take the Court through it today, go through the two and a half pages of *Mana Property* where Justice Blanchard explains the essentiality test, reading it with some factors I'm going to identify in a brief oral submission to supplement that.

But just so we know where we're standing on this issue, if I could ask Your Honours to look at volume 6 and this is the lease addendum so we spent a lot of time going through the main agreements but of course the Kingston West those units are going to be leased to the hotel so there is a lease addendum setting out the terms on which that lease will take place. That's made up of two parts, the first is a, what Mr Moore described in his evidence as the hardwired requirements, what has to be in the lease, and then the second part is the actual draft lease for which you're saying you're going to enter into a lease roughly on these terms. And the requirement for the 30/40 year lease term is primarily set out in the hardwired requirement at the beginning, not the ADLS lease part, the hardwired requirement which is at SC1114. And you'll see capital (A) sets out the part that you're going to procure a lease to be entered into in the terms of the attached draft and reserves again as with much of this contract, quite a degree of flexibility for the vendor as to what the final terms of that will be. But the critical one is (B) which then deals with the rental term. And so it says that, gives the rent there

at the start of it, then the second sentence, “The term of the lease shall be determined by the vendor,” again repeating that discretion above, “But the initial term of the lease including renewals shall not be greater than 20 years with further renewal periods of no more than 10 years in total.” Now in those terms that’s rather hard to understand because it’s not clear if it’s actually saying it’s 20 years in total or 30 years in total but I think the problem being those parenthetical “(including renewals)” creates some confusion but the way everyone’s treated this as being, let’s treat that as being a 30 year maximum term of the lease so we probably don’t need to get into that debate as to what that actually means and how they’ve used those words “including renewals”. And while I have the agreement here I’ll just ask you to flick through to the actual draft lease itself.

WILLIAM YOUNG J:
Sorry in your written submissions where you say 13 years, you actually mean 30?

MR BARKER:
Sorry paragraph?

WILLIAM YOUNG J:
Para 1, “The draft was an initial term of up to 13 years”?

MR BARKER:
Yes the initial term.

WILLIAM YOUNG J:
But shouldn’t it be 30 years?

MR BARKER:
No that’s the total term including –

WILLIAM YOUNG J:
One three?

MR BARKER:

Sorry I'll talk about – I was actually

WILLIAM YOUNG J:

Third line.

MR BARKER:

– just going to take Your Honour to that. So what that is referring to is if you go through to the draft lease that's attached, so you've got the lease addendum to start with setting out the hardwired terms. In that it then has at SC1129 clause 3.1, it has the, "Terminate 10 years after the expiry of the initial rent period." The initial rent period being 10 – three years, making an initial term of 13.

ELIAS CJ:

Sorry 11?

MR BARKER:

29.

ELIAS CJ:

29.

MR BARKER:

So you have the hardwire requirements at the front, 30 year maximum, draft lease attached to it sets the 13 year initial term and then the renewal term is set out in the definition earlier and actually doesn't give a term for the renewal term. So the actual draft least attached just simply has the 13 year initial term. But really the key one here is the, what is set out in that first part, the lease addendum hardwired requirements which is the maximum of 30 years.

And then we go to what's actually delivered on settlement and that's in volume 12. Again the reference is in that second bullet point in my notes of argument there. Volume 12, 2436. And just as you go through, 2443 has the renewal

term of being six terms of five years and then you have the 2445 which is clause 3.1 which is the initial term which is seven years after expiry of initial rent period which is three years. So that gives you your 40 year maximum term.

Now the question, there's no issue therefore that this was the lease as tended in settlement was in breach of that obligation in the agreement. The issue is to as whether or not that was an essential obligation and on that point the basic submission, I do have to present this in an reasonably overview way because of our time limits here, is that this is no different from *Mana Property. Mana Property* had a flexibility as to what the amount would be, what the final amount, we're guessing it's going to be this but it may be, it may go up, may go down, has an adjustment as to the price, to get to the right price, but then with a base it can go no further. You cannot be less than this amount of space, and I think that is more than analogous, that is the same as we have in this case here where you have flexibility as to the lease term. The vendor has a discretion as to how long that lease term will be, but it can in no event be more than 30 years, and that is really the heart of this submission. That this is *Mana Property* and what I was going to invite the Court to do was not read through it now but at *Mana Property* paragraphs 24 to 30 I submit that that analysis would apply equally to this case here, and I wanted to make just four comments on that, that I'll ask the Court to bear in mind as they work their way through those paragraphs.

The first comment is the point Justice Blanchard makes in that case is that you can get to essentiality through two routes. One is just the wording of your contract might say it's essential. If you can get there because it's just clear on the words they've words it is essential. The obvious example would be, "It's an essential term that," but it doesn't have to be in that form, just the wording is "essential". Or you can get your essentiality implied from the circumstances of the case. And I think this case, this aspect, if you look at the stage 2/stage 3, that's probably more at the implied end of the spectrum, you know, it's just the necessary consequence of the nature of the obligation. This one is very much driven by the wording of the agreement itself.

It reserved a discretion against a baseline for which it couldn't pass. And that was indeed the second point is that this case is important because it's a discretion coupled with the baseline, which again is what I think you see in *Mana Property*.

The third point I'd ask the Court to consider is Justice Blanchard goes on to consider the nature of the remedies that are actually available as a consequence of that breach, and he treats the fact that a minor breach of your baseline that you've set, may in fact give you very little financial recompense at all, and that is a reason why it is treated as being essential, because there's no other way you can, if you're forcing this person to simply accept financial recompense for a breach of an obligation you've imposed, there will be no financial recompense, and they've essentially been forced to accept an obligation that they never asked for in the first place. I think that's the, that's part of the issue that's I think underlying a lot of these points in the case and I think it certainly underlines the way the Court of Appeal approached this issue and my friend approached it when he takes the example of another property sold at the same time, with a longer lease period, and it sold for the same value. I think the objection to that is that it's turning the essentiality enquiry purely into a value enquiry, and that's, if you want to know what is the defining feature of essentiality is that it's not a value enquiry. That you could take the example where perhaps I buy a car and I say I want a green car. They deliver me a yellow car, and they say to me, well, green, yellow who cares, I've got 50 people here who say they'll take the green car, no value difference et cetera. But the point is, I wanted a yellow car, and that's the heart of the essentiality enquiry. It's not about these value questions, it's about what did you actually agree was essential to me in this contract. I think that's where the wording of this agreement, or this part of the case is so important, because it makes it clear that this is what, I'll accept you doing anything up to 30 years, but I won't accept you doing anything other than 30 years, or more than 30 years, and that's the heart of the essentiality enquiry. So it doesn't make much sense to say, well someone else would come along and paid for the same, for a 40 year lease, a 50 year lease, a 60 year lease. I didn't ask for that. I wanted a 30 year lease.

Finally, I just wanted to emphasise the problems that this causes for the purchasers, potential problems of course, and that could have been important to them in their investment decision, by what it does with the expansion of 10 years, and there is a reference in the evidence in cross-examination of Mr Harkness, and it's at volume 3, sorry, the reference in my handwritten note is, yes so the reference should actually be, sorry I apologise, that very, very last bullet point on the page, if you could change that to 575 as being the correct reference. So it's in volume 3 page 575. And it's a slightly unsatisfactory part of the cross-examination because you get the feeling that actually in the context of that courtroom the atmosphere may have been quite different but it's not quite captured in the transcript. But Mr Harkness said in his evidence, it doesn't matter if it's 20, 30 or 40 years long and we have this cross-examination where they're talking about what if you've got a non-performing hotel, it might matter a heck of a lot to you that it's actually 10 years longer that you're stuck in that relationship and so if you're in a situation where the hotel operator – this is line 13, "Where the hotel operator is perhaps not performing as well as the purchaser might think, in those circumstances you might very much want to be terminating or renegotiating your lease at 20 years, not 30 years?" "Yes, although to some extent you could say that if it hadn't been performing over the 20 years that's quite a long time to have a non-performing lease." "It's a very long time to have a non-performing lease, isn't it?" And unfortunately it moves on at that point but as I said you get the feeling that actually in the courtroom, not there but that is the point that's being made, it is actually a very long time to have a non-performing lease if you are, so it is – the lease term is something that could actually have importance for some, this is not something that's purely academic.

But Your Honours in view of the time, unless Your Honours have any questions on that I'd ask you to, I'd refer to the written submissions and then that overview which I think hits the key points but unless Your Honours have any questions I'll move onto the common property?

ELIAS CJ:

No, thank you Mr Barker.

MR BARKER:

So the common property issue I think, we should for this just keep that volume 6 close by because this is very much a process of us working through some of the provisions in this agreement. I realise Your Honours have been doing that for the last day and a half but believe it or not there are actually some provisions you probably haven't had to consider yet. But really the heart of this issue, if you go to page 1106 and 1107 and this is from the draft outline plans and specifications. And you then also go to the very end of our submission, we've attached a schedule with some colouring to it and the question really is in this part of the case, is how have we gone from 1106 where my submission will be the contract appears to suggest that that is in fact generally common property to a situation where the common property has been reduced to, you will see on the first page of schedule 2 that narrow 1.1 metre alleyway that takes you through to the lifts and then over the page that alleyway continues past the units themselves. So all you have in common property at the time of settlement as tendered is this narrow alleyway through the lobby to the lift and then a right to walk to your unit. And this is in the context of a hotel investment where really you'd expect or part of the submission, or develop it; you expect the purchaser to have a distinct and strong interest in maintaining not only those facilities that they need to run the unit; utilities, the boiler, those sorts of bits which are all taken away, you don't get those, but also those facilities necessary to run a hotel because this is an investment in a hotel for these people. They're buying a unit in a hotel. All of that goes, taken over by a principal unit created for the benefit of the vendor, and this idea of the investment in my hotel unit has suddenly become separated from what's actually necessary to run the hotel, you know, you don't have the two together.

ELLEN FRANCE J:

So the space that otherwise was available to be the common property that's in issue is all of that that's now got the 323KW–

MR BARKER:

Yes, yes.

ELLEN FRANCE J:

So they're two, two parts to that?

MR BARKER:

So 323KW is, covers lots of part of that, I think it's all of the green. There are also other units, the ones that are uncoloured with the PU over them, they're actually retail units that have been created, so they're separate units. But again all of these are owned by the vendor. But really our main focus is not on the retail units as such, it's on the ones really, you know, you can run your unit with, you know, the fact you need heaters or a PABX et cetera, those sorts of things, coupled with what's necessary to run your hotel, you know, this is an investment in a hotel. But the other ones are just retail units that have been created as well. And I would just like, while we've got that plan in front of you, see on 1106, going back to the agreement, those letters that are very hard to read in the middle of that blank space, I spoke to my friend's junior last night and they're happy to accept that actually says "lobby" and "reception".

ELLEN FRANCE J:

Where's that?

MR BARKER:

So just on the, so if you look in the blank space, you see that square, under that, that word is "lobby" and just below that a little bit more is "reception". We can actually, the problem apparently was that these, the discovery for these was essentially faxed through from Singapore, wherever it was, and no one has bothered to get the originals, or in fact get better copies.

So I'll come back to the agreement because really one of the issues I want to explore, that blank space, the indications, the basic argument is that that blank space is common, was generally, seen at a general level as being the

common property, and the only time in this agreement where it actually envisages an intrusion into that common property is through the creation of management unit and so we need to work out what the parties meant by "management unit" and did they mean by that, that all of that could be taken away with the common property left as being just simply that one metre corridor. I should note that, of course, that one metre corridor of the common property that's left is also essentially arrogated to the vendor because before settlement they executed a common property lease which is essentially for one year longer than this lease. So they'll always, so you're going to find when this lease comes to an end there is actually a lease in place for the common property that will run for one year longer so these unit holders not only are facing the problem that they've lost ownership and hence all the control you'd usually associate with all of these parts of the, these things that are now in the common property, that as a result of this common property lease what common property they've been left with, they're not going to be able to access anyway when it comes to the end of that hotel agreement, and the point is it puts all the power for renegotiating these hotel arrangements in someone, in the hands of someone who isn't actually one of the unit holders in this development.

WILLIAM YOUNG J:

Who actually owns these units now?

MR BARKER:

KVH now owns them, owns them all as I understand it, so once the settlements didn't take place it's essentially held on to all units. KVH, yes. So I'll turn to the agreement because there are some provisions in here which are of some importance. These are the ones, I note them under heading 2 of my notes, and I'll just cross-refer to the notes as well because I do want to try and move through this. The first point is that 4.1(b) the parties are purchasing a unit and unit title estate and just note that under section 9, this is referred to by the Court of Appeal, your starting point is that unallocated property in the unit plan is the common property. And then if we now come into the agreement and at page 1068 we see there's a definition for common property.

So it means the, “Common property to be vested in the body corporate following deposit of the unit plan.” And again that would be whatever is not allocated to a principal unit will be a common property. And the unit plan is then defined and this is an important definition for the purposes of this argument. Over on page 1071 the, “unit plan means the unit plan to be prepared in accordance with the Act to be deposited in respect of the land and which, subject to the provisions of this agreement, will be based upon the content and intent of the draft outline plans and specifications.” So it has to be based on the content and intent of the draft outline plans and specifications. And that must be as they are actually attached, because if it’s ones that maybe, because under the agreement there was the ability to vary the draft outline plans and specifications. But you could hardly have an obligation to prepare a unit plan based on the content and intent of a plan that maybe produced five years into the future so I think what that’s saying is that you’ve got to be based, the content and intent of the draft outline plans and specifications as they are attached to this agreement. And that becomes, just to foreshadow this, I think this becomes very important when we come to clause 4.9 which gives the ability to vary the common property because when you start to vary the common property you are varying a unit plan and the unit plan is subject to the limitation here that it must remain consistent with the content and intent. And one of the ways you can look at this aspect of the case is to ask yourself, at the end of the day, does that look like – is that in any way based on the content and intent of what was attached to that agreement? But so coming back, just getting ahead of myself. The unit plan has to be based on the content and intent of the draft outline plans of the specifications so it will roll forward to those and there are some indications here that parts, those aspects related to a, necessary to the running of the hotel and so forth are in fact part of what you are purchasing and what you're expecting to receive. And if you go to page 1097, we get the general description describing it as with a restaurant, bar, lounge, front of house, business centre, car parking, conferencing and meeting facilities. And then under “building description” all the amenities et cetera, the last quarter of that paragraph, “The main entrance on the north elevation at level 3 and is accessed off the adjacent footpath beneath the canopy. The entrance leads

onto the reception area, lifts and a generous lounge. The entrance to the carpark is also et cetera, et cetera." Just passing over the next page which just notes "Building services" and the like referred. And then over on 1099, one point is it's slightly minor in a sense that it's only talking about lighting but it is of interest in that it's grouping together the idea of what you're expecting in your apartment and what you're expecting in your front of house areas et cetera. So apartments you get halogen lights; front of house, common areas, combination of pendant lighting; back of house office areas halogen lights et cetera, et cetera. So it is linking the idea of it's not just your unit. It's something more than that.

And then we go forward to the, I won't take Your Honours back to that plan, you've seen that plan but that's then the one that's attached to the agreement.

I then want to come forward to clause 4.9, and this is on page 1076. So this is what's relied on, the Court of Appeal and the High Court also, to the basic argument well even if it's common property what's specified there, you can vary it as you like, and the point I want to, there's really three points I want to make about this clause, because it says in the middle of 4.9(b), "Varying, altering, adding to or omitting parts of the common property," and that's the power that's relied on to say well you can do what you like to the common property. I think the first point to note about that is it's actually recognising that there is common property already identified, otherwise why would you be having this power to vary it. So on the plans you've got, with that blank space, there is common property there because it's telling us that there is, and we can vary it. Well what is the common property, well it's got to be that unallocated space that is not otherwise contained within a principal unit.

The second point I want to make about that is that if you're going to vary the common property, you will be varying the unit plan, because that's what creates the common property, and you then have to come back to what is your restriction on the unit plan. The unit plan must be consistent with the basis for the draft outline plans and specifications as they are.

O'REGAN J:

But a definition wouldn't modify a substantive clause, would it?

MR BARKER:

Well it has to get contained in that. I mean that is where it will be reflected, what the common property is, so –

O'REGAN J:

But this is the covenant, be otherwise just describing what it is. There's no covenant in the definition.

MR BARKER:

But what you are buying is the unit on the unit plan, and that unit plan – well I suppose if Your Honour's point were correct you could do whatever you liked to that unit plan, alter it however you like and say it doesn't matter as long as it doesn't affect value. But what the contract is saying is that you're going to get your unit, it's going to be described on the unit plan, that's what we're getting told in our definitions, and –

O'REGAN J:

The contract says you're going to get common property but it can be varied, substituted, taken away and so on, and that's exactly what happened.

MR BARKER:

Yes, but that's, I think that's my point is that, if you are going to do that, you are altering the unit plan. So this is talking about a whole range of things. You can change all the other bits in the specifications. You can change it to, you know, different wood, different lights, et cetera et cetera. But once you start playing with the common property, you alter a unit plan, and we've been told that what you're buying is a unit as defined in the unit plan, and the unit plan can only be altered based on the current draft outline plans and specifications.

WILLIAM YOUNG J:

But if you alter the draft outline plans then the unit plan will follow that.

MR BARKER:

That was my point when I went back to that definition. I said when it says based, consistent, if you go back to the definition of "unit plan" when it says, "based upon the content and intent of the draft outline plans and specifications", my submission would be that that has to be as they are at the time of this contract because otherwise you're saying that they can be based on the content and intent of plans that may be made five years in the future, which would be a reasonably meaningless concept to put in.

O'REGAN J:

Well if that's what you sign up to, that's what you sign up to.

WILLIAM YOUNG J:

I suspect they may have signed up to that.

MR BARKER:

But I, that's the point is I don't think that is what you're signing up to. It is saying it must be based on the content and intent of the draft outline plans and specifications. That must mean for this purpose, as they are at the time of the agreement, because otherwise what is the point in those words to say, "based upon the content and intent," of plans that we might develop five years into the future, well I mean that's just meaningless. So I think that you need to read 4.9(b) as subject to that qualification, that if you are going to start, that you are going to start playing with that common property, you need to do so in a manner that is based on it's hardly a high standard here, I mean it's only based on the content and intent, what is actually set out in that agreement. That's hardly an unusual proposition to make in an agreement for sale and purchase, to say, it ain't going to be exactly this, but it's going to be like that. So I don't accept that it's a completely unrestricted right under 4.9 to vary as you choose.

The third point I want to make about 4.9 is that it doesn't actually suggest the creation of a principal unit, or a new principal unit. It perhaps in a different context may, if you had to work, you could maybe find that obligation but it doesn't actually expressly say that and in this case we'll see that really to the extent that it is apprehended a new principal unit will be inserted into that or taken out of that common property, that's within the concept of what is the management unit and that's really where this whole point leads to, so this is just really making the third point here that's not actually expressly giving you the power to create a new principal unit; you're going to find that power elsewhere and that's when we get to the draft lease addendum.

So it's probably a good point then to move from the actual heart of the agreement itself through to the lease addendum and we find that starts at 1114 and we get nothing in this hardwired, again I'm using Mr Moore's words, hardwired part of the start about this idea that some new unit is going to be created. And really the relevant provisions start over at 1123 and there is an interesting provision there which is definition for "common areas". And it means "those parts of the building now or hereafter designated by the body corporate," so it suggests that the body corporate has the power to in fact designate them, "for common use and enjoyment in relation to the building, and includes access ways, driveways, footpaths," so on, "forecourts, plaza, entrances, ground floor foyer, lobbies, vestibules, passageways," et cetera, et cetera. "Shared toilet facilities," because all of these are of course taken, "recreational facilities and all appurtenances and conveniences of and in relation to the building which are not the subject of exclusive occupation pursuant to this lease or any other lease in the building and includes all areas designated as common property." And a couple of points I want to make about this is that first is that "those areas subject to exclusive occupation" would appear to be a reference to retail units, because if you go down to the "Revenue definitions" down at "gross revenue" and "gross unit revenue" you'll see that this, so this is the revenue, well the revenue these unit holders are going to derive is quite a complex task but the key drive is for the money, the cash coming into these gross revenue figures there and they exclude from

that money from businesses operated in those common areas. So they get that money. But the second point is that –

WILLIAM YOUNG J:
I've slightly lost the point of that sorry?

MR BARKER:
I was just dealing with that lease part so we can just put that to the side if you like, but where it says under that definition common areas, "not the subject of exclusive occupation pursuant to this lease or any other lease in the building," that's really I think dealing with the retail units.

WILLIAM YOUNG J:
Right.

MR BARKER:
And the second point I really wanted to draw from that is that it does suggest control by the body corporate of these areas such as floors, lobbies et cetera, et cetera.

The next point is over the page at 1125 and this is really what the High Court and Court of Appeal based the right of the vendor to claim this property is that there's a reference to a "management unit" and a "management unit lease". So it first says "management unit" and that doesn't actually necessarily require the creation of a new principal unit, it just says it will be those principal units that are identified but I accept that the position at trial appears to have been that, it suggested a new unit will be created out of the "common property" so to speak, subject to what that – but it was common property. So it does suggest that there's going to be a creation of a new principal unit and then that is going to be leased. And so really that's from its roundabout way is coming to the heart of this whole argument, is that you've got, what we'd submit, is the common property shown on that plan, you've got an acknowledgement that you're going to be putting in a management unit into that common property somehow. The question is what is the content of that

management unit and I'll come to that in a – one minute just after I just note one more provision in this agreement. And that is the dreadful subparagraph (m) on the next page which there was an interminable, I don't want to say, interminable cross-examination but a lot of time spent at trial on this particular issue and it was all about whether or not there was agreement for a common property lease et cetera. But the point I just wanted to make, so this is – what this provision is, is that you basically get, in a rough form you get your gross revenues and you deduct the operating costs to get the unit entitlement. So these are the costs that can be deducted and it says, "all rent, expenses and outgoings incurred by the lessee in its capacity as lessee in respect of the management unit and the lease of other hotel areas," et cetera et cetera. The point I'd make is that it's envisaging that the lessee which is KVL which is the person ultimately owns the principal units that are created would be a lessee of those units, it wouldn't be the owner of them, it would be the lessee of those units.

So I can now probably move quite quickly to the key parts of the submission on interpretation. If Your Honours go to my handwritten document and over at point 3 of my handwritten note, my notes for argument; the first bullet point I dealt with when I showed you what the schedule as attached to the written submission, so what you get is that at settlement, having seen what the agreement actually says, at settlement you've got this new principal unit created and it owns everything. It even owns the common area toilets, it owns the utilities, it owns the PABX, the gas, the water, the plant et cetera. It does not just – you can almost see as gradation, it's not just what you need to operate the unit, you know just the basic things like the boiler room or something like that, it's that and it's what you need to operate your hotel as well. It's everything and all you've got is this one metre narrow corridor that you can scurry to your room without being bothered otherwise by other people. And I note also the common property lease and the consequence of this is really if the lease were to come to an end for any reason, so imagine your hotel operator says that I don't want to continue with this, say I only actually want to take two floors of this building, I don't care about the people on the last floor, they're not going to be subject to a new lease or anything like

that. The people on that floor, those people who are outside of that thing or people who don't want to go back into that arrangement, how are they ever going to operate any sort of hotel facility that's anything better than really some individually privately managed book-a-bach type arrangement where they arrange for someone to scurry through that hallway up to their room and pop in there. They've lost the ability to manage this as a proper – the unit holders as a group through the body corporate lost the ability to operate this as a whole functioning investment, they're subject to the interests and the demands of someone who is not an identity of interest between you. They are not the unit holders. These people are people who've actually got a great deal of leverage over unit holders. And I've given some references there where Mr Moore makes that point.

But I will come to Mr Moore's evidence now. So really paragraph 4 I make the argument as to how we interpret that. And I've already made the point about clause 4.9, that I think it is subject to that limit in the definition for the unit title. But really over the page at the second bullet point where coming to what the heart of this is and it's what do you mean when you say a "management unit" and there seems to be really two differing interpretations that are put forward on this issue and the first is Mr Moore's and that's at volume 2 of the evidence and I will take you to this because I think he's got some helpful comments that he makes. And at page 39 –

ELIAS CJ:
Sorry what volume?

MR BARKER:
Volume 2, page 391. And at the bottom of that line 30, "If instead the KVL owns one or more of those management units, its cost of ownership would be expected to be essentially the same as the rent it was going to pay." "It would if they were used for management purposes, but that's where the problem arises. They're not – the management units are, that I would, the management units that I would normally expect to be included would be things such as, you know, an office staffrooms, but the way the management units

have resulted in the unit plans, the management units now take into account other areas that you wouldn't expect to be management units, so you're deprived, you're paying the costs on those, I accept, but you deprive from the revenue." And he goes on, in fact I won't take Your Honours through it but I would ask you to read pages 369 through to 399 and I will take you through 399 because I think that's, he makes the point at a number of spots there but the best expression is at 399. So looking at it from two different perspectives, one what does it possibly mean in management 2, what would you expect would be left in the common property? It's the top of that page. "Not, not really because again you put this in the, you need to put this in the context of a hotel. So you need to think in terms of what are the, what are the facilities that are going to be important for, that are going to be important for the hotel. The obvious one is reception." I'll ask Your Honours to read that, it's probably quicker than I talking, saying it to you. So that's really the interpretation that we're contending for is what is meant by management unit. It's going to be limited to those areas such as staff, offices et cetera, et cetera and it's not going to include those areas that are necessary for you to in fact manage your investment here which is the point that he makes in that –

WILLIAM YOUNG J:

If you had any management unit it would make it hard to, for the unit owners as a group to manage their investment in the manner you postulated. Say for instance the management unit consists of the reception area in a back office, it would be quite hard to, for the unit owners to tip out the lessee and run it as a sort of a commercial apartments.

MR BARKER:

It would be hard, not as hard as if you didn't have that at all. But the other side of this is that of course they're not actually going to actively manage all this, this is always going to get passed onto the hotel operator to have exclusive use of. And the hotel operator is the person who is going to run your reception and that sort of thing. But it didn't, that didn't necessitate that you actually passed the ownership of it to that person because – and you can see the perfect example is the common property lease, they've actually done

a lease with KVL there to pass the use the use of the common property, no reason why that couldn't have been for all of it. And that's really the nub of the objection, it's not that someone's, you'd expect someone's going to manage it, of course they're going to manage it, the nub of the objection is that you actually now no longer own it and no longer have the ultimate control over it. So that's really the problem with it. And I mean there will always be problems if people do in fact separate but at least those problems are going to be handled within your body corporate. You know they're going to be handled.

WILLIAM YOUNG J:

But I'm sorry as soon as you've got the idea of a management unit that's not, I suppose by definition isn't going to be common property, then you are going to have the potential for a fly in the ointment?

MR BARKER:

There is and again what is your protection, it's going to be who's going to control that management unit. I mean you can, in a normal – we think about a, I'm paraphrasing some, I'm no expert on the Unit Titles Act but in just a normal apartment building your management unit might be ground floor unit 1 where the caretaker lives, gets reduced rent et cetera, et cetera and that's going to be held as dealt, it will be dealt with in your common, your body corporate rules as to what their rights are et cetera, et cetera. So it's not necessarily that it's this. You could have done this with this all being common property and just said well that's going to be notionally the management unit. The management unit has no meaning in the Unit Titles Act; it's just a name you give to something. You could have if you wanted to if it's all just common property and we're going to separate off some perhaps to, you know be leased to someone or dealt with by some retail unit, we're going to do this in this way but at least the control lies with your body corporate, it's not lying with someone else who's – I wouldn't say fundamentally opposed but they don't have an interest in your ultimate financial driver here which is that I'm offering you a room that a tenant can stay in. You know they're not the people who, they're not the people with the interest that drives this investment but you've

got someone who can stand in the middle and say you've got to come through my reception though.

And so look I will just quickly, I see it's 3.30 and I've got to give Mr Mills some time as well as Mr Goddard. Just summarising those points that I make there, I submit that the Moore approach is really the more preferable approach that we should take which is the limited approach to what is meant by the carve out for the management unit, consistency with the unit plan. More commercially sensible for the very reason I've just explained. And finally if there is any ambiguity and I think it's probably fair to say that it is ambiguous as to what is meant by the term "management unit", that ambiguity should be resolved contra proferentem and I've given the references there where in the Court of Appeal and also in the Supreme Court in *Firm PI 1* recognised that that still has a role to play in the situation of true ambiguity.

And so finally the essentiality in my submission flows simply from the recognition of the obligation. If the Court were to recognise that it was an obligation to keep those areas within the control of the unit holders then it must necessarily have been essential to their decision. Because it's in many respects, it's the reason why you found the obligation in the first place, if you found that obligation it's for those same reasons that will motivate you to treat it as being essential. Unless the Court has any further questions?

ELIAS CJ:
No thank you Mr Barker.

MR MILLS QC:
I'm aware that we're really running out of time so I'm going to have about a five minute [inaudible] I think to give you the structure.

ELIAS CJ:
Well what time do you require Mr Mills?

MR MILLS QC:

Well the time I would like and the time I've got are different. So there is a, I think on the Lakeside West issue, it's a narrow point, I know it hasn't –

ELIAS CJ:

Sorry what time would you like?

MR MILLS QC:

10 minutes.

ELIAS CJ:

Yes that's fine, yes that will be fine won't it Mr Goddard?

MR GODDARD QC:

Absolutely Your Honour, 13 or so should be fine.

MR MILLS QC:

That's very generous of you. Let me then very quickly try to give the structure of this. I'll need the volume 6. The argument here in broad brush terms is that the Lakeside West units were sold and purchased as exclusive residential units. The word "exclusive" is not in the contract but that is the term for which I contend. The contract which we'll need to look at is the same one we've looked at so many times in volume 6 and if we just start in on it it's at 1215 or anywhere thereabouts but the part that really matters here I think is the annexure which describes what Lakeside West is and that is at 1243 and you'll see it's described there, "General description, Lakeside West is intended to be a luxury lakefront residential apartment building," and so on. Now I acknowledge immediately it says "intended" but the – and I haven't got time to go back over the marketing and resource consent issues but the resource consent issue in particular is important and I'll see if I can do this without having to go into the documentation in great detail.

The first point I make is that we know what residential means here because of the zoning. The zoning for Lakeside West was high density residential and

that's in Mr Giddens' evidence and also in the resource consent documents which I took the Court to earlier. It's high density residential and it does not permit any commercial activities nor any liquor licensing within that zone so whatever maybe open to argument about the meaning of residential as expressed in clause 1.1 what I say is that the resource consent tells us absolutely what was the meaning of residential. And the position we had at the point at which the purchasers were being told to settle was that what we then had was a building that was in a different zone. It's in a mixed use residential and commercial zone which is the result of an application made by the receivers to try to improve the benefit in the receivership for BOSI which was the debenture holder who appointed the receivers. Don't take that to be a matter in dispute, it was in a different zone and that zone was a result of a specific application which changed it from high density residential and required consent to instead be mixed use residential commercial. What that was combined with was a, an encumbrance that was sought by the receivers as part of this transition from residential into a consent that allowed short term accommodation, commercial activity and as part of it allowed a liquor license, mini bar services and all the things that you would really associate with a hotel type operation, to come into this building. And the encumbrance that was sought which was the requirement under the Building Act was that there had to be provision made for disability access in order to run it in this way and so the evidence is that there was two ways in which the requirement for the encumbrance would be satisfied. One was to provide all of the disability units and access that the encumbrance required, the other was to have less of that but to connect, and I'll explain what I mean by "connect" in a moment, to connect Lakeside West to the adjacent hotel operation so that any letting of units in Lakeside West then had to be through the Hilton, so that's the result. So what we started with is described as a luxury residential apartment building and we know what that is from the zoning and on settlement the purchasers are being told that you now have been asked to take a unit in a building that is mixed use, short term accommodation permitted. Under the previous zoning only letting for more than three months was permitted. So somebody could come in, you could let someone else have it but there was all long stay which is consistent, in my submission, with the concept of a luxury residential

building where you know your neighbours, where it's a community as opposed to something where today you might have Jo Bloggs next door and down the corridor and the next day you might have Jo Smith. And then on the encumbrance with this choice available to either put in all of the disability units that could have satisfied the encumbrance, the decision that was made by the receivers was to do it in a way which linked it because of fewer disability units to a requirement of management for any letting by the adjacent hotel. So the detail of this I think is in the written submissions, I'm sorry this is an overview, but that's the nub of the complaint and the change, that they have signed up and purchased a residential luxury unit. These were expensive units, and that's what they are being told to take on settlement. And the submission clearly that flows from that is that the requirement that it be a luxury residential unit was an essential term, that's what the purchasers bought, that's what they were buying and I'm sure reference will be made to the fact that Mr Ho Kok Sun, I think it's been referred to already by Your Honour, has said that he wanted to be able to rent it out. Well he could, he could do it for three month periods; what he couldn't do was do short stay and they're now being asked to take it on this basis as though that's what they had contracted to do.

Now just by way of rounding this out, the way in which the argument ran at trial and I would readily acknowledge it that I am arguing, putting this argument forward now in a different way to which it was run at trial but on the basis in my submission that the essentiality point about the residential building was put in issue on the pleadings. I've pooled together what was pleaded separately as the encumbrance issue and the residential nature. The encumbrance issue in my argument is relevant in thinking about the change that has occurred and whether that could possibly be something that came within what these purchasers had signed up for and in my submission it is a very different beast.

At trial there were arguments made about, in particular, about two commercial activities that went into the building as a part of this change in the consent that was obtained to allow commercial activity. The first one was a gastro pub and the second was a hairdressing operation, both of which were to service the

general public not just residents of the building. It could have been activities like cafés and so on that would, for the residents and their guests but this was only possible because of the change from residential to mixed-use residential/commercial. And there was evidence which on the way I view it, at any rate, was really quite irrelevant to this argument which was about, well how much material adverse effect did it have on the units, to have a gastro pub in the building as opposed to across the road and so on. And so it turned into, as other aspects of this case did at trial, into a focus on clause 4.9 which my friend, which Mr Barker has just taken you to and which you've heard about before. Did it have a material diminution on the value of the units by these changes that were made? Now certainly on my argument that I'm putting to the Court that the question of a change in something that was essential as a term of the contract which was that it be a luxury residential building and that meant residential within the then-meaning of the zoning could not be changed to something that was no longer residential and be said to be under 4.9.

If you could just turn briefly to page 1221 of that Lakeside West document where 4.6 and over the page 4.9 are there because –

ELIAS CJ:
Sorry what page?

WILLIAM YOUNG J:
Sorry one –

ELIAS CJ:
What page?

MR MILLS QC:
1221. 4.6 is the one that was relied on for the encumbrance and then 4.9 more broadly but I'll just briefly dwell on 4.6 just as a matter of interpretation. So, "The vendor reserves the right to grant or receive the benefit of any," and I'm just jumping down to it, "encumbrances which may be required in order to

satisfy any conditions of the consent," and then in (c), "Or the use in operation or the development or use of the building." Now in my submission just as a matter of interpretation we have to go back to the definition of the building and it was the building at the time of contracting and at the time it was a residential building with a zoning that permitted only residential occupation. And so an encumbrance that is solely because it has been changed to a mixed-use commercial/residential and in order to allow disability access cannot have been necessary for the development and use of the building in the terms in which it was at the time of contract. That was not needed on any view for a residential building. It was only needed because it had changed to a commercial mixed residential building so the interpretation that's been placed on 4.6 in the Courts below, particularly, really I think in the High Court about the fact that the encumbrance could be defended as being within 4.6, in my submission, is a matter of contractual interpretation is wrong.

ELLEN FRANCE J:
It was required by statute though, wasn't it?

MR MILLS QC:
Yes but only because they had been changed from a residential building into this mixed-use one and wanted short-term accommodation. Once you moved the short-term accommodation then the Building Act says you've got to provide a certain amount of disability access. But my point is that this relates to the building at the time of contracting which is a residential building and the encumbrance is of no value for purpose in relation to such a building. So it can't apply here.

Then on 4.9, this too was relied on very heavily and referred to in addition in the Court of Appeal as this broad approach which really asks well has it had a material adverse effect, so has the gastro pub had a material adverse effect; has the hairdressing salon had a material adverse effect and in that context the evidence turned into a issue about, well what's the difference between noise in the building and noise across the road, there's going to be noise in the Precinct, we know it's going to be an active area. But in my submission,

again on the reading of that clause if one looks at 4.9(b) it's actually quite narrow. It gives, the vendor the right to "alter or vary the draft outline plans," et cetera, et cetera. And the examples that are given in relation to the development which remember includes the building and the curtilage so this is really what we're talking about here is, "inverting or 'mirroring' the unit, varying, altering, adding to or omitting parts of the common property, varying, adding to our substituting external components and finishes on the building," and such like. In my submission that cannot possibly be read as allowing the vendor to convert a building, if the Court is with me thus far, that was sold and purchased as a luxury residential building which allowed no commercial uses in it for general public use and no liquor license, no mini service, no room service and so on and so forth, this clause cannot as a matter of interpretation be read to permit that. And so given the shortage of time and the fact my friend's already been generous to me, unless there are questions I probably should stop there. But in my submission it was an essential term that it be residential and a luxury residential and that meant in the context of the contract itself and the resource consent which confirms it with its zoning, an exclusively residential building and that was an essential term and it was breached.

I've been told to fix one error in the written submissions at paragraph 173 and given it's turned a "would" to a "not" it probably matters. So if I could just ask you to go in the written submissions at page 26 to paragraph 173 and you'll see the last, the second to last line, "This would necessitate," it should read, "This would not necessitate." This relates to the common property argument I think. So unless I can help further, those are my submissions.

ELIAS CJ:

Thank you Mr Mills. Yes Mr Goddard.

MR GODDARD QC:

Your Honour, I did anticipate ending up squeezed for time so what I've done to save the Court, I need to take notes in case I say anything worth remembering is to type up two pages of the notes I had as at lunchtime, if I

could just provide those through Madam Registrar. I can I think be quite quick.

So first of all: the suggested obligation to complete stages 2 and 3. The exchanges with the Court about the structure of the agreement, in my submission, confirm my point 1 that the better view is that there's no obligation beyond the scope of three key elements of the contract, all of which are consistent. The economic viability conditions in clause 2.1, the promise to build in 6.1 and where there is detail about what's to be built which relates to the building and the curtilage. I did want to pick up two points about that, the first is Your Honour Justice Arnold's question, well and they were selling units in stage 2 and 3 weren't they, and of course they were. But, and I think to some extent Justice Young's question following on from that answered this. Marketing stage 2 and 3 units subject to similar building specific viability conditions wouldn't suggest taking on any obligation to build those. If anything actually it would suggest the reverse, that each was separately conditional on its own viability. The escarpment contract for Dr Ho was not in the trial bundle but of course the two sets of contracts we have for Lakeside West and Kingston West were both in the bundle and were known to the solicitors acting for the parties so they understood that each building was separately conditional on presales in that building and the construction costs of that building.

My learned friend suggested this afternoon that perhaps the developer was willing to take on the much broader risk of building the entire 13 building Precinct because of the buoyant environment. That can't be reconciled with 2.1 in which they weren't even willing to take on the risk of one building unless the economics of that building stacked up. So in my submission the better view is that there's no obligation beyond the building of the unit and the building with everything else being a matter of intention but with the risk allocated to the purchaser. But as I say at 2, "If there is any broader obligation it can only be to build what is economic as and when it's economic, provided that any departures from the broad scheme contemplated in the draft outline plans and specifications do not have a material adverse effect on the

value of the purchaser's unit." And Your Honour the Chief Justice pressed my learned friends, well what is this core obligation you contend for, what is the core and I don't think Your Honour every really got a clear answer to that and that's because it's not possible to identify a core obligation which is both consistent with the text of this agreement and which has been breached and this is the point I tease out in my 2.1 to 2.3. What the purchasers contended for, what the Court of Appeal accepted was that there was an obligation to build stages 2 and 3 but as I say at 2.2, "The suggested term you must build all of the stages 2 and 3 or all of the Precinct doesn't appear anywhere in the agreement for sale and purchase." They're best provisions, all provide for modification for deferral, for suspension, putting things on ice in definitely. And suggest that any change can be made subject only to a material adverse impact on value and my 2.3, "The purchasers have not shown and don't now contend for a material adverse effect as result of non-completion of stages 2 and 3 as at the time settlement was due." Some questions were asked by the Court, my learned friend made some submissions about the provision for flexibility suggesting that that assumes an obligation to build the balance of the Precinct. That respectfully just is not right. The reason that provision for flexibility was needed is that the purchasers, as the Court has seen, had extensive obligations to co-operate with the future development of the Precinct. And if you locked in what that was the risk was that if changes were made by the developer to what they proposed the purchaser would anything well we don't have to co-operate with that, we only promised to co-operate with your original theory and now you've got a different one. It was necessary to provide for flexibility so that even if the developer intended to do something potentially quite significantly different, the obligation to co-operate, to not interfere with it, to not restrain it in any way, to grant easements, the power of attorney provided for in the agreement would all still continue to apply. And that's why even in the absence of an obligation it was necessary to explicitly identify the flexibility that existed in what was proposed, how that might evolve over time.

Point 4, Your Honour really picking up there on Justice O'Regan's point here. The lack of detail and the extent of flexibility both in terms of what might be

built in the future and when it might be built. It's expressly contemplated by – the agreements make it inconceivable that a purchaser could seek specific performance in relation to construction of other buildings. But actually for the same reason, when one pauses to ask what was promised here, there's no obligation with sufficient content to be enforced by a claim for damages in what – it's another way of saying there's no obligation. What I think is even clearer is that that there's no essential obligation and here I want to add a point Your Honour Justice Young explored with my friend after lunch, which is that it's very odd to say that you've got an essential obligation but it needn't be performed pre-settlement and it can be suspended indefinitely either before or after settlement. That would be a very odd essential obligation. My friend when he was talking about the iterative approach to interpretation and looking at the commercial consequences of different readings of the agreement said, well what about the counterfactual that the purchasers you know ask would they have contracted without an obligation to build more than this building, would they really have contracted without that? That would be relevant if the question was: "is there a term to build the building", but it's not the right question when it comes to essentiality which was the issue my friend was addressing. I just want to emphasise that. It's not the right question for the reason I pointed out, in relation to the error in the test adopted by the Court of Appeal. You've got to go on to say, "And was agreed to be essential." So the question is would they have refused to enter into this agreement unless there was a commitment to build more and that more was agreed to be essential and the question of what that more was still remains unresolved as I said. I make the point at 4.2, the detail in the consented plans can't fill these gaps about what was to be built in the absence of any contractual obligation to build what was in the plans which they don't find or to not seek amendments to the consents.

I make the point at 5, "What was tendered at settlement was a unit in a building in the Precinct with the Precinct Park developed," which was exactly what was contemplated and required at settlement. And now I pick up the point that I think the Court ultimately dealt with that with my friend that it's impossible to read clause 4.1 as confined to the position at settlement. (i) and

(m) expressly deal with obligations of co-operation post-settlement for example. And (g) and (k) can only be read in that way as Your Honour the Chief Justice pointed out, 4.2 plainly roams more widely. So attempts to read down at 4.1 in that way just don't work.

Then I've got a whole bunch of bullet points which I just don't have time to go through in detail on the position in the absence of a cancellation. This is at 7. What was confirmed by my learned friend in our exchanges last night and orally today is that the purchasers accept that they had not cancelled up to and including the dates on which the settlement notices expired. So –

WILLIAM YOUNG J:
I think the contention that you face is that the, that your ability to cancel depended on there being effective settlement notices and assuming an obligation and assuming essentiality, at the time you issued the settlement notices you weren't ready, willing and able to settle?

MR GODDARD QC:
But, well I say that – if you look at the contract, the obligations on settlement did not –

WILLIAM YOUNG J:
I know but just accepting his argument that you were offering them something which differed from what you promised, then you were not in a position to offer a settlement notice. If you accept the obligation, if you accept that it's essential that there be a continuing contractual obligation and at least potential ability to supply a complete Precinct; you were offering something different. Now that's the argument and if that argument's right then he's probably right to say that you weren't entitled to issue a settlement notice.

MR GODDARD QC:
That, in my submission, could be right under the Contractual Remedies Act as under general law but not under this contract, given the contractual structure for what was required to be done and given the approach that this, the Court

of Appeal took in *Holmes v Booth* and that this Court took in *Regalwood* which is my friend's preferred name so I'll use that. Because those were both, this is a point I make at my 8.4. Your Honour the Chief Justice asked my friend some questions about *Holmes* and *Regalwood* saying well aren't those warranty cases so we don't have the cancellation issue but those were both cases where the Court said either that there was or probably was a right to cancel but that was irrelevant because it hadn't been exercised –

ELIAS CJ:
Yes.

MR GODDARD QC:
– they weren't using warranty in the old fashioned versus condition way.

ELIAS CJ:
No, yes thank you for that.

MR GODDARD QC:
So those are cases exactly on point with what we've got here where the Court was proceeding on the basis that there was a right to cancel but it hadn't been exercised and what they were saying was that in that situation when a settlement notice was issued and no call for an abatement of purchase price had been made, no cancellation, no request for an abatement, there was an obligation to proceed to settle. And so I say first that's not the nature of the obligation at settlement and Your Honour Justice Young's drawn that distinction but even if my were right and there had to be some sort of inherent potential for there to be a more development at a later date, hard to reconcile with the suspension right, that would not preclude giving a settlement notice in this case because of the willingness to do everything available on settlement and the fork in the road, the two-pronged fork.

Your Honour the Chief Justice asked some questions about policy and the point I make at my 8.9 and also 9 is that the code in the Contractual Remedies Act actually is very accessible and very simple. It tells

you when you're allowed to cancel and it doesn't suggest that you yourself have to be ready, willing and able to perform in order to cancel. That was a question which the Court of Appeal left open in *Kriletich v Birnam Investments* CA214/90, 27 February 1991. That was my first terrifying experience of appearing before the then President of the Court of Appeal, Sir Robin Cooke and finding that an argument I started got completely out of control as His Honour said to me, "oh and I suppose you would say Mr Goddard, and I would suppose you would say Mr Goddard and I suppose you would say Mr Goddard" and before long I found myself advancing the argument that was attributed to me in that case which was that the old requirement at common law, that in order to cancel, you had to be ready, willing and able to perform, was not in the code in section 7 and that it had been done away with and that that was sensible as His Honour put to me and I therefore argued because you could get this situation where everyone was in breach and he said "it makes no sense does it Mr Goddard, that no one can cancel and bring the contract to end and if everyone's in breach the contract has to stay on foot, given the flexibility in section 9 isn't it much more sensible that either can cancel and then the Court can sort out the consequences under section 9?" "Yes", I submitted. And His Honour said that remained open, that's consistent with what the Court of Appeal in *Noble Investments v Keenan* (2005) 6 NZCPR 433, [2006] NZAR 594 (CA), that's in my friend's authorities under tab 12. I won't go to it but I'll note it. In that case the Court of Appeal the judgment delivered by Justice Glazebrook actually held that you can cancel even though you're in breach; that was a vendor who hadn't paid a deposit. That's no longer a requirement. There's no reason to read that into the code, it's very simple, it's very clear, it works and it's the overlays that are being put on it that are the problem. Of course if someone's obligation is conditional on the other person's obligation, it doesn't fall due so they haven't breached it so you can't cancel for non-performance but that's the only exception whereas a matter of interpretation there's no breach because the other party hasn't performed a concurrent precondition. I'm conscious of the time.

The sale of business with key employee example takes things nowhere, that's my 8.10. "If the employee's ongoing commitment to the business is essential

then the purchaser may be able to cancel," but if they don't cancel then they have to perform and purchase the business. I also make the point and again I can't overstate the importance of not unduly complicating property transactions and not adding layers of unstated requirements to contracts which have been worked out carefully over time. Clause 12 of the agreement for sale and purchase is clear here, it provides expressly for a right to cancel in the events which occurred in this case and the Contractual Remedies Act and the case law on it applies subject to the terms of the contract to section 5, that's elementary. The Court shouldn't accept my friend's invitation to complicate this provision and read in other preconditions that are not provided for.

Finally on the three points raised by the rule 20A notice, first the lease term, 30 versus 40 years, just note that the mandatory language "shall not be" in relation to the maximum, isn't enough. This Court expressly made that point in *Mana Property*. That many terms which are not essential are expressed in mandatory language and although in my friend's example about preferred coloured of cars is fascinating, these were investment units, so if they sell for exactly the same price regardless of whether the maximum is 30 or 40 that does rather confirm, as the High Court and the Court of Appeal held, that the difference in lease term was not essential. The Court of Appeal also, that's at paragraph 152, at 154 quite rightly emphasised what a distinct prospect any renegotiation was 30 years out, the difference between being able to renegotiate 30 versus 40 is hardly likely to be essential.

Kingston West common property, let me just provide some references, given that my friend went to Mr Moore's evidence. Mr Moore accepted, and I think this is inevitable, that you couldn't tell how big the management units were going to be, or where they were going to be, or what they were going to include from the plans. The references are volume 2 of the case on appeal, tab 12 at pages 367 to 368.

O'REGAN J:

Say that again?

MR GODDARD QC:
Tab 12, 367 to 368.

O'REGAN J:
Yes I've got that.

MR GODDARD QC:
395 to 396 and 400 and I explored the same issue with Mr Moore in relation to Lakeside West and whether you could tell whether common property was, and he said you just can't tell, and that's at pages 424 to 428. Picked up in the High Court at paragraph 89. I'll skip over everything else. Oh, the Court was, with respect, right to suggest to my friend that the unit plan must be based on the content and intent of the draft outline plans and specifications as modified from time to time, subject of course to the restriction on modifications not having a material adverse effect on the value of the unit. So you can change the plans, subject to that constraint, then the unit plan must be based on wherever they land. So the changes, if they were changes, which we say they weren't, were permitted.

Finally on that my learned friend Mr Barker appeared to accept that there could be a lease of common property for an extended period to the operator, but then that gives rise to all the same control issues that he raised about the existence of management units incorporating these areas, because you wouldn't have effective control over them. So if, and he accepted this and it's expressly contemplated by the documents, before the sales any common property could be leased for an extended period, unlimited by anything in the contract, to the operator of the hotel, you wouldn't have access to those anyway because they have exclusive possession.

Finally on the Lakeside West units, let me just clarify two things. First, the fact of a rezoning of the building is common ground, but there was clear and uncontested evidence first that the ability to let those units via a pool was always anticipated. Mr Garrett dealt with that in his evidence, and Dr Ho confirmed that that was his expectation. Second, Mr Garrett confirmed that

retail uses of those spaces on level 3 were intended well before the receivership. It wasn't a change driven by the receivers. They just followed through what was necessary to give effect to that.

The second point in relation to the Lakeside West units, my learned friend when reading clause 4.6 to the Court, in relation to the encumbrance, skipped over the necessary "or desirable" and the High Court findings that the receivers view that these changes were desirable was open to them and was genuinely held.

ELIAS CJ:
Sorry, that was the High Court?

MR GODDARD QC:
The High Court, yes. That was a scramble, I'm sorry about that, and I'm also very sorry to the transcribers.

ELIAS CJ:
Well that won't, oh, do you mean us? The others can slow down a pace.

MR GODDARD QC:
No, well I meant the people who prepared – I am of course sorry, I apologise to Your Honours for going so fast, but I was actually thinking of the people who prepare the Court's transcripts who will be trying to make sense of my gabble.

ELIAS CJ:
Your gabble, they'll just slow you down.

MR GODDARD QC:
That might give me the lovely deep voice I've always wanted. Are there any questions that the Court has for me?

ELIAS CJ:

No, thank you Mr Goddard, and thank you counsel for your help. We will reserve our decision in this matter.

COURT ADJOURNS: 4.10 PM