

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **UNION HOUSE LIMITED**  
**and UNION HOUSE LEASE LIMITED**

Appellant

AND **AUCKLAND CITY COUNCIL**

Respondent

Hearing 15 December 2004

Coram Blanchard J  
Tipping J

Counsel R B Stewart QC for Appellant  
R J Asher QC and N Hall for Respondent

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**APPLICATION FOR LEAVE TO APPEAL**

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9.59 am

Stewart Good morning Your Honours I appear for the applicants in this matter.

Blanchard J Yes Mr Stewart.

Asher I appear for the Respondent with Ms Hall.

Blanchard J Mr Asher. Mr Stewart, just before you begin, I suppose I should get formal acknowledgement from both Counsel that I am not regarded as disqualified from being involved in this case either at this stage or if it gets leave in the appeal proper by virtue of the fact that in a former life many years ago I have on numerous occasions advised both Mr Crooksina and the Auckland City Council in unrelated matters.

Stewart            There would be no objection on the part of the appellants and I do note that the trial raised no issues of credibility and in fact there was no cross-examination of the any of the evidence, so I couldn't see any issue as far as the applicants are concerned Sir.

Asher             Nothing at all Sir.

Blanchard J      Good. Thank you. Well that gets that out of the way. Right Mr Stewart.

Stewart            Thank you Sir, there are two primary areas in which leave was sought to appeal in the application. Dealing with the second matter first if I may, and raise a *judicata* and abuse of process matter. On further reflection, I'm not myself convinced that it's yet ripe for the attention of this Court in that perhaps it, well that issue, if leave was granted to appeal on the primary ground, and that was unsuccessful, then the matter would go back to the High Court where no doubt there would be argument as to whether or not this matter of breach could be raised on the pleadings and requiring further evidence. And then if there was a judgment there which the parties were dissatisfied with it would go to the Court of Appeal and if any special issue arose, it may one day find itself here.

Blanchard J      Well the Court of Appeal appears to have remitted the matter on the basis that it is open.

Stewart            Well they say that but then they say also it's a matter for the trial Judge.

Blanchard J      Do they?

Stewart            Well what they say is a matter for the trial Judge is whether or not leave should be granted.

Blanchard J      Where's that? Yes, well that leave relates to pleadings and the future course of the proceeding. Have you discussed this point with Mr Asher?

Stewart            No Sir we've both been rather busy lately. But I think we both accept that if the matter does find its way back to the High Court, then my learned friend would need to make an application for leave to amend his pleadings and to adduce further evidence and if you like, in my submission, to embark on a further trial. And that matter's been left on my understanding of the Court of Appeal Judgment to the trial Judge who may or may not be Justice Randerson. Having said that, there are indications in the Court of Appeal Judgment that it would be appropriate for leave to be granted.

Tipping J But could it ever be said that this was a course that was simply not open to the Court of Appeal? One can understand an argument about the merits. But that's not the sort of matter we would normally engage upon Mr Stewart is it?

Stewart No, I accept that the Court of Appeal has jurisdiction to consider the matter. But I would say that on the facts of this case this would be a clear case where the discretion couldn't be exercised in favour.

Tipping J So it would be asking us to review an acknowledged discretion. I think your instincts are sound Mr Stewart if I may respectfully say so, that if it's on at all, it's not on at this stage.

Blanchard J Well what you really appear to be accepting is that it was open to the Court of Appeal to remit it on the basis that the High Court would then have to decide whether it granted leave.

Stewart I think that's where I get to because there was no oral argument in the Court of Appeal and there are issues of facts and some difference of opinion and views on those facts which would have a bearing on whether or not leave should be granted to amend and for further evidence to be adduced.

Blanchard J Mm. Alright well I think we understand your position.

Stewart Having reflected on it last night and on the way down here this morning, I think it's a bit premature to ask this Court to engage on the matter.

Tipping J It can be tested this way without wanting to prolong it Mr Stewart couldn't it, that say the Court of Appeal had itself granted leave, then it might have been quite a difficult exercise to persuade us that that should be reviewed ahead of any sort of merits consideration of the point. Because it would have been an interlocutory ruling in essence. But anyway, I don't want to prolong the agony on this issue.

Blanchard J Well this may be affected by the cross-appeal issue so we may have to come back to that a little later in the hearing.

Stewart On the primary issue, the applicant's position is that fundamentally it is not accepted that the confidentiality clause by itself gives rise to a necessary implication that there is a restriction on the assignment or assignability of the right of first refusal.

And I imagine the matter can be tested this way. Assume the parties were concerned not so much about assignability of a right of first refusal, but were concerned to keep the payment and the injurious affection payment confidential and secret. Now the fact that the assignor may in due course breach the confidentiality clause in relation to those matters in the course of making a transfer of the right of first

refusal is a separate and distinct matter which would not and could not impact on the assignability of the right of first refusal. So it's submitted that a breach of contract, in this case a confidentiality clause, in the course of transferring an otherwise assignable benefit cannot have the effect of converting the ... into an unassignable personal right.

Blanchard J You say in the course of assigning an otherwise assignable benefit. Doesn't that beg the question?

Stewart It may do Your Honour but with respect in this case there is no possibility that the parties here were concerned or intended that the right of first refusal not be assignable. There was no express prohibition on that and there was no evidence that the Council were concerned that if Union Steamship sold their property that they could not also sell with it the valuable right of first refusal over the adjoining property. That was not any part of their deliberation. And indeed if it was the case, you'd expect the customary position to prevail and you'd find an unassignability clause in the contract to supplement the confidentiality clause.

So if we accept the Court of Appeal's approach in the matter, we find in paragraph [35] of the Judgment, that what the Court has done is to draw a necessary implication of non-assignability to ensure that the objective of the confidentiality clause is met. That's why they've done it.

Now there are real difficulties in that approach. First of all it should be noted that there sanctions at law for ensuring compliance with the confidentiality clause. Without by necessary implication imposing on the parties a non-assignability consequence. Secondly, we find that you would then be imposing on the parties a non-assignability provision where the parties never intended that the right of first refusal not be assignable.

And at first instance Randerson J articulated the reasons why it's inconceivable that the parties would be concerned about the assignability of the right of first refusal in the circumstances when it became available under the contract. That is 5 years had to have elapsed. The Council would have had to have reached the view that it was not going to proceed with the Britomart development and it would have to have the intention of wanting to sell the land which they acquired in the first place for the Britomart development. Now in those circumstances, as Justice Randerson observed, how could the Council possibly have any concern as to who acquired the property? Not only that, the Judge observed that if it did sell and Union Steamship was still the owner of the adjacent site and exercised its right of first refusal, it could sell to whoever. Assignability simply was not on the radar of either party when entering into this agreement.

So we get in my submission, by virtue of the Court's approach in paragraph [35] of the Judgment, of imposing by necessary implication a restriction on assignability, we have the bizarre result that the parties are lumbered with a matter that was never part of their bargain or consideration.

Now the fact that that is the basis of the Court of Appeal's reasoning is very clear because it says that if there was no breach of the confidentiality clause, then there would be no restriction.

Blanchard J And you say that if the Court of Appeal has erred in this way, that is a matter which has general action. It's not restricted to the facts of this particular case because it reflects an approach that might be taken in other cases.

Stewart Yes, it would in my submission give rise to some precedent value that if there's a breach of a confidentiality clause, it also has the effect of by necessary implication imposing non-assignability.

Tipping J It was the Court of Appeal that came up, as I understand it, with this hybrid situation or conclusion. I take it the parties were taking the high ground on each side, one saying absolutely non-assignable, the other saying completely assignable.

Stewart Yes.

Tipping J And the Court of Appeal came to this middle ground of only assignable unless you breach the confidentiality clause.

Stewart Yes, and you'll appreciate Sir the breach wasn't pleaded or alleged or relied upon at the trial.

Tipping J No, I'm looking at the higher level Court.

Stewart Yes that's right. There was no, this came out of left field, this halfway house which really says that in some circumstances.

Blanchard J A halfway house can't come out of left field.

Stewart It arrived anyway.

Tipping J It comes a half out of left field and half out of right field.

Stewart And we then get this situation where in some circumstances the valuable rights secured under the contract are assignable. I.e. where there's no breach. But if you incidentally happen to breach another provision in the agreement, that is in this case, a confidentiality provision, then it is non-assignable.

Blanchard J Mm. I think we understand the argument.

Stewart And that leads to my second and final point that I wish to mention. And that concerns the consequence of this clause being imposed. The Court held that if there's a breach, then the benefits are not assignable and furthermore any purported assignment is ineffective. Now the case law is abundantly clear as to why it is that a purported assignment in the face of a contractual prohibition against assignment is ineffective and is not simply a matter for damages. And that is set out in the Submissions in Support at paragraph 5.2, Judgment of Lord Browne-Wilkinson.

Blanchard J That's the **Linden Gardens Trust Ltd v Lenesta Sledge Disposals & Ors Ltd** [1994] 1 AC 85.

Stewart Yes Sir.

Tipping J Is it part of your purpose on this proposed second appeal to challenge that view in any way Mr Stewart?

Stewart No Sir.

Tipping J No.

Stewart I accept that where there is a contractual prohibition against assignment, any purported assignment is ineffective.

Tipping J It's a kind of self-fulfilling injunction in a sense isn't it?

Stewart Yes and in fact in this Court, in our Court of Appeal, which comprised Your Honours in the **NZ Payroll Software Systems Ltd v Advanced Management Systems Ltd** [2003] 3 NZLR 1 case, articulated the rationale for upholding the prohibition on much the same terms as set out in paragraph 5.2. Now, in this case, it is the breach of a confidentiality clause, which had quite a different purpose to a prohibition on assignment clause, which is the clause that is breached.

Tipping J Well it's not only a breach, that's why this hybrid situation is quite interesting jurisprudentially. It's not only a breach of that clause but it is the trigger for the non-assignability.

Stewart Yes. But the rationale that existed under the non-assignability clauses for holding that the assignment was ineffective is not present when you get a breach of a confidentiality clause.

Tipping J Because there is no absolute prohibition on assignment, is that the?

Stewart And, there's that Sir, and also because the parties did not intend the contract to be personal in that there was to be no assignment.

Tipping J Well that's the corollary yes.

Stewart Yes, and that was a matter which also Justice Randerson addressed in his judgment, that there was no reason why the parties to this contract would have considered it personal and therefore have included a non-assignability clause.

Tipping J Well I have to signal, subject to hearing Mr Asher, that I think this hybrid approach is a little unusual and prima facie and at least is fit for further consideration.

Stewart Well I'm pleased to see I'm not alone in that then Sir.

Tipping J Well just prima facie.

Stewart Absolutely Sir.

Tipping J And there may be a good answer to it. But.

Stewart Yes, and if there was I'd go quietly. But I have nothing further to add.

Blanchard J Thank you Mr Stewart. Mr Asher.

Asher Well Your Honours it may be that I have a bit of a task ahead of me in the light of that last observation.

Tipping J I didn't wish to distract you Mr Asher but this is a pretty unusual situation here. Neither of the parties thought, as I understand it, to raise this hybrid proposition and it does create problems because there isn't an inevitable personal dimension in the contract. It's capable of being assigned in some circumstances presumably.

Asher Can I perhaps explain briefly Sir why the matter really wasn't unargued in the Court of Appeal, the halfway house. You won't be surprised to hear that in the appeal we were taking the high ground as our primary position. But we were also making submissions that were entirely consistent with the ultimate decision of the Court of Appeal. And in fact the decision of the Court of Appeal, as the Court of Appeal itself said, isn't a departure from the decisions in **Payroll** and **M and M v Bank of NZ** (unreported) COA CA 48/98; 25/5/98; Tipping, Gallen, Doogue JJ; 11/11/99) and if I could just spend a moment on that. In the 1997 Court of Appeal decision I think it is of **M and M**.

Tipping J I seem to have been involved in that one too Mr Asher.

Asher You were Sir, you gave the judgment.

Blanchard J The plot thickens.

Tipping J Yes.

Asher The issue was whether a confidentiality clause in a settlement agreement between a bank and a customer contained an implied or implicit prohibition in that case against the appointment of an agent to administer the settlement agreement by the bank. And the settlement agreement involved the exchange of confidential information and the Court of Appeal held at page 5 that the confidentiality clause by clear and necessary implication, and this is at the foot of page 5 and if you wanted to look at it, it's at tab 15, that by clear and necessary implication, that confidentiality clause prohibited the bank from appointing the accountants as its agent if that involved divulging the deed or the terms of the settlement. In other words the same, exactly the same approach as was adopted by the Court of Appeal who said that there was a prohibition on.

Tipping J Well we didn't say there, but if it could be done without breaching the confidentiality clause there was some sort of hybrid situation.

Asher Well effectively that's.

Tipping J It's not a precedent is it for the hybrid?

Asher Well effectively it may be Sir.

Tipping J It is?

Asher Because it's saying that only if the appointment of the agent involved divulging the terms of the settlement. And I'm.

Blanchard J But it's a rather different situation Mr Asher from the assignment of a contract. It may be of some guidance, but it seems to me it's a different situation.

Tipping J We did say I suppose in the penultimate line of 5, if that involved divulging.

Asher That's what I'm, that's exactly why.

Blanchard J This does look like a conditional stipulation but you're wanting to apply it. I think the Court of Appeal has applied it, perhaps it would be more accurate to say, to a different situation. Maybe it's possible but isn't it something that's arguable and of some general significance?

Asher Well it's really just an application of the general principle that's contained in **M and M** and also in **Payroll**. I mean **Payroll**.

Blanchard J Well **Payroll** didn't have to deal with this nuance because it was obvious in **Payroll** that any assignment was going to involve disclosure.



Asher But that's why they didn't need to deal with it Sir. But there's no doubt that if that, if there was an issue that the same approach would have been taken because it was consistent with **Payroll**.

Blanchard J Well that may be, but as I recall it I was one of the Judges in **Payroll** and so was Justice Tipping.

Asher Justice Tipping gave the judgment.

Tipping J I seem to be responsible for it.

Blanchard J Justice Keith as well, so you've got a Majority going with you if this case gets to appeal.

Asher Extraordinarily august body if I may say so, and. (Laughter)

Blanchard J Leave is refused (laughter).

Asher But **Payroll**, which is a case which has stood now for a few years and, in my respectful submission, expresses the law very clearly.

Blanchard J Would you believe two?

Asher Expresses the law pretty clearly.

Blanchard J In fact it's just had it's second anniversary.

Asher Well there we go Sir. As far as I'm aware there's been no suggestion on any quarter that there's any doubt about the principles enunciated there.

Blanchard J But it's not so much a doubt about **Payroll** as such as it applied to its facts but, not infrequently in the law, a different fact situation comes up and qualifications emerge. And this is what's being argued for here.

Asher Well there will often be the case that, generally it will be the case that when a Court in an appellate capacity applies principles to facts that there may be some variations. I suppose the point I'm making is that the principles are clear. They're clear from **M and M** and **Payroll**. And while you can argue about the applicability of those principles in any case I suppose, including this case, it doesn't involve here a point of new or general significance. It's just the sort of process that is undergone when legal principles are applied to particular fact situations. And what we have in **Payroll** is a pretty clear statement by the Court of Appeal. And it also deals comprehensively with the second aspect of the appellant's challenge, which is consequences. Because it.

Tipping J Just before you go onto consequences Mr Asher, would you mind my just asking you, you're not seeking to cross-appeal in the sense that the

Court of Appeal should have found for an absolute prohibition as a result of the confidentiality clause as I understand it? Which, I'm not running your client's case but I just wanted to make sure that that was in fact the position.

Asher Well we haven't certainly done that at this stage Sir and we make the.

Tipping J Well it's now or never isn't it, or nearly now or never?

Asher Because I must say we have seen this case as an application of the **Payroll** and.

Tipping J Well I would have thought with great respect that **M and M** and **Payroll** don't so much support the hybrid proposition but the absolute proposition if it is arguable, and I'm not sure whether it is, that the circumstances in which you could assign without breaching the confidentiality clause were so limited, if not nil, that the implication favours absolute. I'm not expressing a view. I'm just saying, I'm just interested to note that you're not arguing that.

Asher No, we have, as I say, accepted the Court of Appeal's view that they have not extended **Payroll** in any, or that this is really an application of the principles in **Payroll** to this case.

Tipping J Well it's over to you.

Asher Well.

Blanchard J You're not seeking in this respect a variation of the Order made by the Court of Appeal? In other respects you are. But.

Asher No we haven't. We haven't because as I say we have seen this as an application of the principles in **Payroll**.

Tipping J But in **Payroll** there was no suggestion that it was either absolute or open.

Asher That's because it was quite clear in **Payroll**, as you observed Sir, that there had been a, or there's been a breach of the confidentiality requirements. So no issue arose. So that's the difference. But of course as I've said Sir, in **M and M** that issue was flagged and the case was.

Tipping J I think people might be putting a little bit more weight on the word if than might have been intended or, but anyway. Look all I wanted to do was to get clear in my mind that we were not going to be asked to consider, reconsider, your client's high ground argument.

Asher Yes. Well I confess in the light of the indications from the Bench that maybe this is not seen as an utterly straightforward application of the **Payroll**.

Tipping J I don't have any firm.

Asher I should reconsider that.

Tipping J Well I don't have any firm views at all.

Asher I understand that.

Tipping J But I don't really see how one can properly, well one might be able to, but it seems to me that at least it's a possible issue.

Asher Yes.

Tipping J And one wouldn't want to have to address the law in this area if you like with one possible option not open.

Asher I agree Sir. And I must say in the light of this exchange, I wonder Sir if you would, I wonder if there is a way in which I can leave this issue open so that we could make sure that all options are available if you are minded to see this as an issue that warrants leave.

Tipping J I think Mr Stewart, if he wants leave, has got to accept that a possible cross-point against him should float. What the end result's going to be who knows.

Stewart Of course.

Tipping J Well that's very fair on Mr Stewart's part. So I think we should include this possibility that it should be viewed as absolute.

Asher Yes.

Tipping J Within the range of matters that need consideration.

Asher Yes, with respect Sir that seems to me to be my appropriate response to the present situation.

Tipping J The advantage from your point of view, unless Mr Stewart decides in the light of this development not to stick with his answer to me, is that of course if it's absolutely unassignable, that's the end of it.

Asher That's the end of it, yes.

Tipping J But Mr Stewart I think should be perfectly entitled to revisit that if he sees fit because he made that answer to me not facing an absolute argument.

Asher No.

Blanchard J I must say I had the same reaction when I saw the cross-appeal and I was a bit surprised that it was framed in a way which would have restricted the range for the Supreme Court to decide matters.

Asher Yes.

Blanchard J And I'm not saying that, shouldn't be taken to be saying that I necessarily think that the absolute position is correct. It may or may not be. But it would be unfortunate if the Supreme Court came to the conclusion that that was the correct position but somehow, because of the way in which leave had been granted, it was jurisdictionally unable without making an amendment at the last minute to the grounds for leave, to deal with it.

Asher Well the way in which that matter could be dealt with Sir is that you could, the Court might consider giving me leave to amend the cross-appeal.

Blanchard J Or add to it.

Asher Add to the cross-appeal.

Blanchard J Mm. Do you have a problem with that Mr Stewart?

Stewart Not at all Your Honour.

Blanchard J Thank you. Alright, well you've also got your point about whether the Court of Appeal should have found on the material before it that there was a breach.

Asher Yes we have Sir and we put that forward on the basis that we would proceed with that only if leave was granted.

Blanchard J It's not a point which would be of general application. I suppose however in fairness.

Tipping J I think it's a point isn't it that needs to be ventilated?

Blanchard J Mm.

Asher Yes. That's why it's been put in the cross-appeal application strictly on a conditional basis. If my friend did not succeed in getting leave, then I wouldn't have remotely argued that it was a point that warranted this Court considering it for all the reasons, well for obvious reasons. But if the appeal is to proceed, I would ask for leave to be granted in that respect.

And just before I sit down, obviously my friend has indicated effectively that the cross-appeal on the, his cross-appeal in relation to the discretionary decision of the Court of Appeal is not being pursued. I have obviously no problem with that. And indeed my friend and I discussed, we did discuss this on Monday and it doesn't come as a surprise to me. And I understand why that's been done. But as I say I really have probably taken enough of Your Honours' time. I've set out the basis upon which I opposed leave which was that this is an application of the principles in **Payroll** and **M and M** and I would again just record that if leave is granted I would seek the ability to add a point to our cross-appeal on the basis discussed.

Blanchard J    Alright, thank you. Anything in response Mr Stewart?

Stewart        No Sir.

Blanchard J    Has consideration been given to the amount of hearing time that will be needed for this case? One day? I'm asking this lest there be any question of security for costs. If we were minded to grant leave either way, are either or both of you going to be seeking security for costs against the other?

Stewart        (away from microphone) ...

Tipping J      I'm glad to hear it.

Blanchard J    And do you agree one day?

Asher          I was whispering to my friend one day because it took us a day in the Court of Appeal, it was a very full day in the Court of Appeal.

Blanchard J    A day and a half would be more likely.

Asher          It might be prudent to allow that extra time.

Blanchard J    Well now, we'll retire for a few moments just to discuss this matter. We shouldn't keep you waiting very long.

Court adjourns 10.37 am

Court resumes 10.43 am

Blanchard J    The leave applications of both parties are granted. The approved grounds for the appeal and the cross-appeal will be as follows:

(a) Did the existence of the confidentiality clause in the contract between Union Steamship and the Auckland City Council mean by necessary implication that the contract was not assignable without the consent of the Council either:

(i) absolutely; or

- (ii) if it could not be done without breach of the confidentiality clause.
- (b) If the answer to question (i) is yes and there was a breach of the implied provision, does it follow that the assignment was ineffective.
- (c) Should the Court of Appeal properly have found on the material before it that there was a breach of the confidentiality clause by disclosure by Union Steamship.

Issues (a)(i) and (c) are raised by the cross-appeal.

The appellant must pay security for costs in the sum of \$7,500.00.

That's the Order of the Court. There'll be a Minute issued in those terms.

Stewart As Your Honour pleases.

Asher As Your Honour pleases.

Blanchard J Thank you. We will now retire.

Court adjourns 10.45 am