

IN THE MATTER of a Civil Appeal

BETWEEN **BRENT RONALD LARSEN**

Appellant

AND **RICK DEES LIMITED**

Respondent

Hearing 23 November 2006

Coram Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Gault J

Counsel D K Wilson for Appellant  
D A Wood and S L Robertson for Respondent

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**CIVIL APPEAL**

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10.02am

Wilson If Your Honours please I appear as counsel for the appellant.

Elias CJ Yes thank you Mr Wilson.

Wilson If I could mention I am assisted by Dr McMorland who is here and I'm wondering whether it might be in order for him to sit beside me.

Elias CJ Yes that's fine, thank you.

Wood Counsel's name is Wood Ma'am and I appear for the respondent with Mrs Robertson.

- Elias CJ Thank you Mr Wood, Ms Robertson. Yes Mr Wilson.
- Wilson Your Honours it is my submission that the key points in this appeal will concern the clause in the contract 3.7 which deals with settlement and then the letter that has been written by the vendor's solicitors as to what they were proposing would be a remote settlement. Clause 3.7 is set out in my submissions and it's also at volume 1 of the case on appeal you have the terms of contract included at page 60
- Tipping J They're the same, identical in all contracts I presume?
- Wilson Yes Your Honour. The provision of clause 3.7 in the contract – important key points are that the purchaser shall on the settlement date pay or satisfy the balance of a purchase price etc and the vendor shall concurrently hand to the purchaser the title documents and the obligations are interdependent. It had been the view in the Court of Appeal and to some extent I think in the High Court that what is provided for in clause 3.7 is a face-to-face settlement, or commonly known as a face-to-face settlement and that as I've indicated in my written submission is a point which the appellant respectfully accepts.
- Blanchard J Well it certainly anticipates face-to-face settlement but does it actually require it? It requires the purchaser to initiate a payment but that can be done by a means which doesn't involve face-to-face provided that the purchaser is prepared to run the risk that the vendor will then transmit the documents.
- Wilson Well the clause anticipates or foreshadows the face-to-face settlement by its language but I accept that much of this case is going to come to what 'pay' means in these circumstances.
- Blanchard J But you could make a payment under 3.7 by any means that constitutes payment. The concurrency provision is for the protection of the purchaser. The purchaser has to move first and needs protection against the possibility that the vendor won't then do the vendor's part by handing over the documents. Normally that is done, or used to be done, by face-to-face, but you didn't have to do it that way. You could if you were prepared to run the risk send off your bank cheque and simply trust the vendor then to release the documents.
- Wilson Yes, with respect I accept that Your Honour and if it had been the case that the money and cleared funds had arrived with the vendor prior to the required time for settlement then that would have to be taken as the purchaser making payment.
- Tipping J Is it perhaps this that the envisaging of face-to-face settlement in terms of 3.7 is relevant to how payment is to be made in terms of the clause? In other words a bank cheque coming up along with my brother and

you have just been discussing before 5 o'clock would be fine, but it wouldn't necessarily would it an electronic transfer before 5 o'clock

Wilson No it wouldn't. One example would be if the purchaser's solicitor arrives at the vendor's offices just before 5 o'clock at a required time for example with his laptop computer and says 'here I'm just doing an electronic transfer to your bank account', my submission would be that wouldn't satisfy the mode of payment because the

Tipping J But is the mode of payment dictated by the envisaged face-to-face arrangement, is that what you're saying?

Wilson In the sense that to amount to a tender of settlement by the purchaser, which much of this case is about, the vendor needs to be satisfied that he has received payment. He needs to have some sort of proof or evidence that he has received payment. He couldn't for example just have the purchaser's solicitors arriving and saying well I've just transferred the money to your account five minutes ago and nothing else. He's got no evidence that it's actually been paid, as in this case he can't go to his on-line bank account and look at it and see that the money is there. That is one of the things that has been established in the facts in this case. The same in my submission when you move away from the vendor receiving some evidence of the fact that payment has been made, payment and cleared funds is in his account, if you move away to that you inevitably get into a situation where all you would really have would be the purchaser's solicitor saying I have undertaken to have made, I undertake, I've paid, I have paid, something of that order.

Elias CJ Well then the vendor won't be in default if he doesn't pass over the documents, the title documents, but has not the purchaser for his part performed his obligations?

Wilson Well it's a matter of in this context of whether settlement has been tendered by the required time and I'll come to those other issues before

Elias CJ I'm not sure about this, is it helpful to talk in terms of settlement as opposed to performance of the obligation stipulated for by each of the contracting parties?

Wilson Yes indeed, we're largely dealing here with the question of the purchaser's performance and I certainly accept that and

McGrath J Mr Wilson your point is that the purchaser in addition to making payment has to verify that the payments be made to the vendor in a face-to-face settlement the vendor can check for himself, but in any other arrangement it is an important thing for the vendors to be able to verify that the payment has been made.

- Wilson Yes it is, well I think historically when one studies the older books on this and some of the judgments make it clear that while a settlement is an interdependent matter it is for the purchaser to seek out the vendor and tender payment to him.
- Tipping J That's not my brother's point at all.
- McGrath J The point that I'm saying is that when you say that all the purchaser has to do to pay, if you contemplate a face-to-face settlement it's a situation in which the vendor is able to verify that payment is being received, it's not just the fact of payment, it's the additional element of verification, concurrent verification that's important to the vendor who may have to deal with the funds immediately.
- Wilson Yes indeed, absolutely, because that is one of the points of the performance and settlement by the purchaser so that he knows on a face-to-face settlement one hand passes over the cheque and the other hand receives the title documents.
- Blanchard J Do you accept that there would have been a payment, take a hypothetical situation, where before the appointed time there has been an electronic transfer of funds on an irrevocable basis to the vendor's trust account and the vendor has been able to verify that, in other words they have notice that the monies irrevocably in their trust account, would you accept that the purchaser's obligations had then been fulfilled?
- Wilson Yes I think I would.
- Tipping J The question then might become who has to do what to verify? Is there an obligation in the vendor to look or does the purchaser have to demonstrate somehow to the vendor that these funds have irrevocably been transferred electronically.
- Wilson Well in my submission it's on the purchaser. Now this largely gets to what happened in this case where there is what you may call an agreement for remote settlement or a provision for a remote settlement, putting it neutrally. My submission is that clause 3.7 gave both parties an entitlement or an expectation of a face-to-face settlement so that they get the certainty of knowing that they receive what performance by the other party concurrently. Now there's been a movement away from that by writing a letter of remote settlement and the vendor by that letter has said, and it effectively means in my submission 'I'm not insisting on a remote settlement providing this is done', and the letter is written in terms of receiving evidence that payment has been made. The letter says that they will provide the document etc on receipt of
- Tipping J Well it provides to use my brother McGrath's word, it provides its own means of verification.

- Wilson Yes it does and that is spelt out in the letter of being important but the vendor wants to have it verified that the money is cleared funds available for its immediately use by the settlement time, so the point of the letter was to say it is seeking receipt of this verification, receipt of the faxed undertaking that a bank cheque has been credited to their account and the verification by a faxed copy of the cheque and the stamped deposit slip, and the significance of that is that there is verification and proof from an independent source that the money has been credited to by a bank cheque to the solicitor's trust account. It is verified by a stamp, among other things, on the deposit slip, so you have face-to-face settlement in the contract then you have the remote settlement agreement which clearly spells out that the movement away from remote settlement is instead to receiving evidence of the money being in cleared funds immediately able to be used by the vendor.
- Gault J You invariably referred to this as a letter in a remote settlement agreement. Presumably you take the view that it is not just an arrangement between the solicitors but it's of contractual force between vendor and purchaser.
- Wilson Yes I do Your Honour. I accept that the legal classification of what this letter amounts to may be a little bit unclear. There are some, I suppose there's some possibilities which would seem to be an agreement between the parties would be one, and that appears to be what the Court of Appeal found or accepted. It may also be perhaps classified as a waiver by the vendor in the sense that the vendor has said effectively the contract provided for face-to-face settlement so I saw and received your money in my hand when I contemporaneously handed you the title. I've moved away from that. I've waived the need for that by saying instead I will accept that you have performed providing I receive these documents set out here in proof.
- Tipping J Isn't it simply an agreement between the parties, assuming it's contractually binding, when remained contractually binding, isn't it simply an agreement between the parties as to how the mechanics of settlement in their case were to be achieved?
- Wilson My submission is that it is an agreement and it effectively agrees on the manner of settlement, the mode of settlement and it pans out, expands on or varies
- Tipping J But if we don't need it unless it's raised elsewhere for other purposes I don't think we need divert ourselves as to what precisely, the question really is what is originally binding interparties and did it remain binding?
- Wilson Yes sorry I was giving an answer to His Honour which I thought might have been moving towards what exactly this was legally and whether it actually may have only been an undertaking between solicitors rather

than the third possibility I was coming to which was an agreement waiver undertaking

Elias CJ It's rather distorting the purport of this letter isn't it to describe it as potentially a waiver by the vendor of this implicit obligation of face-to-face settlement which perhaps is no more than an assumption anyway because what this is is an undertaking which if acted on by the purchaser enables the vendor to not tender concurrently. I mean that's the effect of this document.

Wilson It is Your Honour, my submission is

Elias CJ It's not really about notice as such, it's about look let's do it this way, we'll give you an undertaking and then the purchaser, if the purchaser acts on this and makes payment, arguably is waiving the purchaser's right to receive the title documents concurrently.

Wilson Yes with respect my submission is that it is an agreement and it may not be taking us anywhere to think of it as a waiver. There may be elements of that and there may be elements of waiver by both parties if the purchaser accepts that he's waiving possibly an entitlement to be there in person and receive the title documents concurrently with the payment of his money.

Gault J Did the purchaser ever accept a bank cheque means of settlement?

Wilson Did the purchaser ever accept that? Well the purchaser has received this letter, has not responded to it but to a degree has acted on it

Gault J Well to a degree

Blanchard J It couldn't be foisted on the purchaser.

Wilson If it wasn't though you would have to go back in my submission to 3.7. The purchaser could say well I don't like that letter. The contracts got clause 3.7 in it.

Blanchard J And what's wrong with that?

Wilson Well then he has got to, under clause 3.7, pay money on the settlement date which is effectively a tender of settlement. Now much of this in the real heart of the appellant's case is that maybe not quite so much about the bank cheque versus electronic transfer, more a matter about the question that deals with the second aspect as to whether there's been a tender of settlement under clause 3.7 or under this settlement agreement when the vendor knows nothing of it when the crucial time comes.

Elias CJ I'm still not terribly assisted by the emphasis on settlement. The purchaser has made payment. The purchaser has fulfilled his

obligations, leaving aside this question of notification, but in terms of payment it's not a question of tendering payment, the payment has been made.

Wilson It is accepted and it was certainly my client's case throughout the Courts below that accepting what the Judges said that there's no difference in substance between electronic transfer and bank cheque, it's accepted that, but there's a couple of aspects of that. One is that it relates to what really amounts to tender of settlement here because this whole case is essentially that because there's been a settlement notice and time has become of the essence for performance of the contract it had to happen by a deadline, and

Elias CJ Payment had to be made by the deadline?

Wilson Yes, performance of the contract by the purchaser had to be by the deadline.

Elias CJ Yes.

Wilson And that was essential because of the previous default by the purchaser. The vendor is saying payment performance wasn't made by the deadline and it purported to cancel the contract, so the ultimate question is whether the cancellation was valid. That is really the issue that there is but within that are the two issues of whether payment by electronic transfer certified performance obligations and whether

Blanchard J Well I think you're accepting that it would satisfy the performance obligations in all respects other than the fact that it doesn't notify the vendor that the payment has been made.

Wilson Yes it doesn't and

Blanchard J It is a payment but it's an un-notified payment?

Wilson That's correct.

Blanchard J Right.

McGrath J Mr Wilson if you're coming down as I gather you are on the basis that there was an agreement for a different manner of settlement entered into, I can see in terms of what I presume is a variation, an agreement varied the contract as to the matter of settlement, I can see an offer on the 17<sup>th</sup> February in the letter. Where is the acceptance of that offer? You referred a moment ago to the purchaser acting on the letter but I'd just like to be clear in my mind as to what it is that constitutes the acceptance by the purchaser which presumably is needed to complete the formation of the variation agreement.

Wilson Unfortunately there's no specific action that the purchaser took in response to that letter. The letter you'll notice did actually say at the bottom 'would you provide an acknowledgement on the duplicate copy etc', but that's actually only acknowledging copies of the documents. The purchaser didn't do anything specifically. It didn't write back and say 'yes we'll have a remote settlement on those terms' or it didn't write back and say 'well we don't want face-to-face settlement but we'll have some other kind of remote settlement'. Essentially it didn't do anything specifically in relation to that.

McGrath J Well if that's the case wouldn't the 17<sup>th</sup> February letter just have remained a proposal that didn't constitute an agreement to vary anything.

Wilson Well that is one possibility, and if that was the case it would leave 3.7.

Blanchard J Well at 4.25pm on the critical afternoon the vendor clearly didn't regard that letter as binding in contractual terms because the vendor's busy saying 'no you've got to come and do the settlement personally.

Wilson The vendor did say that and I can come to that. The position would appear to be in my submission that if the letter of 17<sup>th</sup> February didn't amount to anything because it wasn't accepted by the purchaser and remained a nothing then we have only clause 3.7.

McGrath J Well I understand that but I want to come back because I understood you to say that the purchaser acted on the letter and I understood from that you were suggesting there was a course of conduct undertaken by the purchaser that was sufficient in the end to conclude an agreement in terms of the letter, now is that not the case?

Wilson What I was referring to by that is that the purchaser on the evidence clearly did not proceed to perform a contract by a face-to-face settlement. You're talking about this agreement being as to the mode of settlement

McGrath J Yes.

Wilson And my submission is that 3.7 of the contract contemplates face-to-face settlement, purchaser going and seeking out the vendor and saying here is my money. The purchaser didn't seek to do that.

Blanchard J But assuming that's correct, it's not evidence of any persuasive kind that the purchaser treated that letter as an offer which it accepted. As I understand it the purchaser has never evinced an intention to use a bank cheque.

Wilson There's no indication that it said that it would pay by bank cheque

Blanchard J So this is no more than a proposal, perhaps a standing offer, but then



Wilson I wasn't saying that there was anything wrong in the purchaser not doing anything about this letter. The problem seems to be that you have to look at what occurred between this letter and the settlement time and there's an issue of whether there's some degree of acceptance buy of this

Blanchard J What do you mean by some degree of acceptance? - like being a little bit pregnant?

Elias CJ Or dead.

Wilson No, no, face-to-face settlement as provided for in the contract.

Tipping J But what exactly is the contractual status of this letter? You seem to be moving with great respect all over the place Mr Wilson. You're saying it's part of the contract, now how did it become part of the contract?

Wilson Well there are several possibilities here and it's not essential that

Tipping J Well let's have your best, let's have the best possibility.

Wilson The principal one is that the contract provided for face-to-face settlement, that's my submission. The purchaser evidently

Blanchard J Well it didn't

Wilson Evidently did not propose or have in mind doing face-to-face settlement. It clearly proposed a remote settlement. There's indications in the evidence of it saying

Tipping J Look I couldn't agree more that this was the proposal and offer, some that was alive, but how did it become contractually binding?

Wilson Well the Court of Appeal were of the review

Tipping J Never mind the Court of Appeal

Wilson That by its conduct it had accented to it because it didn't

Tipping J Accent by conduct is that the way you would wish to

Wilson Its assent to it by its conduct in the sense that its conduct was towards a remote settlement.

Blanchard J But how can you say it's an assent sufficient to be an unconditional acceptance of the offer when the purchaser was all along they wanted to use an electronic funds transfer?

Wilson Well they said that to the secretary or receptionist I think on the afternoon of settlement. I don't recall of the evidence before that.

Blanchard J Well did they ever, did they ever unequivocally say 'well proceed in accordance with this side letter'?

Wilson No they definitely didn't.

Blanchard J No so the side letter never had contractual force.

Wilson Well if that's the case

Blanchard J And if it did have contractual force Mr Newdick would have put his client in breach of contract with his letter at 4.25pm.

Wilson Well that's a different issue. It has never been an argument for the appellant in the Courts that the letter by itself at 4.25pm saying we want face-to-face settlement was effectively binding.

Tipping J Well that's not the point. That's not the point. If your clients case is that this letter was contractually binding, Mr Newdick, by proposing a different means was repudiating it.

Blanchard J Now would you prefer to have it contractually binding or repudiation or not contractually binding?

Wilson Well I certainly accept the point that Your Honours are making with respect that if it is contractually binding the letter that he wrote at 4.25pm would be a breach of the agreement. However that letter wasn't acted on. The purchaser clearly wasn't going to go and do face-to-face settlement at that time.

Tipping J But how refusing repudiation, how can he claim to be entitled to cancel?

Wilson Well he's not repudiating the contract as such, he's saying, he said then at 4.25pm that he wanted face-to-face settlement.

Blanchard J It would still be a very serious breach which would deny him the ability to cancel.

Tipping J I don't see how you can insist on a party settling by a means that you're not entitled to require and then say 'you're not performing as we unlawfully require, therefore we can cancel'.

Wilson Well nevertheless the obligation of the purchaser to settle in my submissions remained

Blanchard J So we're back to 3.7.

Wilson           Essentially we're back at 3.7.

McGrath J       Mr Wilson I'm still having fundamental difficulty that I think that we've moved off towards this question of repudiation but to my mind I need to come back to the basic point. I've noted you down as saying that the letter became part of the contract by conduct towards a remote settlement. Would you mind just telling me what actions or other conduct on the part of the purchaser amounted to conduct towards a remote settlement because it seems to me it's fundamental to your position that there was an acceptance through such conduct and I really need to know what the actions were that you rely on.

Wilson           Well with respect there are other factors that come into it and it's not the total of my client's case.

McGrath J       No don't worry about the rest of the case and I appreciate this possibility of waive or something but you're saying it's an agreement. If there is an agreement there has to be some act of sense to the proposal and you're talking about conduct but can you just help me with what conduct it is that you're relying on?

Wilson           The view is based on that under the contract settlement, the mode of settlement was to be face-to-face under clause 3.7 and the conduct is that the purchaser, the evidence would suggest the purchaser on the day of settlement in particular was not proceeding towards a face-to-face settlement, therefore it must have been proceeding towards a mode of settlement carried out remotely.

McGrath J       Well his conduct indicated that he was taking up and in essence accepting the proposal of the 17<sup>th</sup> February and what particular steps that he was taking on that day do you rely on? You might like to refer to your chronology perhaps.

Wilson           The steps would be that it was proposing to transfer the money to the vendor's bank account, solicitor's bank account.

Tipping J       How can that possibly be an acceptance of a proposal that you do it by bank cheque?

Wilson           Well I think without going through picking up the evidence exactly on that point. I think that the purchaser's solicitor saw no particular difference between a bank cheque and electronic transfer.

Tipping J       Well never mind what the purchaser's solicitor may have been thinking, how objectively can someone doing something quite different be an acceptance of a proposal that you do it by bank cheque in the way specified in this letter? I'm just mystified.

Wilson The position is that with respect my client's position in this case doesn't, there is two main possibilities. Either there was a kind of remote settlement agreement or there was clause 3.7

Tipping J You talk very loosely about a remote settlement agreement. That's not good enough. You've got to talk about the method of remote settlement. You can't just talk about some amorphous remote settlement agreement. I may be tough but we're here in the Supreme Court, we're trying to get these things tidied up and tidied down

Wilson Well the starting point of my submission is that the parties contracted on this form which has clause 3.7 in which speaks about because of its wording of being concurrent, interdependent, handing over

Tipping J Look with great respect I understand all that. We don't need to be told it several times. How can it be acceptance of a proposal that you do it in such-in-such a way by doing it in another way?

Wilson I accept what Your Honour's saying. I'm not trying to submit or argue that the purchaser at any stage agreed with the precise terms of this letter.

Blanchard J So the letter has no contractual force.

Elias CJ Well it may.

McGrath J I think Mr Wilson that what you're saying that there were two possibilities on the table. One was the original contractual manner of settlement which on your argument was face-to-face; the other was a remote settlement on the terms set out in the letter that what your client did was enough to indicate that he was taking up the latter option. Now whether he was in compliance with it in the end or not is another issue that you'll come to address by dealing with the matter through a bank cheque.

Wilson I'm sorry, do you my client or the purchaser was taking it

McGrath J I'm sorry, I mean the purchaser, yes.

Wilson The purchaser was taking up the offer of a remote settlement. My submission is that the purchaser was taking up the offer of remote settlement but it never spelt out 'I accept that offer precisely'. It never said 'I accept the offer of remote settlement with a bank cheque' and it never said 'I accept the offer of a remote settlement'.

McGrath J But what you're saying is that he did enough to indicate that if the two possibilities on the table, it wasn't the original contractual one that he was taking up, he was indicating that he was going to pursue the route of the 17<sup>th</sup> February and you then have to look at whether what was done was in compliance with that.

Wilson Yes that is what I was saying by moving towards settlement. It was taking out the remote settlement option.

McGrath J Now I can understand that. What are the particular actions that indicated that he was moving towards the 17<sup>th</sup> February option if I can put it that way, which was a remote settlement option?

Wilson Because its conduct on the settlement day

McGrath J You don't rely on anything prior to the day of settlement?

Wilson I don't from memory think there were any, if I could just check something Sir,

McGrath J Well I can't think of anything, but it's your case.

Wilson I think it was a complete vacant matter of conduct up until the settlement day and on the settlement day there's correspondence and indications that we're going to eventually get the money and we're going to sort of request to be transferring it by or an indication we're going to transfer it by electronic transfer.

McGrath J You're going to get money and you're going to put in the bank account if I can put it that way, and which letters? Just show me the letters that were indicating that on the day.

Wilson I'm pretty certain Your Honour that the only actual evidence of conduct is the solicitor's evidence saying that he was going to be doing remote settlement and I can come to that as opposed to any letter. I don't think they wrote a letter on that day.

McGrath J Well I think perhaps you may want to leave it at that and we'll see what your opponent says when he gets up, because it's an issue

Wilson The matter is outlined in case on appeal in the actual evidence in the brief of the evidence, volume 3, page 314. This is the evidence of the purchaser's solicitor, Mr Richards, and he in about three paragraphs outlined what happened on settlement day, none of which contains a letter from him to the vendor's solicitors, says he received on that day a series of letters with amended settlement statements. He says on the 5<sup>th</sup> March, this is para.24, he drew down the funds and he speaks about the Finance Companies and that there was further delay. That's talking about the lenders' funds and then over the page at para.25, that he telephoned Turner Hopkins, the vendor's solicitors and said he wished to make enquiry requested by the mortgagee's solicitors to ensure that settlement would still proceed between 4pm and 5pm. He was advised that the secretary was away and there was advice about penalty interest and he says I informed Amy Conway that it was possible that we would not be able to settle until about 4.50pm and in para.26 he says

'during the course of that conversation with Amy Conway, the secretary, he discussed her settling by electronic funds transfer because the settlement would be late in the day and he indicated that we would settle by that method'.

McGrath J Right well look that's helpful thanks. You're accepting that there was an agreement on that basis?

Wilson Well that is in my submission evidence that the purchaser was proposing himself a remote settlement. Now I agree there's a problem about whether, because there's a distinction between what the vendor proposed and what he is saying here, that they don't quite marry up and that means as we may know this of course is not complete agreement. There's no contract

Tipping J And how do you extricate yourself from that problem?

Wilson Well it's a question of whether the preciseness, whether you're talking about that yes we're agreed on remote settlement or we're agreed on this precise remote settlement by a bank cheque and electronic transfer. My submission

Tipping J So your client's very precise when it suits him but very loose when it doesn't?

Wilson You see what's happening here is that the lawyer is saying, this is the last day of the settlement notice, and the lawyer is saying the lenders have said they are only going to provide the money after 4pm and they're going to settle between 4pm and 5pm, and we all know that banks close at 4.30pm and so there won't be an opportunity to obtain a bank cheque anyway. Now the issue really on this point, and it's not crucial to my case by any means, is that if there was a remote settlement agreement on these terms it would be because of the assent in general terms by lack of any other conduct and by moving towards a remote settlement on the day that constitutes agreement. That is as far as I can take it.

Blanchard J What's an agreement to do? This is what I don't understand. You've got a very precise offer and you have what you call an assent which doesn't accept the method.

Wilson I accept that it may be that that doesn't constitute a contract, but the gist of what the purchaser did was to attempt to do a considerable amount of what is in the 17<sup>th</sup> February letter. The part that I quoted from para.26 of this brief of evidence indicates that the solicitor is effectively asking if he can settle by that method.

Tipping J Sorry, which solicitor are we talking about?

Wilson The purchaser's solicitor. I was reading from his brief of evidence and

Gault J He got a reply by fax in no uncertain terms to that request.

Tipping J I would like to know whether you seek to support the Court of Appeal's analysis at para.50, page 48, which seems to be within those three lines at the bottom of para.50. 'As the purchaser did not suggest any alternative settlement procedures, or complain that the procedures suggested, we consider that it must be taken to have assented to the procedures in the letter'. But in effect that is saying that by doing nothing the purchaser must be taken to have assented.

Wilson Well I accept the lack of actual action does create difficulties in trying to determine whether the contract is here but this is an analysis which in my submission is valid. I'm quite happy to accept that by the lack of assent

Blanchard J So you're now saying that the letter is contractual? I'm getting very confused because you keep taking positions which are different. I realise you're being driven to them by questions but at some point you're going need to tell us whether you say that that letter was binding or not.

Wilson I'm quite clear that my position is that the purchasers wrote their letter of 17<sup>th</sup> February for the reasons outlined here and not proposing any alternative

Blanchard J The vendor wrote the letter?

Wilson The vendor wrote the letter.

Blanchard J Yes.

Wilson And there's an acceptance or assent to it by the matters that we've outlined and by

Blanchard J So you say that that letter was binding?

Wilson I'm saying it's binding but if it is not then we have the contract

Blanchard J Well then let's just work on the basis that it was binding. Did not the vendor then repudiate it?

Wilson The vendor took a step which would be in breach of that.

Blanchard J And remained in breach at the time they issued a cancellation notice.

Wilson Well the breach was only, if you do something that's in breach of contract it may give the party the right to cancel it, but if the party doesn't

- Blanchard J The fundamental rule is you can't cancel after a settlement notice if you are in significant breach.
- Tipping J You must be ready, willing and able to settle in the correct terms.
- Wilson Well the evidence is in my submission that the vendor was ready and able to settle.
- Tipping J It wasn't, if this note is binding it was proposing a method quite inimical to the binding method of settlement.
- Blanchard J It was saying let's make things very clear. You've got to do a personal settlement.
- Wilson Yes but that is one matter in relation to remote settlement, the mode of settlement, sorry, not remote, the mode of settlement
- Blanchard J Well it's pretty fundamental.
- Wilson The position remains that the, well it hasn't really been put to the test here, but there's nothing to suggest that if the money hadn't been in cleared funds and given to the purchaser by 5pm that that's treated as performing purchaser's settlement obligation.
- Tipping J No and Mr Newdick was quite clearly for tactical reasons wanting to make it as difficult as possible for them to settle. There's not suggestion implicit in the letter that he would accept a more easy method. That's the whole point of the letter.
- Blanchard J And then he made himself unavailable when they tried to ring him about the letter.
- Gault J I wonder whether that letter had any effect on the settlement notice, if as you say by that time it was impossible, to insist on an impossibility would seem to effect a waiver of the settlement notice.
- Wilson If one accepts that there was a remote settlement agreement, I'm accepting that letter was a form of breach of that but my position is that it was not acted on.
- Tipping J I think your much better position is to go back to the 3.7 and say, because really I think you're struggling with great respect with skill but not much success in my mind. You can hold it both ways you say. You say they didn't perform either the settlement side letter or in terms of 3.7. Do you perceive yourself to be in a better position under the settlement letter than under 3.7? Is that why you're struggling to hold onto this side letter?
- Wilson No I don't wish to, I didn't see it as my position to have to struggle to hold onto that because I'm quite happy to accept the obligations of 3.7



if need be. I just have to deal with the facts as they are. The facts are that we had this letter that we have what we know about, what the purchaser did; we have facts now that we have Mr Newdick writing this letter at 4.25pm – those are the facts as they are. Now they're open to various interpretations but the whole thrust of my case is that you can look at either of those, and I'm quite happy to go just with clause 3.7

Tipping J Well you can't say anymore on the binding nature of the side letter can you? You've exhausted that.

Wilson No, I've well and truly exhausted myself about that.

Elias CJ Can I just ask a couple of points of clarification? I took from what you had said that you accept that the bank cheque dimension is irrelevant, is that right?

Wilson It's irrelevant in the sense

Elias CJ Irrelevant to payment I should have said.

Wilson Yes, I accept that because there's no difference in substance between the two, by itself in that sense it is irrelevant.

Elias CJ Yes.

Wilson It's not, if you had gone back to having an agreement for settlement like this, what is important is that to settle this transaction the purchaser had to have some evidence and proof that he had received the same cleared funds in a sense that they're there knowing he can use them at 5pm. He can repay a mortgage, settle another transaction at 5 minutes past 5 because he knows and has had evidence that they're in his bank account.

Elias CJ Yes, but that obligation you say arises out of clause 3.7.

Wilson It arises out of clause 3.7 as well as out of any kind of interpretation of a remote settlement agreement.

Elias CJ Well, you see I really wonder whether all of this argument about remote settlement is a red herring. You said in your argument that you relied either on clause 3.7 or the 17<sup>th</sup> February letter, but I wouldn't have thought that the 17<sup>th</sup> February letter is really in contra-distinction to the obligations under 3.7. If you look at the substance of the letter of 17<sup>th</sup> February it seems to me that it's an indication that payment directly into the solicitor's trust account is acceptable. I don't think you need to characterise that as remote settlement at all. It's an indication of a mode of payment that was acceptable and I would have thought that if acted on the vendor would be estopped from saying that isn't payment because he's indicated that that will be acceptable. The

subsequent conduct in suggesting that at a stage at which personal attendance was impossible just couldn't alter the representation that had been made that payment directly into the bank account was alright, so I think it does all come down to clause 3.7 and whether from that there is a stipulation that the parties have made which is essential that there has to be notification, and I would have thought that was the whole argument in the case.

Wilson I accept what Your Honour's saying, that is essentially the half of my client's case. Just putting it another way, and this might be reversing it. You had a settlement notice which had been issued because of the default. There was a deadline of performance by the purchaser or by the parties by 5pm. We came to 5pm and the vendor had no knowledge of any form of settlement at all.

Elias CJ Well then surely in terms of whether it's an essential term, you have to overcome the fact that in clause 3.7 it's expressed as something which is of benefit to the purchaser. It means that until notification is obtained, the vendor will not be in breach of his obligations to concurrently hand over the documents.

Wilson Well no, my submission is that clause 3.7 required the purchaser to pay and in my submission the law means that to pay means what is commonly referred to as a tender of payment. A tender of payment is

Elias CJ But you had more than a tender of payment, you had payment.

Wilson You have payment into a bank account but unbeknown to the vendor.

Elias CJ Yes, yes and I understand that, but the notification that you put so much emphasis on is one which is implicit in the use of the word hand-over or whatever. So you're building quite a substantial edifice on a fairly flimsy foundation there it seems to me, to say that is an essential term that the parties have stipulated which justifies cancellation when it's apparent purpose is to make it clear that the vendor is not in default if he doesn't pass over the title documents until he knows that payment has been made.

Wilson One of the key points in the appellant's case Your Honour is that to perform a contract means tendering, making payment in a sense that it is there for the immediate use of the vendor.

Blanchard J Does it help to focus on the word 'tender' that 'tender' is something that comes to the attention of someone.

Wilson That's correct. That's what my submission 'a tender' means.

Tipping J I would have thought with great respect it was essential to the vendor to know whether they had in fact been paid by 5pm.

Wilson That's the key part of my client's case.

Tipping J That seems to me and always has and I agree with the Chief Justice, that is the heart of the case and it's taken us an hour to get there. But the question is is it essential or is it so clearly implicit in 3.7 by the method stipulating that the vendor is entitled to know for a certainty whether they've been paid and with respect to the point that's been put to you I would have thought there was a strong argument that it is essential and it's not just a mechanical thing at all.

Wilson Indeed I'm happy to accept Your Honour's views on that but

Tipping J Well I'm coming to your assistance in this respect but perhaps

Wilson But the question I would like to deal with, the issues about essential terms because they arise to some degree in the respondent's submissions and they're part of the Court of Appeal judgment as well in saying that the purchaser, vendor didn't stipulate that the bank cheque was the only one, it didn't stipulate that receipt of notice was essential to it by that time.

Tipping J Well the first question might be why does 3.7 envisage face-to-face settlement? I would suggest it does so for two reasons. One for security, documents exchanged for money, and two, so that the vendor and for that matter the purchaser can know for a certainty that the transaction has gone through.

Wilson Yes absolutely, I agree entirely Sir. Because that is the whole point of this contract that the parties to come to settle a transaction like this, and it happens with every case, both sides have to have the assurance and certainty that there's been this exchange.

Tipping J So your argument really would be that the purchaser's obligation which is essential is to tender a payment and that involves putting it forward, which might be putting it into a bank account, but also ensuring that the vendor becomes aware that that has occurred.

Wilson Yes that has been my submission throughout that it must come to the attention of the vendor and one of the reasons for that is that the vendor wants to be able to use the money. It's not much point in being in your bank account if you don't know it's there. Now so that part is it's essential that he does know that it's happened and essential that for the reasons that it's obvious, any vendor would want to know that he's able to use the money.

Blanchard J Well if you accept then that the purchaser was entitled to respond to the settlement notice by a remote settlement of that means with notification, you're then faced with the fact that your client at the last minute and in breach of obligation insisted on face-to-face settlement

Wilson Well that's going to get back to the part that we may have been moving on from as to whether this letter constituted an agreement or whether it was a waiver because I

Blanchard J No, which letter?

Wilson The letter of 17<sup>th</sup> February.

Blanchard J No we're not talking about the letter of 17<sup>th</sup> February, we're talking about the letter that your client wrote at 4.25pm on the last afternoon, demanding that settlement be in person.

Wilson Well if there's never been any correspondence about any kind of other mode of settlement, it would be my submission that looking at 3.7 the vendor or the purchaser are entitled to say face-to-face settlement.

Blanchard J I thought we'd just got an acceptance from you that any form of tender with notification would suffice.

Wilson Yes indeed, sorry I might have misunderstood your question in the sense

Blanchard J Well let me put it to you again. I think you accept that it would be sufficient compliance with 3.7 and the settlement notice for the purchaser to effect a remote settlement involving cleared funds with notification to the vendor by 5pm. Do you accept that?

Wilson Yes.

Blanchard J At 4.25pm your client, contrary to that, insisted that the only method of settlement would be face-to-face and never withdrew that insistence.

Wilson Yes but I'm not trying to support the letter, I accept that in some senses it was wrong. It could have been wrong in a number of senses.

Blanchard J It was a breach of contract.

Wilson Yes but the contract remained. The purchaser didn't act on that. The purchaser didn't say well that's a breach and

Blanchard J That so, but the vendor proceeded to cancel when it was still in breach.

Wilson Well it cancelled because there hadn't been brought to its attention any settlement.

Tipping J Are you saying in spite of this letter requiring settlement to be completed in person the purchasers still have to perform its part of the bargain along the lines you've just accepted?

Blanchard J But by the stipulated time

Tipping J By the stipulated time, and it not having done so vendor could cancel?

Wilson Yes.

Tipping J But how can a vendor cancel if it's demonstrated that it's not really willing and able to settle in the terms that the law allows?

Wilson Well I'm not sure that the

Tipping J If you're right in answer to my brother Blanchard that

Blanchard J The vendor was saying remote settlement won't be accepted.

Tipping J That puts it more shortly, yes. And if it was obliged to accept remote settlement is it not unable or unwilling to perform its part of the bargain?

Wilson Well the letter says that we require settlement to be completed in person.

Tipping J Yes.

Blanchard J Yes, in other words remote settlement's not good enough.

Wilson But it's probably in my submission taking a wrong interpretation of clause 3.7, because as we know under clause 3.7

Blanchard J Well it may be. The vendor's solicitor may have misunderstood clause 3.7, but that doesn't give it the right to then make a demand which is contrary to the contract.

Wilson Well what Mr Newdick was doing incorrectly here was expressing an incorrect interpretation of clause 3.7 and that by itself is not a breach.

Blanchard J Well he adhered to that.

Wilson But to say this how I interpret the contract

Blanchard J What Mr Newdick was saying was 'I won't accept a remote settlement'.

Tipping J With notification of being implicit in that, yes.

Wilson He was saying

Gault J But he wasn't just communicating his interpretation, he was making a demand, a requirement.

- Wilson That's what the wording says 'we require settlement to be completed in person'.
- Gault J Yes, yes, so he was insisting on something which he was not entitled to insist upon.
- Blanchard J And what happened when that letter was received was at that point they were still waiting for the funds to come in. They got them I think at 4.38pm and the first thing they did was to try to communicate with Mr Newdick about that letter and they couldn't get him because he wouldn't come to the phone. Now that obviously threw them off balance in the same way as they've been thrown off balance if the fire alarm had gone off in their building and distracted them, and they then transmit the funds, they then have all the trouble with the fax, time slips by. How can the vendor possibly justify a cancellation in those circumstances?
- Wilson Well my submission is that the letter puts forward a position that's incorrect about the meaning of clause 3.7. It had nevertheless been default by the purchaser on the required settlement back in February. The purchaser had not settled and a settlement notice had been issued requiring him to settle. It is still
- Gault J It must have been a requirement to settle in terms of the contract.
- Wilson Yes and my submission is that it was still for the purchaser to settle in terms of the contract. That is what his obligation was. It was unaffected by this letter.
- Gault J But if a notice is given requiring something and then while that notice is running an insistence on something quite different is imposed, what does it do to the notice?
- Wilson Well the question is Your Honour whether it really is any different. It is saying it requires settlement.
- Gault J It requires settlement but only in a particular form.
- Wilson All it says is requires settlement to be completed in person, but it's still the provision that the purchaser makes payment, so it's really
- Tipping J I think what you're arguing is that this letter does not, in spite of its requiring unlawful in the non-pejorative sense means of settlement, there was still an obligation on the purchaser to perform its part of the bargain by 5pm and it didn't.
- Wilson Yes indeed.
- Tipping J But what authority is there for saying that when you're faced with a situation like this and the other party is in default, that party can

cancel? In other words how can you cancel when you're not ready, willing and able to settle in terms of the contract and you've evinced a clear intention of not being willing.

Blanchard J In other words if they'd turned up at one minute to five, sorry, if they'd completed their electronic transfer at one minute to five and got the notification through by one minute to five, this letter is saying not acceptable, had to be in person.

Wilson Yes but that didn't happen Your Honour of course.

Blanchard J Well I know it didn't happen, but

Tipping J We wouldn't be here if it had.

Wilson It remained the obligation to settle.

Tipping J This was a high level bluff and it's a question as whether or not Mr Newdick's bluff hasn't been called.

Wilson Well I don't wish to support Mr Newdick in his letter obviously. I deal with it. I'm saying that he has interpreted 3.7 as being in effect and he's written a letter he thinks clarifying that 3.7 requires payment, sorry, what is called a face-to-face settlement because it uses the words 'hand' etc.

Blanchard J He's not saying in my opinion your obligation is to complete settlement in person, what do you think about that, he's saying for the sake of clarity we require settlement to be completed in person. It's a demand.

Wilson Well that's on the word 'require'. If you took clause 3.7 where I submit and it has been the view of the Court of Appeal that it contemplates face-to-face settlement, it does seem to do that in a sense that it can be face-to-face settlement, but it's quite possible for the purchaser to say 'I have already paid you'.

Tipping J You have to argue don't you that clause 3.7 requires face-to-face settlement, because it's only if it requires face-to-face settlement that Mr Newdick's letter is justified?

Gault J You've already accepted that it doesn't.

Wilson Well I've accepted that you can have payment but the clause is that it has a certain amount of wording which is really only consistent with it being face-to-face, so either party is entitled to insist on that, particularly the words concurrent and interdependent and hand etc. They clearly point the parties towards

Gault J That's contrary to what you agreed when it was put to you by Justice Blanchard quite some time ago.

Wilson Yes but that doesn't rule out the possibility that earlier in the day before you settle that the cleared funds have been paid. - could have been actual cash; could have been a bank cheque, and it's been brought to the attention of the

Blanchard J Why does it have to be earlier in the day.

Wilson Well earlier than when you

Blanchard J You could do it at one minute to five with the notification.

Wilson You could do. This would have been accepted that if leaving aside the 'in person' part, if there'd been evidence coming to the vendor that the bank cheque and what have you had been in the bank account and he receives that evidence at one minute to five, that is payment.

Tipping J I have to say that I was surprised at your concession because quite honestly I think it completely collapses your case and I would have thought there is a respectable argument that 3.7 requires face-to-face settlement.

Wilson Well I don't know whether I've been

Tipping J But you've disavowed that.

Wilson No, I've said a number of times in my written submissions that face-to-face, 3.7 is face-to-face settlement but within that you can have a situation which we're hypothetically talking about here where valid payment has already been made.

Blanchard J What do you mean by 'has already been made'?

Wilson Well supposing the purchaser's solicitors have a courier deliver the actual cash before then physically to the vendor's solicitors and then there's a telephone discussion saying 'yes you have the cash now, I've paid'.

Tipping J But it's absent waiver or agreement to some other form of settlement. You're not arguing as I understand you that clause 3.7 requires face-to-face settlement. I think we've got to get this absolutely clear, because when you answered my brother Blanchard a few minutes ago you clearly were acknowledging that the clause permitted as of right another method.

Wilson Well it does require that but then we're in a situation, we're talking about a situation where one party has pre-empted that by actually making a payment before then.



Tipping J Look I'm not interested in the facts of this case, I'm interested in what you're submission is as to what 3.7 on its face requires, absent any variation, waiver or anything else.

Wilson Well essentially my case is that 3.7 does require face-to-face settlement because it uses that wording.

Blanchard J So a tender of payment involving that the putting of the money into the bank account plus notification wouldn't comply with 3.7?

Wilson Well this is where I'm getting to the situation that the purchaser has in effect pre-empted by actually making payment.

Blanchard J Never mind what happened in the particular case, look at it in the abstract. Could you comply with 3.7 by putting the money into the solicitors trust account and notifying them that you'd done so, so they were able to verify that it was there irrevocably?

Wilson I'm wondering if I might have a few moments to confer about that, to contemplate that. We have discussed that point but I feel that it's getting too, in some senses we're dealing with this case and in some senses we're dealing with cases generally. It becomes a difficult

Elias CJ I think you should really try to concentrate on the points of principle because those are the points that this Court has to be most concerned about. Would you like us to take the morning adjournment now Mr Wilson?

Wilson Yes that would be fine Ma'am.

McGrath J Mr Wilson one possibility you might ponder over the adjournment is that the contract actually stipulates that notification and verification is to be provided on settlement implicitly by the purchaser. There's nothing that would indicate it was the ultimate obligation of the vendor to check the money was there and to check the money had actually been paid.

Blanchard J Well I'm not suggesting that.

McGrath J And you just might like to consider whether that's not an answer.

Blanchard J Well I was never suggesting that.

Wilson Yes well part of the problem is that when we're dealing with the case here we have what's found later to be a payment of cleared funds that's been sent back, which is different from what His Honour Justice Blanchard was saying of the purchaser is aware that he actually has in his bank account now the payment they're able to use it at five to five. We didn't have that in this case.

- Tipping J You've got to lift your eyes to help us from the banal facts of this case to the points of principle.
- Wilson Indeed and one of the
- Elias CJ Well actually even from the fascinating facts
- Tipping J That banal is a wrongly chosen word but it evinces some slight frustration frankly.
- Wilson I agree and I was hoping that my submissions were trying to address principles and how these matters are dealt with as a point of principle, but then we tend to get a little bit stuck as to whether we're talking about some other situation or this one and if you accept that yes the purchaser has simply come out and made the payment before any suggested time for a face-to-face settlement, what happens to face-to-face settlement? In some senses you would obviously say its otiose I don't need that now because you've actually been paid.
- Blanchard J But it's good enough for that to have happened at 10.30pm in the morning, it's good enough for it to have happened at one minute to five, provided you're able to ascertain that the payment's been made to the bank account.
- Wilson Yes the key point is that the vendor knows he's got the money.
- Tipping J The key point is what was the purchaser's obligation, under 3.7 and ascertained from the notes? What was the purchaser's obligation under 3.7?
- Wilson I certainly agree with Your Honour on that aspect here because although there's these two issues, there's a question of cancellation being valid or not and they will depend on what were the obligations of the purchaser and whether he performed those by the required time.
- Tipping J Precisely.
- Wilson And one of the matters we were going to deal with was this question of essentiality because the Court of Appeal and in my learned friend's submission there's references to what terms may be said to be essential and what may not be, but in my submission there's only one provision that had an essential nature to it and that was the obligation to tender or perform settlement by the required time and that came about because of
- Elias CJ That seems totally contrary to your case Mr Wilson, because on one view if that's the only essential term for the purchaser to make payment by the required time that happened. Your case really requires you to say that there was a further essential term and that was that the purchaser notify the vendor the circumstance of payment.

Wilson Well the making of payment and the tendering of payment in my submission means bringing it to the attention of the vendor.

Blanchard J Yes, so in the contracting community a tender that was never brought to the attention of the landowner wanting the work done wouldn't be much of a tender.

Elias CJ No.

Tipping J It would be a Clayton's tender.

Elias CJ Well alright we'll take the adjournment now for 15 minutes thank you.

11.24am Court adjourned  
11.48am Court resumed

Elias CJ Thank you. Yes Mr Wilson.

Wilson Yes Your Honour, I said at the outset that this case largely turns on interpretation of 3.7. It is my position that the clause does require face-to-face settlement – that's settlement in person. That may not end the matter. You see the clause is expressing the two fundamental obligations by either party of what they've got to perform, so like many promises in a contract they're two promises linked together. Now although I'm saying that it requires face-to-face settlement, either party it seems could voluntarily perform in advance.

Blanchard J In advance of what?

Wilson Before there's a time for a settlement, they could on the day before the settlement date perform in advance for example.

Blanchard J Well could they do it at one minute to five?

Wilson Yes, you see it could be by either party, it could also be the vendor. The vendor, I think this has happened, could for example a day or two before settlement date deliver the title documents.

Blanchard J Yes, I've seen that happen.

Wilson Now what is the situation if somebody has performed in advance despite this clause? It's my submission that by doing that they've waived the, or renounced or waived the reciprocal benefit that's in clause 3.7.

Tipping J But does one have a right to settle other than face-to-face when the other party is insisting on settling face-to-face?

Wilson Well you would perform, yes, you could have the purchaser saying 'I want face-to-face settlement' and the vendor the day before the settlement say 'here are the title documents'.

Tipping J But to exercise that right effectively I would have thought you had to do everything required of you before a closing time.

Wilson Yes you would, and so when it comes to payment, which is the key point here, you've got to tender payment in the sense of getting it to the attention of the vendor

Blanchard J But you could put the money into the vendor's solicitors trust account, let's say the day before, and notify them that it was there.

Wilson Yes.

Blanchard J That would be good enough?

Wilson That would be performing your 3.7 obligation in advance and renouncing the benefits that are there under that clause for you.

Blanchard J But you said a little while ago that you could also do that at one minute to five. That's why I asked what is 'in advance' mean.

Wilson I think you can so long as at one minute to five you can satisfy the vendor that he, if you're talking about paying the money, you've got to be able to satisfy the vendor that he's got the money. If you can do that at one minute to five that would seem okay.

Blanchard J Yes right, thank you.

McGrath J And if you did it at 10 o'clock in the morning you would still have to provide that verification in a manner reasonably acceptable to the vendor by 5 o'clock wouldn't you?

Wilson Yes, indeed that is part of it.

Tipping J And that everything comes back then on this argument to the fact that whatever they were entitled to do, that is the purchasers they didn't do an essential ingredient, ie, verify payment prior to 5pm.

Wilson Yes.

Tipping J That's the absolute bottom line of your case isn't it?

Wilson It is. That is the central point of the case and essential because the vendor didn't know.

Tipping J And why is notification essential in these terms? I think I know the answer but I'd like to hear it from you.

Wilson Because it's the essence of tendering payment that you get payment to pay so that he has it, he knows he has it, he knows he can deal with it. Now

Gault J Can I just have your assistance on one matter please Mr Wilson? You as you contend 3.7 requires face-to-face settlement, coming to the facts of this case we have a situation where the vendor indicates by letter of the 17<sup>th</sup> February that that will not be required and then on the day of settlement when it is recognised that it's too late, insists upon face-to-face settlement, can in that situation a vendor having demanded compliance which he knows is impossible then insist still on the time limit?

Wilson Well I take it on this we're assuming that the letter of the 17<sup>th</sup> February didn't amount to an agreement

Gault J It doesn't matter.

Wilson In that case it would be, in my submission it would be the nature of a waiver

Gault J Or a representation.

Wilson Or a representation that 'I will accept something less than what the contract provides'. A contract provides for face-to-face settlement or requires it in my submission, I am happy to accept less than that. Now if it's not acted on then it's in the nature of my submission of a waiver; there's no consideration for it and the waiver could be retracted

Gault J Can you revert to insisting upon your strict legal rights having represented that you will not in circumstances where you know it is impossible to meet the time limit?

Wilson Well there's two things that come into that. My fundamental case is that 3.7 requires it but a party can voluntarily perform it in advance at one minute to five.

Gault J Well I heard all that but your proposition was that this clause requires it.

Wilson I didn't come prepared in my writing submission on this, and I can provide a copy of this later, but from *McMorland and Sale of Land* which I've quoted from has an extract on possible retraction of the waiver of a few lines long which is at para.5.13, page 168.

Blanchard J This is a living author.

- Tipping J Not half lived.
- Wilson And this is in relation to fulfilment of conditions but I think the principle about waiver is the same. The author's noting that there is the possibility that the person who has waived a condition may wish to retract the waiver and seek to rely on the condition and he says 'the right to resile must be considered. The waiver being a unilateral act there is no consideration for it so the only mechanism for preventing the party from resiling is estoppel. The retraction of the waiver is effective unless the other party has acted upon it, perhaps to their detriment. Such an act may be large as when the vendor enters into an unconditional contract for another property or small as when the other party incurs a small amount of legal costs. The authority that's quoted as *Connor and Pukerau Store Ltd 1981 1 NZLR*
- Tipping J But here there's clear action to detriment because they haven't geared themselves up to satisfy the strict terms of the contract and no longer can. Clearly acted upon this waiver or whatever it is. You can't withdraw it can you when someone's clearly going to be relying on it in circumstances where they can never go back to the correct technical legal position. In fact that sounds most unjust.
- Wilson They can perform a contract.
- Tipping J No but they were going to perform it in a particular way, relying on this representation, waiver, call it what you like and then when they're all relying on that lesser way, suddenly at the very last minute the rug's pulled from under them. That can't be right.
- Wilson Well with respect Your Honour it didn't seem on the facts that they had relied on it. They were intending to do a remote settlement.
- Tipping J Yes that's exactly how they relied on it as opposed to face-to-face settlement and then at the very last minute they're told remote settlement's no longer any good.
- Wilson Well we went over this in relation to whether it constituted an agreement or not.
- Tipping J Yes but you've quoted and no doubt a very learned and accurate passage, but it's fundamental for that passage if there had been action upon the waiver otherwise to the detriment different factors come into play. That's when you get an estoppel.
- Wilson Well clause 3.7 requires face-to-face settlement but as I've outlined, a party can voluntarily perform that. Newdick writes and says he requires face-to-face settlement, a party can voluntarily perform that.
- Tipping J It's too late.

Blanchard J Couldn't physically do it at that point.

Wilson By the method that we discussed.

Tipping J *Pukerau Stores* is very clear on the fact that you can't withdraw a waiver if the other side have relied on it to their detriment and would suffer detriment in the circumstances of the withdrawal.

Wilson I accept that you can't, if it is a waiver and they've relied on it, you can't withdraw it without reasonable notice and 20 past 4 wouldn't be reasonable notice etc, but my submission is that's not the situation we're in here. We're in a situation where we have had the letter written of the 17<sup>th</sup> February but no response whatsoever from it until that time. The first response seemed to be that at 4.15pm

Blanchard J But they knew before 4.25pm that the purchaser was relying on that letter at least to the extent that they were proposing to do a remote settlement.

Wilson Well the evidence was from Mr Richards that he indicated he was going to transfer the money electronically.

Blanchard J Well that clearly isn't face-to-face settlement.

Wilson No he's advised that to the secretary.

Blanchard J And as soon as that happens Mr Newdick writes his letter.

Wilson Their advice that they're proposing to do it electronically is somewhat disconnected from the 17<sup>th</sup> February letter as we pointed, they're quite different.

Blanchard J Well it wasn't what you were saying about an hour ago.

Wilson Well I was to a degree pushed to what the Court of Appeal had said that they had by a lack of action, by proceeding towards a remote settlement, were going with the concept of remote settlement but they weren't going with the 17<sup>th</sup> February letter. Now because 3.7 requires remote settlement, that's its language and that's the nature of the promises

Tipping J You mean face-to-face settlement?

Wilson Oh sorry, it means face-to-face settlement. It requires face-to-face settlement. The letter by Newdick was not out of order. He's pointing out that he requires face-to-face settlement. Now that didn't stop the purchaser transmitting the money. If what had happened here is if they'd had obtained a bank cheque, faxed through the required proof, and that was received, of the deposit slip etc, it would be impossible for the vendor to be suggesting that there hadn't been tender of settlement.

- Blanchard J S clause 3.7 would have been complied with?
- Wilson Yes in the sense that outlined when we came back from the adjournment that the party has performed its obligations
- Blanchard J But Newdick was saying that wouldn't be good enough. You have to be here in person.
- Wilson Well this gets down to the legal issue that I was endeavouring to outline. Although so much of this wording of clause 3.7 points to the requirement of face-to-face settlement, a party can fulfil it. You see it does require it in the sense that if one of the parties is not doing anything, the other party can say I require face-to-face settlement so the purchaser can say the last time for settlement is 5 o'clock on this day, I'm coming to your office and I'm tendering the money to you – I require face-to-face settlement. In that sense he's entitled to insist on
- Blanchard J The purchaser can certainly require a face-to-face settlement because the purchaser's entitled to concurrent delivery of the documents and the only way you can achieve that is by face-to-face settlement, but I question whether the vendor can require anything more than that there be a tender of payment.
- Wilson Well it's the same thing. Just to complete that one the vendor if it doesn't suit him can deliver the documents the day before, perform his obligations in the same way
- Blanchard J But I think you've already accepted that it would be in compliance with 3.7 for the money to be provided irrevocably coupled with the necessary verification and that doesn't involve a face-to-face settlement.
- Wilson Yes I'm accepting that on the basis that 3.7 did require face-to-face settlement but you can go ahead and perform it anyway if you choose to do it that way.
- Blanchard J Well in other words it complies with 3.7, therefore 3.7 does not require face-to-face settlement on the part of the purchaser. It may require it on the part of the vendor.
- Wilson Well it requires it in the sense that if both parties are to get the contractual elements of 3.7 and there's no other arrangement or agreement they have to do it that way.
- Blanchard J The concurrency I put it to you is for the benefit of the purchaser not for the benefit of the vendor.
- Wilson There must



- Blanchard J How is the vendor going to be in any difficulty in being left with documents which the purchaser hasn't yet picked up? The vendor can always say to the purchaser, I'm holding these at your risk and it's over to you to come and collect them.
- Wilson Yes but it seems to me that it
- Blanchard J Still less I would say these days when we've moved on to the electronic documents.
- Wilson It seems to me that it's similar for either party but not many people do it because they want security and assurance of handing over the title or handing over the money for immediate control of what's been received in response to it. But either party can do that.
- Blanchard J Well let's turn it around the other way and test that. The vendor has a bundle of documents and decides that they'll simply deliver them to the purchaser's solicitor the day before settlement. The purchaser says 'oh I wasn't expecting you today, we haven't got the money', and the vendor's solicitor will say 'well never mind, you can have the documents'. The purchaser can then complete their part by remote settlement. The vendor can't insist that the purchaser's solicitor trudge across town with the blank cheque. Another means of payment plus verification will suffice. So that's why I say that the concurrency part of the clause is for the benefit of the purchaser.
- Wilson Well I don't, I'm not sure that it is necessary for resolution here but it is a point of principle, but it seems to me that 3.7 very much has this equal balance to it in spelling out what the purchaser does; what the vendor does; that they're concurrent; that they're interdependent. All the hallmarks are is that it's a balanced provision so there's similar provisions for each.
- Blanchard J Well no, it was written like that because it's a sequence provision. Money in ordinary parlance goes to the documents and the money doesn't have to be handed over except in exchange for the documents. But that's for the purchaser's benefit because it's the purchaser who must make the first move, and even if the vendor chooses to make the first move, the vendor can't insist on concurrency.
- Wilson When it boiled down to it with respect Your Honour I would have thought that it is both. Because of it being concurrent you have the purchaser with the money in his pocket and he pulls it out, he's not actually going to give it to the vendor unless the vendor is with the hand passing him the title. Now that's why it's concurrent, likewise for the vendor. He's not going to pull the title out of his pocket and give it to the purchaser and he can see that
- Blanchard J The vendor's not obliged to do anything except against a tender of payment.

- Wilson Yes but if he's there with a person tendering payment and the person says 'here I'm tendering payment to you' he surely can't take it unless with the other hand he can hand over the title.
- Blanchard J That's why it's for the purchaser's protection.
- Elias CJ There must be some sense of reality about all of this. It's not a straight-jacket that you have to trundle over. If the purchaser has made payment ahead of the time stipulated and the vendor isn't ready to pass over the documents surely it's not essential for the purchaser's solicitor to hoof it over town yet again to pick up the documents if he's got an undertaking or whatever that they'll be made available to him. People don't sort of work like this surely, do they? I've never done any conveyancing.
- Wilson When we're discussing the principles you unfortunately get down to what these elements are. You try to get down, you get driven down to the bare bones of what's happening.
- Elias CJ But that's why surely you've got to look at the substance of what the obligations are and whether they've been performed.
- Wilson Yes and that's why the particular provision in clause 3.7 spells out the obligations on both sides.
- Elias CJ But it can't require face-to-face
- Tipping J Immutably.
- Elias CJ No. I mean you're still left with your important point about the notification but it can't require that settlement be face-to-face because these interdependent obligations can be performed without the two solicitors being present.
- Wilson Well I wasn't meaning to suggest that when somebody performs in advance that that lets the other party off the hook in any sense. Obviously when one party performs in advance, the other party must then perform as well. That does leave an issue that if you perform in advance, so the purchaser pays in advance, not personally but by bank cheque etc how the vendor transmits the documents and I accept he obviously does have the obligation to perform the contract and provide the title documents. But he would be entitled to say 'you've paid the money in advance. The documents are here at my office, you can come and pick them up'.
- Blanchard J Yes.
- Wilson I don't think, I'm not aware of any law that would say he has actually got to hop in a taxi and go over town

- Blanchard J I think that must be right in terms of money goes to documents.
- Wilson Yes.
- Blanchard J Money has to collect documents.
- Wilson So it's definitely for the vendor to perform, making documents available and in that sense it's face-to-face. Now we were touching before on this question of what provisions may or may not be essential, because this relates to cancellation and it relates to the last part of my submissions which dealt with s.5 of the Contractual Remedies Act, and the submission I was making before was that the point which is of, when you look at the old law of condition between what is essential or an old law what is a condition and what is a warranty in the cases that my learned friend relies on, what was essential here was settlement by the required time which came about as you will see on the fax because the settlement date passed in February, the purchaser did not settle and the vendor issued a settlement notice under clause 9.2 and that notice pursuant to clause 9.4 required, sorry 9.2, required the person on whom it served to settle with time being of the essence on the stipulated date. Now that is the part that is essential. There may be some other parts but in my case that's the only part that I have to rely on of saying what essential and it has led in this case to it being a remedy in the contract which the vendor is saying the purchaser didn't settle by the required time and so the vendor is saying it was entitled to cancel under clause 9.4. Now, you take these other provisions like bank cheque versus electronic transfer in the Court of Appeal saying it wasn't essential that notice be given by 5pm. Now, this substantial degree of acceptance in my case is what the respondent says that those weren't spelt out as being of the essence and clearly they couldn't be. What is of the essence in a contract in terms is what is made of the essence when a contract is formed and in my submission it doesn't change during the contract, it's what is formed. Now it wasn't specified, it wasn't spelt out, it wasn't agreed that it was essential that payment be by bank cheque so it wouldn't be the case that the vendor would be cancelling because it was another form of payment rather than a bank cheque just for that reason. The vendor is only cancelling for one reason and that is that there wasn't performance of the contract by the required time. When it comes to notification of payment, the Court of Appeal I think said that it hadn't, I think they said that it hadn't been agreed that notification was essential, meaning that one couldn't cancel for that. Now I accept that it wasn't specifically agreed that notification was essential but the situation on this point, which is slightly different from the bank cheque matter, is that notification or drawing to the attention of the payee, his part of making payment, that's where it comes in.
- Tipping J Or part of settlement parce the Chief Justice's dislike for the contractual term.

Wilson Yes.

Elias CJ What was, oh I see.

Tipping J So if settlement is essential by 5pm all necessary ingredients of settlement are essential by 5pm?

Wilson Yes, and one of the necessary ingredients is that the vendor is made aware that he has the money.

Elias CJ But to get to the point of it being a necessary ingredient, there's nothing in clause 9 that assists in that is there? You were just back into the proper construction of clause 3.7?

Wilson Yes, to pay.

Elias CJ Yes.

Wilson Because clause 9 says they must settle and clause 3.7 is a definition of settlement

Elias CJ Well clause 9.4 is that you have to comply with the terms of the settlement notice but the only material term here presumably is the time, is that right?

Wilson Well it is under clause 9.2 as opposed to 9.4

Elias CJ Oh sorry, 9.2, I see.

Wilson It said that the party shall settle.

Tipping J That's why I said the contractual term.

Elias CJ Yes, yes I see.

Tipping J Rather pretentiously I have to say.

Elias CJ Yes.

Tipping J Well that's your case, identification or verification is part of settlement. Settlement has to take place by 5pm – it didn't.

Wilson That indeed is correct.

Tipping J But your problem, that would splendid if it weren't for this letter of 4.25pm.

Wilson Well the letter is prepositioned on 3.7 being the requirement of face-to-face settlement. Now Mr Newdick can say 'I require settlement face-

to-face and he's not in breach of it by doing that because that is what clause 3.7 says. He's merely saying what clause 3.7 is.

- Blanchard J We're going back over ground we've already covered.
- Tipping J I don't want a re-tell of old ground but I do want to know how you can cancel when you weren't ready, willing and able to settle. Assuming we're against you on the mandatory nature of face-to-face, can you cancel when you weren't really willing and able to settle in a manner permitted by the contract?
- Wilson Yes a vendor can cancel on these facts because there had not been settlement.
- Elias CJ I'm at the slightly earlier point still of what was required, is there different terms used in this agreement? Clause 9 uses settlement, but presumably settlement is performance of the obligations on each party so you're still back at whether
- Wilson Back at 3.7, yes.
- Elias CJ 3.7 requires notification. Are you going to say anything more on that point? I mean I think I'm the only one perhaps who is still troubled by it, but is there anything more you want to say about that.
- Wilson Well the essence of it is that payment is getting cleared funds to the vendor that he can immediately use.
- Blanchard J And you don't know you can use them unless you know you've got them.
- Wilson No.
- Elias CJ Is there any authority on this point?
- Wilson Will in my submission it comes from the very nature of payment.
- Tipping J You're not paid until you know you're paid?
- Wilson Yes, essentially. And here there was no means of knowing. If you stop the clock at 5pm here the vendor had no means of knowing that he had been paid. He hadn't received a communication. If he had looked at his bank account where the money would have been transferred to that would not have shown. It's been accepted
- Elias CJ This is a point of general application in terms of contractual principle I would have thought, if you're putting the propositions broadly as that, that you're not paid unless you know you're paid. Is there any authority that you're able to point to on that?

Wilson I haven't come with an authority

Elias CJ And on the essentiality of that?

Wilson Well I haven't come directly with an authority that says that payment means that the payee must know or be able to know that he has the money

McGrath J But often it will be the case won't it that giving clear title will entail contemporaneously, at least notionally, paying off a mortgage for which a discharge is handed over?

Wilson Yes.

McGrath J And there may have been a mortgage discharged in this case wasn't there?

Wilson There was a mortgage discharge. It's in the documents in here.

McGrath J To the nominee company?

Wilson Yes. You see it's fundamental here under 3.7 that if you did have a face-to-face settlement you know you're being paid. That is the point of it because you're there and receiving it and not handing over the title until you know you've got the money in your control. Now it's the same when you move away from that. If you move away to some other form of payment, it's the essence follows from 3.7 that you must know that you've got it into your control. You can't deal with it. You can't pay off your mortgage if you might have wanted to do it at one minute past 5. Settle another on-purchase – anything like that if you don't know you've got it.

Tipping J Is this a possible way of looking at it from your point of view Mr Wilson that the vendor has a legitimate interest in face-to-face settlement because of the certainty of payment implied? If the purchaser chooses to adopt a different albeit legitimate means of payment, the requirement of notification is it implicit or inherent and essential because of the vendor's legitimate interest in face-to-face settlement.

Wilson Indeed with respect I'm entirely happy to accept that. That's what I've been trying to say, perhaps in my written submissions maybe not as succinctly. Because you had that interest, the vendor needs to know with certainty that he has the money there and that's what the essence is of what the cases talk about cleared funds is money that you

Tipping J But I don't think the purchaser can simply say this concurrency and so on for my sole benefit, therefore I can do it without notifying you. There is some element of benefit in the concurrency interdependency for the vendor and the way to fuse the different interests and reconcile

them is to allow the purchaser to do a non face-to-face payment, but the price of that is requiring verification. I means that's the way I'd be inclined to see it, jurisprudentially if you like.

- Elias CJ Well there is
- Wilson That's always been the case we've been trying to make is that the key point was that
- Tipping J I know but I'm just trying to articulate it in a way that as it were fits with jurisprudential notions of the law of contract.
- Elias CJ Well you might be right in terms of the argument based on construction of 3.7, I'm not sure about that, but in terms of the wider principles in issue, I have a query as to whether it is the purchaser's obligation where the vendor receives payment via an agent.
- Tipping J I only said not paid until you know you're paid in this context. I wasn't suggesting that was necessarily an immutable principle of payment law.
- Gault J The clause does not say that the vendor shall be paid. It says the purchaser shall pay.
- Wilson Well my submission is that it has long been accepted that what the purchaser is doing is tendering payment and pay means the transfer of money so it's got to get to the person. My submission hasn't got to the person if it's in some location that he doesn't know about. For example if you are taking it that it can just go into the bank account, you can't see it, you may in principle get to the situation where the money could go to some other place. You could say these lawyers have written saying that there DX number is such and such, that's part of them, they're inviting receipt of things there, so the person could if that approach was taken pay money by putting the bank cheque money in the DX box. Sooner or later the vendor's solicitors will go and pick it up. Now that can't be right. It must reasonably be brought to the notice as part of what payment is, to convey it to the payee.
- Blanchard J Yes well take another example. If you and I are the vendor, well I'm the vendor, you're the purchaser, and I'm acting for myself and I've given you my bank account number, in a situation where time hasn't become of the essence, I'm not necessarily monitoring my bank account everyday yet if payment is effected late but still while notice is running, I'm going to lose out on the interest on the money because I don't know it's in my bank account so I haven't transferred it across to my savings account where it will earn some interest. So it would seem to me that your argument that payment involves notification has something going for it.

Elias CJ It may as a matter of construction of 3.7 but as a matter of general contract law if you indicate that payment can be made by payment into your bank account, payment is made irrespective of notice. It's just that the proposition as you stated it a few moments ago seemed very wide. It may be that it doesn't matter and it's not necessary to state it as dogmatically and that you just rely on the particular provisions in clause 3.7, but a proposition that payment is not payment unless the payee notifies the person to whom payment is made, strikes me as too absolute.

Wilson Well the notification, just describing it as a notification might not be entirely accurate. You have to, I would submit it's more in the sense of that acting reasonably the payee will know he's received it, so you can't just, if it was paid to a bank account, the payee's bank account, the payee just can't say 'well I don't look at my bank account on line or a statement until the end of the month and I never knew I had payment'. You couldn't really do that.

Gault J You could hardly be sued for failure of the obligation to pay.

Wilson No, you couldn't but then that's

Tipping J Context is everything.

Gault J Context must be everything.

Wilson That's taking a different context and although there may not have been a notice saying I have paid you by this way at least the person within reason is able to find that out, and that might be so especially if it's been indicated there might be payment in that way. That's moved away from the fact here a little bit.

McGrath J Mr Wilson have you finished that point?

Wilson Yes I have.

McGrath J Could I just take you back to the letter of 4.25pm. I'm just interested to know to what extent it was a feature of the case, or the case against you was run on the basis that that letter caused a lot of disruption. Now obviously the purchaser had a lot of problems before 4.25pm and 5.03pm but I'd just like to know whether the case was run on the basis that this letter contributed significantly to them or whether on the other hand the letter from Newdick was simply ignored by the purchaser. You may want to evidence; you may want to point to pleadings.

Wilson I can only speak from my recollection but perhaps after lunch I could pinpoint what was said about it. My recollection is that there's not very much because I think the gist of what was going on here as the evidence shows is that the purchaser was proceeding to attain its



money from finance companies which was coming in late and it's solicitor had said we're going to do an electronic transfer.

Tipping J 294, page 294 is a letter from the purchaser's solicitors back to the vendor's solicitors and in effect saying, I won't put it colloquially, but nonsense, we don't accept your requirement, end of story.

McGrath J But the timing of that letter I think is important isn't it?

Tipping J The timing

McGrath J So I think that may be after 5pm.

Tipping J Is it after 5pm?

Gault J It is because clearly we evidence payment settlement.

Wilson Well it was transmitted after 5pm.

Tipping J It doesn't seem to have a fax transmission note on it but is able to be identified exactly when it was sent by the evidence?

Wilson Well I believe, and I can check this when I have a moment, I believe that this was the letter that the purchaser's solicitors were seeking to fax through before 5pm.

Tipping J This was the one they were trying to get through, yes, and it got through about 5.07pm.

Wilson 7 or something.

Tipping J 7, yes.

McGrath J But Mr Wilson you may be able to help us in a more particular way after lunch but at the moment your recollection is that this letter that was sent at 4.25pm didn't feature strongly in the case?

Wilson No it didn't. It wasn't

Blanchard J Well have a look at page 316. You'll see that it starts at the top of that page with the letter arriving at 4.25pm and Mr Richards is astonished and he rings and speaks to the secretary, Amy Conway, and is told that it's Mr Newdick's decision. 'Mr Newdick isn't available; he's too busy to speak with me. I left a message for him to ring me back urgently. Then about 12 minutes, 13 minutes later the settlement funds arrive from Sanderson Weir. I had not heard from Mr Newdick and I rang to speak to him again. Once again I was told he was too busy and would not speak with me. I checked with another law firm with respect to the position of electronic settlements and he was told that it was the usual mode of settlement. I received no reply from Turner

Hopkins in response to my calls. I was not able to discuss the matter further with anyone from that firm, including Mr Newdick. As time was moving on we proceeded with settlement and it's pretty clear then that they started the electronic processing', but isn't it plain enough from that that the effect of the letter at 4.25pm, coupled with Mr Newdick's unwillingness to make himself available has led to a crucial delay and they don't complete the process by 5 o'clock.

Wilson Well I don't recall, my learned friend may be able to help on that and I may check it, but I don't recall it being part of submissions to any extent that

McGrath J Of course the funds didn't come in to the purchaser's trust account until 4.38pm did they?

Wilson Yes and that was the first time the purchaser was ever able to settle this transaction.

Blanchard J Yes, but my point is that at 4.38pm, having got the funds, the first reaction is to try to get Newdick on the phone about this letter of 4.25pm.

Wilson Yes that's correct Your Honour and they

Blanchard J And Newdick won't come to the phone. Maybe it's good reason.

Wilson Well I think there's some evidence about that in his cross-examination or brief. But then the vendor's solicitors proceeded to transmit the funds anyway and they give the time when they started to do that and when they finished it.

Blanchard J Yes but my point is that if it hadn't been for the letter of 4.25pm it may be that they would have started the transmission earlier, completed it earlier and got the fax through in time, but they got distracted and they're trying to get hold of Newdick about the letter he's written.

Wilson Well Your Honour may take that inference from this passage you've just read out. I don't recall it featuring in the case that

McGrath J Well it depends who in the office was transmitting the funds I suppose? Whether it's Mr Newdick or someone else.

Blanchard J Well he says 'as time was moving on we proceeded with settlement', so they've clearly waited in order to talk to Newdick and then he's not available so they get on with it, but it's too late.

Wilson Well they've received the money at 4.38pm and they've begun transmitting it at 4.50pm.

- Blanchard J And then they run into the problems with the fax machine. It doesn't strike me as very fruitful ground for a cancellation notice at three minutes past five.
- Wilson Well that may turn on the issue of whether that did make any difference but the thrust of the matter is that the purchasers, even from an earlier time, their solicitors had indicated they were going to do the settlement by electronic transfer and they were waiting for their money from the finance company, that was what they had said.
- Blanchard J But they're suddenly told that's not going to be good enough. Now it may be that they should have just ignored that completely and transmitted the funds as soon as they had them in hand to do so, but the fact of the matter was that Mr Newdick's letter does seem to have caused delay.
- Wilson Well it does seem with respect that
- Tipping J Are there any findings of fact in the lower Courts, either of them, touching upon this issue? I'm not saying we can't draw inferences but I would be interested if any, particularly the trial Judge did.
- Wilson Well if you look at page 20 in the High Court judgment, Justice Winkelmann recorded this at para.15 at the bottom. Her Honour noted the letter from 4.25pm.
- Tipping J Para.15?
- Wilson Paragraphs 14 and 15 on page 20.
- Tipping J No, it's just a narration of the facts.
- Wilson It's a narration of the facts but it wasn't mentioned there, Her Honour didn't record some suggestion that Mr Richards had been delayed
- Blanchard J Well in para.16 Mr Richards rang to speak to Mr Newdick again but again was told that he was too busy.
- Wilson Then Her Honour goes on to say that the purchaser proceeded to settle.
- Tipping J Is there any pleading or argument in the lower Courts that this letter of Mr Newdick's was relevant to any of the issues and if so, how?
- Wilson I have a strong recollection that there was no submission that lateness was caused by this letter. The thrust of the purchaser's case was essentially that it transmitted the fax and it was the vendor's solicitors fault that the fax line was busy, and that was the argument taken in the High Court and the Court of Appeal. It wasn't a submission that I can ever recall saying that in addition or separately the purchaser was put back in its schedule or its activity

Tipping J No, no don't confine it to putting it back in the schedule which is the immediate point my brother is making. What I want to know was there any pleading or argument below that Mr Newdick's letter had a material influence on the party's rights and obligations?

Wilson I don't recall that kind of submission at all Your Honour. I'm happy to hear what my learned friend says about that but my current recollection is that there was no argument along those lines.

Tipping J I just wanted to clear it away. If they had said something I'd want to know what they'd said.

Wilson It was certainly recorded that he had done the letter, that there had been attempts to contact him

Tipping J Of course they recorded it but

Wilson But there wasn't an argument developed from that.

Blanchard J Is there anything in the Court of Appeal decision on the subject? It looks as though they may have just essentially repeated the

Wilson They said at the beginning

Elias CJ Well I'm not sure that it was an issue really. I'm just looking at the pleadings.

Tipping J No, I don't think there was any reliance on this letter as affecting in any material way the obligations or rights of either party.

Wilson It wasn't pleaded as such or anything and it wasn't a case pleaded

Tipping J I mean that doesn't ultimately preclude us from giving it some effect, but it's certainly not a very happy position to be in on second appeal.

Wilson Well I appreciate the points and the comments that have been made about the letter in terms of whether it may create an estoppel

Tipping J I mean this is in your favour. Don't think I'm trying to

Wilson Yes, I fully recognise that with respect Your Honour.

Tipping J Oh you did, well good I'm glad.

Wilson I just wish to add that I still maintain with respect the submission that in addition it was him spelling out a settlement in person, but we have gone on from that as to what a purchaser is entitled to do or may choose to do.

Tipping J Expressly there was no argument below that because of this letter a right of cancellation which might otherwise have existed didn't?

Wilson Sorry, is that in the Court of Appeal?

Tipping J Anywhere. Was it ever argued below that a right of cancellation which might otherwise have existed was not available because of this letter?

Wilson Well I've had a lot of things about this case Your Honour in my mind but I certainly do not recall that.

Elias CJ Mr Wilson where are you intending to take us now in your submissions?

Wilson Well I had hoped I was somewhere near the conclusion. I hadn't addressed at length s.5 of the Contractual Remedies Act but I think we have touched on that before because my case is very definitely that this was not a cancellation under the Contractual Remedies Act, it was a cancellation under clause 9 of the contract and I've set out in my written submissions that that is the provision that applied, s.5, because clause 9 provides the remedies in the contract.

Blanchard J Would you accept that in order to cancel under the contract the vendor had to be ready, willing and able to complete settlement in accordance with the contract?

Wilson Yes indeed Sir and he was ready, willing and able to settle in accordance with the contract.

Blanchard J Regardless of the 4.25pm letter?

Wilson Yes, the 4.25pm letter, while I certainly acknowledge that there was difficulties with it for writing it but it is nevertheless spelling out clause 3.7 and it leaves the purchaser with the position that he's still going to perform settlement. The purchaser effectively has not taken any notice of that letter and it's similar to the situation you get where there could be a breach of an agreement and a party affirms the contract. The purchaser has attempted to perform the contract thereafter, irrespective of that letter, and as was pointed they also wrote the letter just before 5pm saying that, I forget the wording but effectively saying it was ineffective or invalid, so they have elected to proceed with the contract.

Tipping J Is that a submission that to the extent there was any repudiatory conduct in the letter? That's the Newdick letter. That repudiation was not accepted.

Wilson Not accepted and the contract was affirmed. Yes well unless Your Honours have any other questions I've come to the end of my submissions.

Elias CJ Thank you Mr Wilson.

Wilson Thank you.

Elias CJ Yes Mr Wood, do you want to get underway?

Wood As the respondent is required to do Your Honours the synopsis has been filed in terms of the requirements which is mercifully shorter than the maximum usually allowed. The thrust of those submissions Your Honours is it rests in two concepts. The first is of the obligations of the parties and the second is on essentiality, and I've listened with respect to the questions you've asked my learned friend and the answers he's given and it appears to me that this case may come down to a couple of core issues, particularly around notification and particularly possibly around the letter of 4.25pm, but if I wish to put it pithily, the respondent's case comes down to this, a single question. When did payment in full by an irreversible means within a required time become a breach of contract entitling a party to cancel?

Tipping J Sorry I don't quite understand that, when did payment in full become a breach.

Wood Payment in full has been made here Your Honour in my submission. It's been made in an irreversible manner and it was made before a particular time. What proposition you'd be faced with is that in some manner that is a breach and it's a breach entitling absolution.

Tipping J It's not a breach per se I don't think as it shook out it was just a breach in the lack of notification.

Wood I accept that and that's the issue that Your Honours obviously wish to address, but in my respectful submission there can be no argument that payment was made and payment was not tendered, it was actually made and made in such a manner that the vendor could have had immediate use of those funds but they were in his solicitor's trust account, they were available. But in that context if Your Honours wish me to address immediately the position of notification, those issues are addressed in my submissions at paras.60 and 61 and again this addresses an issue the Chief Justice in particular raised with respect to authority at para.67. Now with respect to notification before I get to those point though may I revert to the actual contractual requirement, the obligation that was placed on the purchaser in this case? The obligation by virtue of the notice, the settlement notice, was that the party upon whom the notice was served had to perform its contractual obligation, time being of the essence.

Tipping J You had to pay by 5pm?

Wood Correct Sir with respect and if you revert to, not to all of 3.7, but 3.7.1, the clear obligation on the purchaser there leaving everything else

aside, was to pay. It requires of the purchaser nothing else. An obligation to pay the sum specified which in this instance that purchaser did. Now that's an express term and in effect it was the only essential term arising from this contract. An obligation on this purchaser as a consequence of the settlement to do a particular thing which in my submission was done. And that is what I meant Your Honour by the question I posed, that payment was actually made therefore in my respectful submission there could not have been a breach, at least could not have been a breach entitling the cancellation.

- Tipping J Well the question is a little more subtle. The question is what constitutes payment in these circumstances?
- Wood If one was to view the word simpliciter Sir, payment means to make a payment. The terms of this appeal referred to tender. This wasn't a tender it was an actual payment that was made. Now if a payment means more than what the actual words say it could only mean implicitly that there were other conditions attached to that payment but the only condition in this case impressed upon this purchaser was to make a payment. There was nothing else impressed upon the purchaser. Anything else would have to be implied and anything else would have to be in essence essential. There's nothing in my submission that makes anything else but a payment simpliciter essential in this instance. Now Your Honours also quite obviously wish me to address
- Tipping J Where do you get this concept of essentiality from which comes out of the Contractual Remedies Act and the argument against you there is that we're not into the Contractual Remedies Act, we're into a contractual right of cancellation?
- Wood I've dealt with that in my submission Sir.
- Tipping J Yes but is that able to answered in a succinct and persuasive way Mr Wood?
- Wood I hope I have not misunderstood Your Honour's question but the essential obligation in this instance arises from the contract. Time is impressed upon this purchaser as being of the essence to make
- Tipping J Time was essential, no question that the contract makes it so, but if the Court finds the payment obligation involved two ingredients, actual payment and notification, why do you say that notification was not essential?
- Wood To do that with respect you have to imply at least that the words 'to pay' means something other than they appear to mean.
- Tipping J But the premise is that it does mean if you're right on your first premise that's the end of the question. If you're wrong and that

payment in context means literal payment plus notification, then why do you say notification being an ingredient of payment doesn't essentially have to take place by 5 o'clock?

Wood Well my argument of course Sir is that notification is not an agreement of payment.

Tipping J I know that.

Wood But having said that what the condition was designed to do was to ensure that the vendor was actually paid. Now notification then is a benefit if I may put it that way to the vendor that he knows he been paid, but that knowledge in my respectful submission triggers not, or should not be attached to the 3.7.1 obligation but it triggers the obligation that the vendor then has to perform his obligation under 3.7.2.

Blanchard J I imagine you would accept that if the purchaser is endeavouring to comply with 3.7 the purchaser has to make a tender of payment and in order to do that has to draw the fact of the tender to the attention of the vendor.

Wood I accept that Sir but

Blanchard J Why should it be different for a full payment?

Wood Tender in its essence is in my submission an advice in this case to a vendor that the purchaser is in a position to settle in the usual language, ready, willing and able to settle. I am here, I am ready to settle. What actually

Blanchard J Well don't you actually have to wave the cheque under the vendor's nose?

Wood Or your laptop computer with the EFT requirements in it, but in this case more than that actually happened in my submission that the payment was actually made.

Blanchard J But can more in fact be less?

Tipping J The law omits one of the key points about tender, that you know that you're being offered the money.

Wood But my response to that Sir with respect is this, the fact that you know you've been offered the money and you know eventually in this case you've got it, does no more than put you in a position where you then have to perform your obligations.

Gault J Mr Wood I wonder if we might be focusing a bit much on the term 'to pay' rather than on the clause as a whole and its context, bearing in



mind the emphasis on concurrency and interdependency is clearly involved in triggering the concurrent and interdependent obligation to hand over the documents, so how can that be done other than by the vendor acquiring the necessary information that the obligation has arisen?

Wood Well I answer that this way, that the events that occurred here in this particular instance is that payment occurred as a matter of fact in my submission and notification subsequently occurred within 15 minutes. At that point the vendor has the responsibility to meet his obligations. There is a significant amount of concurrency in that particular instance.

Gault J Well it's not a significant amount of concurrency when the settlement is to be effected by a particular time.

Wood That's on the assumption with respect Sir that notification is required by 5pm.

Gault J Well I hope we're not going in a circle.

Wood I know and I appreciate what you've just said.

Gault J What I'm putting to you is the concurrency and interdependence obviously means that the obligation to deliver documents must be triggered as part of the settlement concurrently then how can it be triggered?

Wood In the instance here it may only be triggered when the parties are actually undertaking a face-to-face settlement can it not?

Gault J Or some other equivalent means of achieving the same end is in place.

Wood Yes I accept that but I'm not sure where it gets us here that's all.

Gault J It seems to get me to the point that an awareness of the situation is an essential part of the settlement.

Wood My submission on that Sir of course was that notification was required within a reasonable time not concurrently given the circumstances that existed here.

Tipping J That's the real problem with the Court of Appeal's jurisprudence. It dispenses with the rationale of concurrency.

Wood But the difficulty with respect in implying that to these fact situations Sir is that to a large extent both parties through their solicitors did the same thing. If the letter of 17<sup>th</sup> February had never been written one must assume that the parties would have proceeded on the basis there would have been a settlement within the terms of 3.7 with the requisite degree of concurrency. Now they didn't do so and clearly they

proceeded on the basis that settlement was to proceed on the basis that it was to be done at a distance.

Tipping J But if you're relying on the money coming to hand by 5 o'clock and we say that oh it doesn't matter that you don't know by 5 o'clock, a reasonable time thereafter will do, isn't that going to make commerce much more difficult than is desirable and the obligation to notify as well as pay before 5 o'clock in general terms is extremely simple? So why put commercial parties into the bind of not knowing where they stand for sure until a reasonable time after 'D' time simply to accommodate someone who hasn't got the notice through in time?

Wood I understand the point Sir.

Tipping J It's lunchtime but I really would like some help from you on this because while one can have huge sympathies in individual cases we have a responsibility for the law as a whole. Just to help someone in a situation where they might be thought deserving of help if they're going to make real difficulties downstream is not a particularly attractive idea.

Elias CJ On that happy note with the weight of the law hanging over us we'll take lunch, thank you.

1.04pm Court adjourned  
2.17pm Court resumed

Elias CJ Thank you. Yes Mr Wood?

Wood Your Honours at the risk of demonstrating that I haven't entirely understood Your Honours questions, with respect the difference between 'to pay' and 'payment' may I take you firstly to my submission of para.67

Tipping J I think you may have demonstrated in your first sentence that you haven't understood the question but don't let that deter you Mr Wood. The difference isn't between pay and payment, it's what constitutes payment.

Wood Correct, I appreciate that, I appreciate that. Now in the paragraph I've referred to there is a citation from an authority, although I concede it's not high authority, it's English High Court and I refer in particular to the citation there that the Judge in that case rejected a submission 'that there could not have been completed payment to the plaintiffs unless and until an advice note recording the credit to their account had been despatched to them or had been received by them', and then I've gone on to record the Judge in that case recorded that payment was complete

when the instructions to credit the plaintiff's account were accepted and the computer processes for doing so were set in motion.

- Blanchard J But what was happening in that case? What was the context?
- Wood I'm not sure Sir, the report's in the authorities and I can go to it if you wish.
- Blanchard J Well you've cited, you should know what the case is about.
- Wood There was a dispute about reversal of payments, particularly in-house payments between businesses. There were a series of payments and then reversed payments and subsequently an argument over transfer.
- Tipping J It was more in the nature of an argument as to when payment was complete when there were contra-entries in some trading accounts wasn't it? I remember this case vaguely because I think it was cited in the *Dovey* case that's been mentioned in the present case by somebody.
- Wood That's correct.
- Tipping J But you're right, it was to do with whether something could be reversed, whether it had gone so far that it couldn't be said to be a payment and therefore incapable of reversal.
- Wood That's correct Sir, which in my respectful submission is very similar to what has occurred here.
- Tipping J I don't think it touches on the essential point of this case though. It was a different issue.
- Wood It's similar to the extent that it represents a form of payment. Whether it's accepted that it was not necessary for notification in that case is similar to here is moot. And the citation with respect to the computer processes commencing is in the middle of page 803 – it's para.C. And there's also a similar comment Your Honours, although it may not go quite so far in the *Brimnes* which is also in the appellant's list of authorities at page 784 and that's about half way down that page
- Elias CJ Sorry, what, oh I see 4
- Wood It's authority number 4 Ma'am in the appellant's list of authorities, page 784.
- Elias CJ Thank you.
- Wood And it doesn't go so far as to deal directly with the question of whether the recipient should know, but it implies as much. It's at 784, paragraph small (e) starting with the words 'apart from authority it seems to me', and what Justice Brandon is saying there is that payment

is made at the time the order of transfer is executed, not the time when it's given or received and I would submit that those last few words indicate that the payment in the requirement to pay doesn't imply notification.

Blanchard J You'd certainly expect that to be the case in relation to the situation of a bank taking automatic payment, obviously the bank isn't in the habit of giving advice as to when it's done it.'

Wood That's correct Sir and I am conscious of the comment that His Honour Justice Tipping made before lunch that it may unacceptable to commerce that payees didn't know they'd been paid but with respect the thrust of this case is that we're dealing with very modern methods of payment where payments are direct, instant, where payer and payee generally knows the payment has been made at the time they've been made and it's so new in effect that Dr McMorland's book published in 2000 barely refers to it.

Tipping J Perhaps we can look forward to another edition.

Wood I understood the reason Dr McMorland was here today that he wanted to help us with the third edition. But the essence of that issue in my respectful submission is precisely that. This is a technology that is moving very rapidly and one would not expect commercial people not to have the means of recognising both payment and receipt instantaneously.

Elias CJ I really wonder whether it is so very different, after all there are plenty of cases where parties have directed payment through payment into their bank account or something like that and the fact that it's done electronically doesn't really add a huge amount to that.

Wood Well with respect I agree with that Ma'am.

Elias CJ I'm sorry I thought you were making the point that this was all very new and different and

Wood My concern is this, the issue of notification with respect to these payments and the comment was made by His Honour that there would be a concern with commerce that they need to know that they're made immediately. My point with respect to that is it would be very surprising if a commercial organisation even now lawyers using electronic means for banking in trust accounts did not know that the payments were made

Gault J I suppose there's a notification in the transfer process itself in a way as I understand it the process involves indicating the source of the monies and the purpose for which they're paid or their very abbreviated terms and of course presumably the recipient bank is the agent of the account holder. You have an argument along those lines that that is sufficient?

Wood That is sufficient in my submission Sir.

Blanchard J How do you know that it's cleared funds?

Tipping J I can't always tell from my bank account whether the funds which are being treated by my bank as being cleared or not.

Wood Do you mean Your Honour with respect to the circumstances

Tipping J Electronic, electronic transfers.

Wood Well in this particular case of course the evidence was

Tipping J But how was the vendor to know?

Wood As I understood the evidence from Mr Jones was that he said in effect that anybody dealing with ASB bank know in the legal profession and that's how the ASB protocols operate. They would know and that's both in his witness statement and certainly in his oral evidence.

Blanchard J Was it put to the vendor's solicitor when he gave evidence that he must have known?

Wood Not from memory Sir no. And much of the argument there was about the difficulties over receipt of the fax and the frustrations that the purchaser or the purchaser's solicitors experience with respect in endeavouring to get the facts through at a late stage.

Blanchard J But if he didn't know that any transfer had actually occurred then he could have hardly have known that what had been transferred was cleared funds.

Wood The issue in the end Sir with respect comes back to whether he needed to know before 5pm or whether he knew at 5.07pm and whether that makes a significant difference. Without doubt he knew at 5.07pm, the issue is whether it's critical for the purchaser, whether he knew by 5pm.

Tipping J If notification is a necessary ingredient and time is of the essence of payment/settlement 5.07pm would have been no good wouldn't it?

Wood I would then retreat if I may Sir to the section in my submissions on substantial performance and the comments of both *Dawson and MacLaughlan* on whether substantial performance of an essential term is sufficient. If all of those factors are factors in this case my submission in that case would be that in this instance the purchaser performed the substantial part of the obligation before 5pm, was unable to do so, perform the notification before 5pm for various reasons, they're not part of this appeal, but certainly did by 5.07pm and that in

itself invites the consideration of the doctrine of substantial performance even on

- Tipping J But let's simplify this Mr Wood. If time has validly been made essential and let's simplify it down to your concept of payment, if time is of the essence for payment by 5 o'clock, payment at 5.01pm is no good. There's no doctrine of substantial performance in such a situation that I'm aware of. There's a Privy Council case where tender of payment was made at 10 minutes past five. I've forgotten the name of it now.
- Blanchard J *Golden Eagle*
- Wood *Union Eagle.*
- Blanchard J *Union Eagle.*
- Tipping J And they simply said sorry.
- Wood Well the difference in my respectful submission between that case and this one is that payment wasn't made at all. Nothing was done before 5pm.
- Tipping J I'm putting to you hypothetically that if payment is required by 5pm, never mind what payment is for the moment and it's not made until one minute past five, that's the whole point of making time of the essence that you don't have these arguments about whether near enough is good enough and substantial performance has got nothing to do with this field.
- Wood Well I with respect Sir, agree that near enough is not good enough, but my submission to you is that the obligation of the purchaser in this case was met but perhaps you and I disagree over the meaning of 'payment'.
- Tipping J Well that's all in the premise that payment whatever it means was not achieved by 5 o'clock. I understand your point that it was achieved, but you seem to be saying as a fall-back that even if it wasn't achieved by 5 o'clock you could get home under some doctrine of substantial performance supported by the robust scholarship of Professor MacLaughlan which seemed to me to be doctrinally bizarre.
- Blanchard J That's not Professor MacLaughlan's scholarship
- Tipping J It's not Professor MacLaughlan it's your proposition that against the proposition I'm assuming a substantial performance is good enough
- Wood What I'm effectively trying to distinguish as between the fact that an actual electronic deposit to the vendor's solicitors trust account before 5pm and balancing that against the fact that the vendor's solicitor was

not aware of that until 5.07pm, whether the second part of that experience, of that event, is sufficiently insignificant as against the

- Blanchard J It can't go the question of what payment is though.
- Tipping J My premise is that if payment includes notification you disagree with that, but if we're against you on that, how do you get around in this case the fact that payment was not made by 5pm if we're against you on what constitutes payment.
- Wood If the Court's against me on that concept I have to accept that we're in the same category as *Union Eagle* in effect that payment has not been made if payment incorporates notification. I don't have any issue with that, but I hope I've been vigorous with respect to my
- Tipping J Oh no you've been very vigorous but you seem to be having a fall-back position that I was having some difficulty with Mr Wood, but I understand entirely your argument that payment doesn't involve notification
- Wood Yes.
- Tipping J But you've just addressed the proposition if it does thank you.
- Wood Yes.
- Blanchard J Well if *Union Eagle* applies, all other things being equal, are there other things that make it unequal?
- Wood Yes, yes there are Sir. I could deal if you wish with respect to the difficulties over the letter of 4.25.
- Tipping J So you don't really mean what you've just said?
- Wood Oh I'm sorry, I misunderstood the question.
- Tipping J Well you seem to me to be accepted that if payment involved notification
- Wood Yes.
- Tipping J You hadn't notified by 5pm and therefore *Union Eagle* applied.
- Blanchard J No, no, what I said was other things being equal *Union Eagle* applies and I was asking whether there were other things that weren't equal.
- Elias CJ And Mr Wood was saying yes.
- Blanchard J And Mr Wood said yes.

Tipping J Well alright, well don't let's worry about what you said a few minutes ago. You now say that other things weren't equal and that presumably is the Newdick letter.

Wood Yes Sir I'm assuming you wish me to go there.

Tipping J Yes.

Blanchard J Or go wherever you like.

Wood I'm happy where I am at the moment Sir.

Tipping J Well I think you've got to get out of the, if we're against you on notification, somehow or other you've got to get out of the fact that you didn't settle by 5pm and all I'm asking you is how do you get out of that and my brother Blanchard's endeavouring to give you some assistance by suggesting that there are certain things that might get you out of it.

Wood Well what I wish to address Your Honour is what to make of the letter of 4.25pm, and much of what was said this morning in the discourse between yourselves and my friend Mr Wilson, I would submit is correct.

Tipping J Well all sorts of things were said this morning. What is your submission? What is your proposition?

Wood With respect to that letter there's no doubt in my respectful submission if one reads the evidence of Mr Richards as it was read that that letter significantly threw the purchaser out.

Blanchard J Was that argument put up in either Court below?

Wood No not in that respect, no Sir. What was put up and not in detail I'll have to concede in the Court of Appeal was an argument based on *McKay and Dick* that there are obligations between parties to a contract and an additional argument about the duty to cooperate on the settlement and all of those matters, including the letter of 4.25pm and the whole attitude of the, apparent attitude if I may put it that way, of the purchaser, oh sorry the vendor through his solicitor was such that it frustrated performance by the purchaser to the point where it was unable to perform in its entirety, I'll put it that way, by 5pm.

Blanchard J So are you saying that it was argued in the Court of Appeal that the letter disrupted matters to a point that caused the settlement not to occur by 5pm.

Wood No, it wouldn't be appropriate if I made it as stark as that. I'd like to but I cannot. What I am saying is that the whole attitude if I may put it that way to the vendor to this transaction was to frustrate it to the point



where there were issues arising right through the day of settlement, commencing from very late settlement statements being received right through this whole period where from 3.46pm, in terms of the evidence Mr Richards was endeavouring to contact someone in authority to start with at the vendor's law firm to among other things advise he wished to settle by a laptop funds transfer. There's no doubt in terms of that evidence he advised that he was to have the purchaser's funds between 4pm and 5pm so the firm could be taken to know that they were going to be there. He made a similar phone call at 4.15pm which produced the remarkable letter of 4.25pm

Blanchard J But was it argued that any of these things, whatever they were, actually was the reason why settlement didn't occur till 5pm, I'm sorry, until after 5pm?

Wood Only in so far in my submissions as to indicate that the process that started once the funds were in at 4.38pm was later, because you'll recall that Mr Richards, after 4.38pm when the funds were available, again rang Mr Newdick about his letter. Now that of necessity caused a further delay which meant that payment into the vendor's solicitors trust account didn't take place until 4.54pm and the fax notification was commenced at that time.

Blanchard J Was that argument made to the Court of Appeal?

Wood I can't say with clarity Sir and it would be wrong if I guessed. I'll put it in that manner. I principally based the argument there on the fact that there were delays caused by the vendor and fax notification was delayed as a consequence, and that fax notification couldn't be made because of the vendor's fax being engaged.

Gault J Were you still arguing at that point for an inference that all of that was deliberate.

Wood Oh no, I conceded that in the Court of Appeal Sir and I would concede it here again. There's no evidence of that. What I

Gault J If there is not evidence then why were you arguing it, to what end were you arguing?

Wood I was arguing on the basis Sir that if one stipulates for a method of communication which the vendor in this case did, that the purchaser was to do things a certain way and notify by fax, that it was incumbent on the vendor when the purchaser came to make fax notification that the fax line was available.

Gault J Yes, that's what you argued.

Wood That's how I argued that and it's principally on a *McKay and Dick* principle. Now you'll note in the Court of Appeal they took the first

point Your Honour made that I conceded that there was no deliberation but the balance of the argument remained, but the Court took the view that the key of the facts was no more than an attempt rather than performance. But the principle issue was still there that however you looked at it the purchaser did all that it was able to do to notify this vendor that the funds were in its trust account and wasn't able to do so. Even so far as the purchaser's solicitor telephoning twice that he was endeavouring to get the fax through. Unfortunately there was no evidence that he then went on to tell someone that funds were in the bank account and I would suggest that that would have made a significant difference to this but that's as far as it went – two telephone calls advising that we are endeavouring to get a fax through.

Tipping J Let us assume that whatever you can make out of this Newdick letter is open to you, what doctrinal basis do you have for saying that the presence or the writing of that letter prevented cancellation? What is the legal reasoning that you deploy to support that proposition.

Wood At the point that that letter was written and communicated the vendor was saying 'we are not now going to perform this settlement obligation in the manner that I've led you to believe you could perform it for some time, for two weeks. You're not able now to do that'. Now the consequence in my respectful submission gives rise to at least an estoppel against the vendor, but he could then say 'well notwithstanding that I've written that letter I can now revert back to another position'.

Blanchard J Where's the detriment?

Wood Although I accept a repudiation must be accepted, the purchaser in this case proceeded to at least make the payment.

Blanchard J How as that moving to their detriment as a result of the letter?

Wood It's open

Blanchard J They were going to do that all along.

Wood I accept that Sir but it's open to take a view that that letter and the necessary response to it meant that the purchaser had to do other things rather than concentrate on the simple requirement that it had to make payment. Now there's not a lot of express evidence about that. All you have is the other comments by the purchaser's solicitors in his witness statement but you may with respect be able to take a view that all of this could have happened sooner had that letter not have been written at all.

Tipping J The letter caused detriment through delay, is that the submission?

Wood Yes, and that's an implication I ask you to take.

Tipping J      Isn't a better argument from your point of view

Wood            I'm open to better arguments Sir.

Tipping J      Yes, that in order to cancel the vendors had to show that they were ready, willing and able to settle at all times up to the moment of cancellation; settle in terms of the contract and by writing their letter, assuming their letter was wrong and they weren't justified in calling for face-to-face settlement, by writing that letter they were not, expressly not ready, willing and able to settle on the terms that the contract permitted.

Wood            I absolutely accept that Sir and

Tipping J      Was that ever argued, or pleaded?

Wood            No, in the context of my argument such as it was in the Court of Appeal that there was an obligation or a duty on parties in a conveyancing transaction to cooperate, this in my respectful submission was precisely the opposite. Whatever I could do to put something in your way I would do it, which is what happened.

Gault J        So you say that is yet another breach of the contract on the part of the vendor?

Wood            In that context Sir I was simply responding to

Gault J        Yes there's an implied term of the contract that they will cooperate and they did not and so they were in breach at the time they purported to cancel, is that the argument?

Wood            Yes, I put that up as an answer to His Honour Justice Tipping's question that was it argued, was the letter argued a particular way? My response was on the basis that I argued it slightly differently in the context of an obligational duty to cooperate.

Gault J        Yes, well what I was trying to do is identify the slightly different argument you did advance.

Wood            Well the arguments I did advance were obligations to cooperate on settlement, frustration of the facts, and so on.

Blanchard J    Could I try this argument? A vendor who gives a settlement notice has to be at the time of giving it ready, willing and able to settle and has to remain in that condition, or at least be in that condition again at the time when the notice expires. Now this vendor arguable was not willing to settle in accordance with the contract at 5pm.

Tipping J      That's the same point, but expressed more elegantly.

Wood I'm grateful for that Sir, it's almost a waiver of the vendor's rights in effect that he may well have had up to 4.25pm that I require you

Blanchard J Sorry, a waiver of the vendor's rights?

Wood Well

Gault J It might be better just to adopt what

Wood Your Honour could the transcript be turned off and I'll go back a few sentences and I'll adopt what His Honour Justice Blanchard just said?

Tipping J Well I think that's your absolutely best argument that they weren't ready, willing and able to settle, ergo, they had no right to cancel, it's as simple as that, and whether it's right or not is another matter but it has the virtue of being simple.

McGrath J Another way of looking at Mr Wood might be to say that the conduct of the vendor as indicated at 4.25pm was such that it was plain further performance by the purchaser was pointless so it doesn't matter that the purchaser didn't perform.

Wood I accept that Sir but I also accept that an harassed at 4.25pm trying to get his funds and getting paid acted in

McGrath J I think you would have to establish that proposition. You would have to establish that further performance would be pointless.

Wood Well the reality is from the vendor's point of view further performance was pointless because the vendor took the first opportunity to cancel.

Tipping J No it's not pointless. If you had performed as you should have done there's nothing to suggest that they wouldn't have settled. I'm afraid you've got to exclude any rational possibility that if you tendered as you should have that they would not settle. I think that's the legal position. This was a bluff

Wood Which was called.

Tipping J It was called. Although I think your best point as it's been articulated to you, the question really is 'were you obliged to tender proper performance notwithstanding' and that I think is the point that you didn't.

Blanchard J Well I think the question is whether the vendor was entitled to treat time as being of the essence at 5 o'clock when the vendor arguably was not willing to settle in accordance with the contract.

Tipping J That may be a better way of putting it.

Wood My clumsy attempt to responding earlier Sir when I mentioned waiver and so on really is directed at that point with respect.

Tipping J They couldn't insist on time in view of their unwillingness or inability to settle in terms of the contract.

Gault J But given notice requiring something that they knew couldn't be done in time, so how could they insist on the time?

Wood I'm obtaining a great deal of benefit of listening to Your Honours and I'm quite happy to continue.

McGrath J And you agree with every second statement?

Wood Absolutely Sir, I'm reluctant to put counsel's spoke in the wheel by responding at this point because with the greatest respect I agree with everything that's been said.

Tipping J Well what really worries me, lest you get too excited about this Mr Wood

Wood I'm not excited Sir

Tipping J If you'll forgive me for being a little colloquial, I'm not at all sure you should be allowed to take this point on the letter in the Court when putting it bluntly it really hasn't featured below in any significant way. I would just like some help on that.

Wood If I may I can tell you why that was the case but I

Tipping J I'm not sure that it's proper for you to tell us why. You might like to confer with counsel on the other side but frankly I wouldn't want you to say that unless by consent because all sorts of things can emerge when counsel tells you why something didn't happened that shouldn't emerge. I think you've simply got to address the point as to why you haven't been given leave on certain, sorry, the other side having been given leave and there's no cross-appeal by you seeking to support the judgment on a wholly different basis, you can now run this point, however much assistance you're getting from the bench. I mean there may be a very good response. I'm not against you necessarily, I just want you to help me because it's quite unconventional.

Blanchard J It's certainly not within the approved grounds of appeal.

Tipping J And there's no respondent's notice or cross-appeal.

Wood And there was no cross-appeal.

Elias CJ I'm not sure that a great deal of the argument we've been eliciting has been directed at the grounds of appeal however.

Tipping J This is further off the wall than some of it.

Wood Oh yes I appreciate that.

Tipping J I think you have to say that it's a point of law that no evidence could reasonably have been recalled to effect it and if it's available as a point of law you would ask for leave to support the judgment on this alternative ground and we might be minded to give it.

Gault J Bearing in mind as you said to us that you did purport to our view that there was in effect a breach of a duty to cooperate, evidenced by this particular letter and subsequent conduct so that's about as close as you ever got to it I gather from what you've told us.

Wood Yes, that's fair comment Sir. Well in so far as the issue came up this morning in your discourse with Mr Wilson, because it was a feature that arose then, and was addressed as an issue of repudiation by the vendor, I shall now seek leave to introduce this issue at this point. It would be improper for me not to do so as it's now before the Court and it's an issue that I would submit with the greatest respect should be addressed in the course of Your Honour's judgments.

Elias CJ Perhaps we should ask Mr Wilson whether he can really resist that application.

Wilson Well I am concerned about it Your Honours. I do consider there's no evidential basis for this proposition that the argument has not been taken before.

Elias CJ What evidence would be required to support the argument?

Wilson Well essentially when you look through the evidence it is only as I read it from Mr Richards, the solicitor, and he is saying that he was going to tender settlement, or pay settlement by electronic transfer in any event. I did just during the luncheon adjournment look out what his evidence was. We looked at some of it this morning in his brief when essentially he was recounting what had happened that he had rung and he had spoken to the secretary, he said that he was proposing to do a late settlement by electronic transfer and then he some ten minutes later

Blanchard J But that's all evidence that helps you rebut the argument.

Wilson Yes

Blanchard J What evidence is needed to support the argument rather than rebut it?

Wilson In my submission there hasn't been evidence led,

Blanchard J Well is there any need for any? You have the letter.

Wilson The suggestion was that the letter had caused delay.

Blanchard J Well I think that we're looking at a somewhat narrower legal argument. Was the vendor in breach as a result of that letter, not what the reaction to it was, which I accept might have required evidence to be addressed?

Wilson In that sense I agree it may be a legal argument as to just taking that letter. A lot of focus has gone on that letter but one has to bear in mind that this is happening in the last half hour or so of a settlement notice period which is two weeks. The purchaser had been in breach of the contract

Blanchard J Well if he'd written that letter a week before it mightn't have had much impact. They would have known they had to go over the North Shore.

Wilson I'm sorry, we may be getting off tract. Your Honour was asking I think precedent as to whether I would be opposed to the argument being allowed now as a proposition and I think by the argument is it simply the matter of whether the letter itself means that as a matter of law the vendor was not willing to settle in accordance with the contract

Blanchard J Yes.

Wilson So it's not a question of whether there's a lack of co-operation.

Tipping J It's not the effect of the letter, it's the consequence of the letter for the vendor's position.

Gault J As you put it precisely the question is whether we should now give leave to open up the argument and advance the argument that the letter put the vendor in breach so as to preclude cancellation and of course this was canvassed with you in the course of your argument.

Wilson Yes well the appellant resists taking that argument at this point when we have been through both the High Court and the Court of Appeal

Gault J That's open to you but the question is how are you prejudiced by that being allowed to run as an essentially legal question at this level?

Wilson Well is it being proposed that if leave is granted to now deal with this as a legal issue, there'll be further time to consider it and file submission on it. Is that one proposal or is it the matter that we're finally dealing with today?

Elias CJ Well I asked what your attitude was and perhaps you're indicating that you oppose it, are you

Wilson Yes well it's essentially because I've not come prepared to argue that point today. It cropped up this morning essentially. I have an initial reaction to it but I don't have a considered argument about it to address the points substantively.

Tipping J Did you not see it coming this morning, or you feel you were prejudiced because this morning when we were discussing it you really weren't fully attuned to the point.

Wilson No I was not expecting to be addressing that point.

Elias CJ Alright, well I think we'll press on and conclude the argument and if we're going to entertain it we'll give you an opportunity to file written submissions Mr Wilson.

Wilson Thank you.

Wood To be fair to my friend of course Your Honours it did come up this morning but as it is now an issue before you I take the view I'm justified in seeking leave because it is a critical area obviously for my client.

Tipping J You're not only justified, you're wise.

Wood Thank you Sir. Now most of the, if not all of the other issues, I believe have been addressed. There was one comment made by His Honour Justice Gault before lunch with respect of concurrency a need - the provisions of clause 3.7, but in my submission all that that clause essentially requires is that the purchaser is entitled to concurrent delivery of the documents arising from his payment and all the vendor can do is require payment, nothing more than that.

Gault J I can't see is interdependent because of the obligation to deliver once payment is effective and if a person's to have an obligation history presumably they must know they have the obligation.

Wood I accept that with respect Sir but you then come to the point that it's a triggering of the obligation in effect.

Gault J Yes it is, that is what settlement is, interdependent obligations one triggering the other so that it as I attempted to articulate before lunch, I don't see it as necessary essentially part of payment, I think it's essentially part of settlement under that clause.

Wood This leads one to the view if I may that that clause is principally in my submission for the benefit of the vendor because his obligations flow from it.

Gault J Well both parties



Tipping J      You'd be far better off the other way around Mr Wood I would have thought.

Wood            We make payment then things flow from that.

Blanchard J    How is it for the protection of the vendor?

Tipping J      It might have been a slip of the tongue. I suspect you meant purchaser didn't you.

Wood            I'm sorry, protection of the purchaser, I'm sorry. Apart from that Your Honours in dealing with the prospective additional submissions that is required that's about as far as I can take it unless there are issues I haven't addressed.

Elias CJ        Yes thank you Mr Wood.

Wood            Thank you, thank you Ma'am.

Elias CJ        Mr Wilson do you want to be heard in reply.

Wilson          The notes I've made Your Honours were directed really only to the issue of the implications of the Newdick letter and it's essentially that the focus has come on that letter as a kind of breach in the last 35 minutes when one has to see this in the whole context that the purchaser had been in default for some two weeks, could have settled anywhere along the track and then had finally had got in a position to settle at 20 to 5 in the last 20 minutes, so one has to balance up those aspects there. It was apparent that the purchaser's solicitor was under the impression that he was entitled to settle and was intending to settle in the way he did, or make the payment and that emerges in particular from the cross-examination which was at page 357 of volume 3. His comment there that, sorry page 358, the solicitor was asked at the bottom of the page about a request and he said 'I didn't actually make a request, this is to settle by electronic transfer, I think I pointed out it would be by'

McGrath J      Sorry what line, is it 357?

Wilson          358 at the bottom of the page.

McGrath J      Thank you.

Wilson          He was asked if he was requesting a settlement by electronic transfer and he said he didn't think he had to request that. Then over the page at line 10 he said he was asked 'so is your position that on 5 March you had no intention whatsoever of obtaining a bank cheque and either tendering that or depositing it in Turner Hopkins bank account'. 'That's right'. 'And so you were just telling Amy that you were going to do it by electronic transfer'. 'That's right, when I was speaking to

Amy I was anticipating a very late settlement. To be otherwise would not have been possible but it was my understanding at that time that we would not have settled any other way even if we'd got the money before 4 o'clock'. And I think the solicitor went on to say that he thought that these settlements by electronic transfer are a matter of entitlement of right. But the point I was making is that the solicitor had set on a course that he was transferring money and proceeding in that way, and so he has evidently in my submission not been disrupted by the Newdick letter and was clearly proceeding a remote settlement, knowing all along it was going to be late in the day, so it also can be seen that it was the purchaser who was taking this matter down to the wire. Now I'm not sure whether we're having additional legal submissions about the legal point that there may be leave given for but my initial submission about that was that essentially the Newdick letter stated that they required settlement in person but that in my submission is clearly an expression of what clause 3.7 is and my submissions are, as I outlined this morning, that while 3.7 requires settlement in person,

Tipping J If that is so, you're alright but you have to address the problem of what if it's not so, but you may prefer to leave it until

Blanchard J On the basis that you probably would prefer to leave it until we've decided whether we'll allow this new point to be raised. You might like to look at clause 9.8 of the agreement and compare it with clause 9.1, subclause 2 and you'll see that 9.1, subclause 2 requires that when you give the notice you've got to be ready, able and willing to proceed to settle.

Wilson Yes.

Blanchard J 9.8, dealing with the same party who's given the notice is not in breach of an essential term by implication may still be in breach of a term by reason only of that party's failure to be ready and able which leaves it the position that if your not willing to settle on the expiry of the notice, you are in breach of an essential term. Now I have only a very hazy memory of this but over lunchtime I looked at the book I wrote about 20 years ago and it does deal with this point, perhaps not as helpfully as to give the answer to the point in the present case, but it does indicate that that clause was deliberately worded. It's to protect a vendor who's given a notice and then unexpectedly is not ready and able to go ahead when the notice expires.

Tipping J The point being if I may ask my brother for your assistance that it's the absence of the word 'willing'

Blanchard J Yes.

Tipping J In 9.8.

Wilson Well I appreciate that you've drawn it to my attention and it does seem to have an impact on this, because we're dealing with a position that became hypothetical in that the vendor's cancellation is because it is saying that it didn't receive settlement by 5pm.

Gault J Are you saying there that they didn't cancel because of a failure to settle in person, they cancelled for failure to settle on time? Is that the distinction you're drawing?

Wilson Well I'm quite clear, there was no basis for saying we're settling because you haven't settled in person. You see the settling they've cancelled because there hasn't been a settlement. Five o'clock has come and they've not received any notice at all that part of the money has been paid. I think perhaps it would be unhelpful and totally hypothetical to say well what would they have done if they had received the notice that there had been an electronic transfer or they were told over the telephone that payments been made to your bank account. Those are hypothesis which we don't know what would have happened. The situation is that the vendor come 5 o'clock had no advice or notification that it had settlement monies available to it. I think that's as far as I can take it Your Honours.

Elias CJ Yes thank you Mr Wilson. Well we'll take time to consider our decision in this matter and if we are entertaining the application made by the respondent we'll give both parties an opportunity to file their submissions on that point. Thank you for your assistance.

3.19pm Court adjourned