IN THE SUPREME COURT OF NEW ZEALAND SC 54/2008

BETWEEN **RODERICK WILLIAM NIELSEN**

Appellant

AND **DYSART TIMBERS LIMITED**

Respondent

Hearing:	10 March 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	S P Bryers for the Appellant F Godinet for the Respondent

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CIVIL APPEAL

MR BRYERS:

May it please Your Honours, I appear for the appellant.

ELIAS CJ:

Yes, Mr Bryers.

MR GODINET:

Yes, Your Honours, I appear for the respondent.

ELIAS CJ:

Yes, thank you Mr Godinet. Mr Bryers.

MR BRYERS:

Your Honours, the simple issue in this case is whether or not the parties entered into a binding contract and given that there's just two emails involved, one ought to have thought perhaps that the issue would be quite straightforward but, in my submission, the peculiar facts are raised in basic issues about what lawyers mean when they say parties have entered into a contract.

The following propositions are at the heart of the appellant's case. I begin with the very basic proposition that a contract is, in essence, an agreement between two or more parties. The distinguishing feature being that it is enforceable at law. Second proposition is that a determination of whether the parties have agreed on a contract binding upon them involves an examination of their respective intentions, for the reason that agreement occurs when the parties intentions coincide, summed up in the phrase, "consensus ad idem." And the third proposition is that the intentions of the parties are to be objectively assessed, that is the assessment is of what the parties said and did from the point of view of the reasonable man standing in the shoes of each party.

The question to be answered, is how such a reasonable man imbued with the background knowledge enjoyed by each of the negotiating parties would have regarding the effect of the other parties communication or act. Those submissions are soundly based on the line of authorities referred to in the written submission.

TIPPING J:

When you've got a contract, I don't think anyone would disagree with you Mr Bryers, but when it's a question of an offer and whether it's conditioned in any sense isn't the principal focus at least on the intentions of the offeror, as they would objectively appear?

MR BRYERS:

As they would objectively appear to a reasonable person in the shoes of the offeree.

TIPPING J:

There's a distinction to be made, isn't there, in this context between a unilateral action which is that, an offer, and a bilateral result of acceptance of that offer. If you're implying something into an offer, then it's really the intention of the offeror. I would have thought that was the key point.

MR BRYERS:

If you're approaching it from the point of view of implication of term, I would respectfully agree with Your Honour.

TIPPING J:

Well isn't that what this case is, apart from a subject matter issue, what actually has been compromised, isn't that what this case is really all about? Whether a condition can be implied into the offer that it lapses upon the happening of this event?

MR BRYERS:

Well I've suggested Sir, no, because that approach leads to the wrong questions being asked, in my submission.

TIPPING J:

Well you'll have to develop that for my benefit.

MR BRYERS:

If I can go back to the propositions that I was putting to you, I don't know whether you – I don't suppose you want me to go through all the various cases but perhaps I can summarise them in this way. The first three cases of *Boulder Consolidated*, *Meates,* and *Powierza* are all decisions of Justice Cooke. Beginning with the often quoted statement that a mechanical offer and acceptance analysis of negotiations may be less rewarding than the

test whether viewed as a whole and objectively, the correspondence shows a concluded agreement. On either approach, the point of view of the reasonable man in the shoes of the recipient of each letter is of major importance.

ELIAS CJ:

Sorry what are you reading from here?

MR BRYERS:

That's in *Boulder Consolidated* which is –

ELIAS CJ:

Yes, but are you taking us to the case or are you just reading it? It's off –

MR BRYERS:

I'm happy to take you to the case.

ELIAS CJ:

Well don't if it doesn't fit within your argument. We were just wondering what you were reading from. What page?

MR BRYERS:

Well, that is taken from *Boulder Consolidated* at – which is under tab 9, page 563, between lines 5 and 12.

ELIAS CJ:

Thank you.

MR BRYERS:

In section D of my written submission I've given the citation for the precise passage that I'm relying upon in respect of each of the cases.

ELIAS CJ:

Yes.

MR BRYERS:

Now Justice Cooke reiterated these remarks in *Meates* and *Powierza* and they were cited and adopted by Justice Fisher in the *Transpower* case and by the Court of Appeal in the *Wilmott* and *Paper Reclaim Ltd* cases. I've also referred in the cases to *Airways Corporation of New Zealand Ltd v Geyserland Airways*, tab 16 and *Giltrap City Ltd v Commerce Commission*, tab 17 and the passages referred to in section D of the submissions stand for the reiterated I suppose the – or that a person's intentions are measured by how he conducts himself. He is bound by his conduct whatever his real intentions may be.

McGRATH J:

Are you going to give us just page references, I don't think you need go to each of these cases particularly if they're just following the *Boulder Consolidated* case but just the page reference might help.

MR BRYERS:

Yes Sir. They're all in, as I say, section D of the written submission.

ELIAS CJ:

Oh I thought you said section B sorry. Section D?

MR BRYERS:

Page, if you look at pages 11 and 12.

TIPPING J:

Is the passage your focusing on in particular?

McGRATH J:

So they are, thanks very much. I hadn't noticed that.

TIPPING J:

The passage which reads, "The test being whether viewed as a whole and objectively the evidence shows a concluded agreement."

MR BRYERS:

Which case are we talking about Sir?

TIPPING J:

I'm now looking at the passage cited in *Wilmott v Johnson*.

MR BRYERS:

Just one moment.

TIPPING J:

Is that the passage that you're relying on specifically from *Boulder*? From page 657 of *Wilmott v Johnson*.

MR BRYERS:

Yes 657, paragraph 40 and 41. Forty in particular.

TIPPING J:

This, of course, is traditionally viewed as an indication that you don't have to have a contract fitting exactly the concepts of offer and precise acceptance. This is what it's normally cited for. I'm not quite sure what you're citing it for here Mr Bryers and can you help before you move on?

MR BRYERS:

Yes, I'm citing it for the proposition that in determining whether the parties have made an agreement, it's important to carry out an objective analysis of their intentions.

TIPPING J:

Well, whether they've made an agreement here depends solely on whether the offer lapsed. I just don't quite understand why you're trying to emphasise this aspect, the sort of composite looking at it in the round aspect that Justice Cooke espouse.

MR BRYERS:

Because in my submission it leads to the correct solution.

TIPPING J:

How does it help in deciding whether the offered lapsed before it was accepted?

MR BRYERS:

Because I have to persuade Your Honours that a person, a reasonable person standing in the shoes of Dysart would have appreciated that once the Supreme Court granted leave to appeal the offer was no longer open for acceptance.

TIPPING J:

Because there had been a sufficiently substantial change in circumstances, is that the –

MR BRYERS:

Because it was obvious from the terms of the offer and the context in which it was made, that the granting of leave to appeal would cause the offer to lapse.

TIPPING J:

Yes, well, thank you, I'll await developments.

MR BRYERS:

I've been attempting to emphasise that the cases demonstrate that a person's intentions are critical in determining whether or not an agreement has been made and that intentions are to be judged by the conduct and the words of the person concerned. I have referred to the decisions in *Airways Corporation* and *Giltrap City* as the source of those propositions. There are just two other cases which I can refer to briefly. The *Mechenex* decision emphasising that the parties must be ad idem, that there must be a correspondence of offer and acceptance and the *Canterbury FM Broadcasting* case stating that contract is not achieved by ambush.

I have also mentioned in the written submission, the well known cases on interpretation of contracts, *Investor Compensation Scheme* and *Boat Park Limited* and submit that the concepts developed in those cases have some relevance here on the basis that the question "Was a contract entered into?" has a close relationship to the question, "If a contract was entered into, how should its terms be interpreted?" A critical difference I suppose between the two lines of authority is that when looking at whether or not a contract has been made, one looks at the negotiations between the parties, whereas when interpreting a contract it would seem that evidence of the negotiations should be excluded. However, both questions involve the use of the concept of a reasonable person having background knowledge, so called matrix of fact of the context in which the contract was negotiated.

TIPPING J:

Is it more – I'm sorry to keep intervening but isn't it more what a reasonable person aware of the context in which the offer was made, rather than the contract was negotiated?

MR BRYERS:

Yes, I'd accept that Sir. In fact that is what the appellant's argument is.

TIPPING J:

I'm just being perhaps a little pedantic Mr Bryers but I do think it's important that we have exactly the right focus and understand what your focus is. It's what a reasonable person would consider was the offeror's intention from the point of view of how long the offer was to be open or the circumstances in which it was to lapse, is that it?

MR BRYERS:

Yes.

WILSON J:

Mr Bryers, isn't the better analogy for you, an offer which is not expressed to be open for any specified period and which then lapses after a reasonable time?

MR BRYERS:

No Sir because in this case the offer was only open for a few hours.

WILSON J:

I appreciate that's not the situation here. I'm inviting you to submit that it is a closely analogous situation to an offer lapsing after a reasonable time.

MR BRYERS:

It's analogous in the sense that the Courts are prepared to imply a term into the offer that it will lapse after a reasonable time.

WILSON J:

Coming back to Justice Tipping's earlier question. Why can't you seek to imply a term into this offer that it would lapse upon the Court's decision on leave becoming available?

MR BRYERS:

Well that was certainly the primary argument that was advanced in the lower courts, it foundered each time on the basis that the Courts decided that the significance of the Supreme Court's decision granting leave was insufficient to cause the offer to lapse and I suppose –

WILSON J:

That begs the question doesn't it?

MR BRYERS:

I beg your pardon?

WILSON J:

That begs the question.

MR BRYERS:

I'm sorry?

WILSON J:

Doesn't that beg the question before –

MR BRYERS:

In what way?

TIPPING J:

Well the test can't be different according to the facts. We have to have a conceptually correct approach before we turn to the facts. now you're not abandoning are you that argument?

MR BRYERS:

No I'm not but I am putting to the forefront the idea that a – a so called global approach, that a reasonable person standing in the shoes of Dysart would have appreciated that the effect of the leave decision being made was that the offer was no longer open for acceptance.

ELIAS CJ:

Do you have the full text of the letter? I'm a little surprised we're not starting with the text of the offer letter because in your submissions it doesn't have the heading whereas the offer is made in respect of the above matter.

MR BRYERS:

It's at page 13 of the case on appeal. I'm sorry –

ELIAS CJ:

Yes it's page 16, Justice Blanchard's just drawn me to it.

MR BRYERS:

Yes that's right. Where Dysart against Rod and Greg Nielsen, my client advised it would be prepared to – oh no that's the acceptance. I think the offer was in Mr Swan's affidavit.

ELIAS CJ:

But it's about the case, Dysart and Rod and Greg Nielsen.

MR BRYERS:

I think Ma'am I should start with the offer.

BLANCHARD J:

The writer of the letter is clearly presupposing that leave will not have been granted at the time the offer is accepted because the leave application could not be discontinued after it had been granted.

TIPPING J:

Or dismissed.

BLANCHARD J:

Or dismissed.

MR BRYERS:

Yes, yes well it's on that basis that it's argued for the appellant that the context in which the offer was made, and the terms of the offer itself, make it plain, as you say, that the offer was made on the assumption that the leave application would not be dealt with in the interim.

ELIAS CJ:

And isn't that perhaps reinforced by the urgent instructions which are sought or suggested?

MR BRYERS:

Yes, I think, yes the email was sent on the Thursday and the proposed settlement would be on the following Monday so obviously there was very little time involved. No doubt the reason for that was that the appellant would have assumed that they were going to have to file very soon an application to bring the appeal in enough time.

TIPPING J:

And also, it seems fairly obvious from the context that no one anticipated for one moment that there would be a response from the Court within the time interval that's spoken of here.

BLANCHARD J:

Was the Court actually aware to the knowledge of the parties that an application to bring a leave application out of time was going to be necessary?

MR BRYERS:

I can't answer for the Court Sir, but what had happened –

BLANCHARD J:

What was the reason for that being required? Wasn't it something to do with failure to serve?

MR BRYERS:

Yes.

BLANCHARD J:

Well the Court wouldn't have known about that.

MR BRYERS:

Yes, the Court did know because it was contained in the respondent's submissions.

TIPPING J:

I think the Court simply thought that was such a tricky – not tricky, I'm sorry, that's not the right word, trivial point that it could effectively be ignored and leave was deemed to be granted within the grant of leave – the extension of time was deemed to be granted within the leave to appeal.

MR BRYERS:

Well so it seems Sir, from the decision.

TIPPING J:

It's not formally mentioned in the grounds or in the leave judgment, I don't think.

MR BRYERS:

Yes, yes, no leave to appeal out of time was granted.

McGRATH J:

Where was that – I just –

MR BRYERS:

So when I think about it, the Court must have known.

TIPPING J:

Well it's page 5, all I'm seeing here is the application for leave to appeal is granted. It doesn't say leave to appeal out of time.

MR BRYERS:

No that's this appeal Sir.

TIPPING J:

Oh, I beg your pardon. I'm sorry, I have you at the wrong one.

MR BRYERS:

Yes.

McGRATH J:

So it's the other judgment in which it appears, is it?

MR BRYERS:

It's in page 30, sorry Sir. What was that?

McGRATH J:

Yes.

MR BRYERS:

It's paragraph A.

TIPPING J:

Time extended.

MR BRYERS:

So the Court obviously was aware of the respondent's submission that such an application was needed.

ELIAS CJ:

I'm wondering really whether the construction, just looking at the text of this offer, is correctly characterised as an equivalent trade off entailing the withdrawal or the discontinuance of the leave application, because that would follow as a matter of course from settlement of the dispute. I'm just – I'm exploring there the indication of an implied term that the offer would lapse on receipt of the leave application.

MR BRYERS:

Well that was the basis of the argument in the lower courts.

TIPPING J:

Why would the offeror put that in? I mean, other than to signal some context, because you'd imagine that if anything, it would be the offeree who would say, "I will accept, provided you undertake to file the discontinuance." I just wonder whether this – the idea that this is just purely procedural, which seems to have been the point raised against you below, whether it isn't a little, a rather narrow view of what was in the mind of the person making this offer, causing them to make reference to this point, because as my brother Blanchard said, it seems, at the very least, to have connotations of the circumstances in which the offer is made, presuppose, assume, as Mr Justice Bingham made use of the concept of assumption in that shipping case.

MR BRYERS:

Yes, well I agree Sir, as I read what the offeror is saying, is "Look, if you'll take $250,000, we won't proceed any further with this application to the Supreme Court and the whole thing will be settled."

ELIAS CJ:

Well, but, aren't they saying, rather, that the whole dispute will be settled and if the dispute is settled, the appeal is clearly moot. This doesn't really seem to me, at first sight, to be a bargain with equivalent actions being taken on either side, it's a settlement of the dispute.

MR BRYERS:

That was the approach taken in the lower court and it's perhaps why the submissions before you have been slanted to emphasise that nevertheless this offer shows, and it must have been obvious to Dysart, that the offer was being made on the assumption that the leave application would not be dealt with in the meantime.

McGRATH J:

But it could however just be the pure procedural or administrative consequence that would have to be tidied up after there being first, final settlement and secondly, payment – final settlement in a legally binding sense and then secondly, payment of the sum to be paid on settlement?

MR BRYERS:

Well it is procedural in a sense but obviously you can't withdraw a leave application if it's already been dealt with and what this sentence shows I suggest is that the offeror believed and had grounds for believing, which were known to Dysart, that the leave application would not be dealt with prior to Monday.

McGRATH J:

Wouldn't it really be – wouldn't another inference be simply that it wasn't in the mind of the offeror at all as to what might happen in the meantime in relation to the leave application but he just saw it as a tidying up matter that would be necessary following completion of the payment?

MR BRYERS:

No Sir, I think that really does understate the position because if you look at it from the situation the parties were in, the respondent had put in a submission saying the appeal should be struck out because it hasn't been served.

McGRATH J:

Yes.

MR BRYERS:

And they further said that if an application is made to appeal out of time we're going to oppose it and the grounds on which we're going to oppose it are 1, 2 and 3. All of that appears in their submission. That was the context in which the offer was made. Now it's for that reason that I submit that both parties knew or thought they knew, that there was no prospect of the leave application being dealt with before Monday when settlement was supposed to occur.

WILSON J:

Mr Bryers, to put perhaps the same point another way, could it be said that the offeror was plainly assuming that if the offer was accepted, acceptance would take place prior to a decision on the leave application becoming available?

MR BRYERS:

Yes, yes that's the same proposition put in a different way.

WILSON J:

Put in assumption terms?

MR BRYERS:

Yes.

TIPPING J:

I suppose the question is whether it's purely procedural or whether it doesn't also signal some other assumption.

MR BRYERS:

Yes and that's where the context is critical because as I say, and I emphasise, both parties were in a position where there was a submission before the Court to the effect the appeal should be struck out and that a leave application is needed.

TIPPING J:

You could put it on the basis of assumption. You could put it on the basis that the law implies a term that the offer lapses upon the happening of some fundamental or substantial or material, or whatever strength of test one wishes to adopt. So really there's a double way of looking at this.

MR BRYERS:

Yes.

TIPPING J:

There's a fundamental assumption if you like, which if it's damnified before acceptance, the offer lapses. Equally, as a matter of law, an offer lapses if there's a material, substantial, fundamental, whatever, change in circumstances.

MR BRYERS:

Yes. I agree with that Sir. Where the things have gone off the rails from the appellant's point of view is that when it comes to measuring the significance of the event, the lower courts have focused on, have moved away in effect from the context and said is this significant in comparison with other cases where similar events have occurred and decided that it wasn't sufficiently significant and therefore the offer didn't lapse and I suppose that is encouraged to the submission in this court that the assumption approach is the better one.

TIPPING J:

Logically, the two approaches should really lead to the same conclusion I would have thought because it would be odd if you had a difference depending on what sort of juristic method you adopt.

MR BRYERS:

I agree Sir but that's what has happened so far but I agree that in the cases that I've cited to you, the Judges have always been at pains to suggest that whichever approach you choose should end up with the same outcome.

TIPPING J:

On page 62 of the case towards the end of the Court of Appeal's judgment, it seemed to me with respect, that they came pretty close to the mark as a matter of law before we go on and apply it to the fact in their little paragraph 26(c), at the top of that page 62, "An offer will usually be subject to an implied condition that it lapse if there is a change of circumstances of such significance that it cannot fairly be regarded as still open for acceptance."

MR BRYERS:

Yes.

TIPPING J:

Now, how one applies that to the facts is another matter but it seems to me with respect, that that comes fairly close to the what I would see as an appropriate legal approach.

McGRATH J:

And a common legal approach.

TIPPING J:

Yes, not a novel –

McGRATH J:

I mean, I'm sorry, common in the sense that whether you come at it from an implied term or a fundamental basis of the contract is the difficulty. So you test perhaps the possibility of an implied term by seeing whether there had been a change to a fundamental basis of the contract had taken place.

MR BRYERS:

That in fact was of course the argument that was advanced in the lower courts –

ELIAS CJ:

They don't go away from that though. It's all in application, isn't it?

MR BRYERS:

Yes. I think perhaps the difference in the approach I'm now suggesting is the correct one and the way in which the Court of Appeal approached it may in fact lie more in how do you determine whether or not the relevant event was significant enough to cause the offer to lapse.

ELIAS CJ:

Isn't your starting point the terms of the letter and that is an offer to settle a dispute and at the end of the day, the dispute was still on foot. Isn't that the area of debate, as to simply whether the discontinuance as a consequence was fundamental? If the dispute was no longer on foot because leave had not been granted, that would seem to be a significant change of circumstances but why is it so significant when the dispute remained on foot with leave being granted, the consequence of acceptance and compliance with the term that the sum be paid on Monday could only have led to the appeal not proceeding?

MR BRYERS:

Well, the significance – if we are now moving to talk about the significance of the event that occurred, the granting of leave, obviously the critical significance of it is that it changes the negotiating positions of the parties.

ELIAS CJ:

Well, it might but why is that so significant in the scheme of what is here offered, a settlement of the dispute which remains on foot?

MR BRYERS:

Because if it had been known or appreciated that there was a possibility of the leave application being dealt with before Monday, a different offer would have be made.

ELIAS CJ:

Why do you say that?

MR BRYERS:

The offer you would make in a situation where you had been told that your appeal was out of time, that you needed leave to bring it out of time, as compared with the situation where you've not only surmounted that hurdle but you've been granted leave to appeal, are two completely different situations.

ELIAS CJ:

There may be lots of contingencies in live appeals, do they all have to be factored in, I mean, when are they essential, what's the rule of recognition of that?

MR BRYERS:

Well there is no – as soon as you do that Ma'am, with respect, you get into an abstract discussion and it must always be sheeted back to the terms of the offer. The appellant's case is the offer was made on the assumption, or if you like, implied term, that the leave application would not be dealt with before settlement. And that, I submit, is apparent from the terms of the offer itself, and the context in which it was made.

TIPPING J:

Is the concept of risk helpful? The balance of risk, I would have thought, at least materially changed.

MR BRYERS:

Yes. It did. And there was evidence about that, I think statistically your chances of succeeding with an appeal double apparently once you've got leave, so –

TIPPING J:

But not much good if you don't get leave.

MR BRYERS:

Quite so.

McGRATH J:

Can I just ask you, what – whether your situation isn't very different and much weaker than that in any of the cases you're relying on? For example, if you look at the *Krupp* case and the *Macrae* case, the disputes in *Krupp* had become substantially different, part of it had been decided by the arbitrator. In the *Macrae* case, it had come through informally, yet to be ratified, but it had come through that the arbitrator had actually signalled how he was going to

decide the case. So in those two areas, on the one hand you've got part of the area of dispute removed, the area of dispute has diminished and in the other you've got the matter resolved, now it seems to me that all you're really able to do is to talk about, as you put it, the risk changing or the – and that seems to me to be completely different. After all, one thing we have to remember is that the time in which the offer could be accepted, simply wasn't specified in the offer.

MR BRYERS:

Well, except Sir, that Monday was obviously the deadline for settlement.

McGRATH J:

Yes. But apart from that, there was nothing else that was going to be – it was open for acceptance at any time until then, on the face of it.

MR BRYERS:

Yes. Effectively that led one –

McGRATH J:

What's your best case that's indicating that, what I would suggest are your weaker circumstances, can be fitted into this fundamental change in the basis of the contract?

MR BRYERS:

The points you've just made to me Sir are of course pretty much the approach the Court of Appeal took. They said, well this case isn't as – the circumstances are not as extreme as in these other cases and therefore this even isn't sufficiently significant. My submission is that whole approach is wrong, because the issue is how would a reasonable person standing in Dysart's shoes have regarded the effect of the event on the offer that had been made? And it's that question, in my submission, the case really turns on because if it is accepted that Dysart must have realised that the Nielsens were not intending their offer to survive leave being granted, then the offer lapsed, and they knew it.

McGRATH J:

You basically say you're going back to basic principle?

MR BRYERS:

Yes.

ELIAS CJ:

If looking at this letter, the second sentence hadn't been included but there had been an indication that payment would be made on Monday, "I've been instructed to put forward an offer of $250,000 in full and final settlement of the above matter", on your argument, would you still be able to contend that the circumstances changed with the delivery of the leave application? Because the context was an unresolved leave application?

MR BRYERS:

Well that argument obviously could be mounted Ma'am, but it would be weaker.

ELIAS CJ:

So it is the express reference to withdrawing the leave application that is critical?

MR BRYERS:

Not critical, but it improves the argument immensely, because here you have something in writing, communicated to the other side in the offer itself indicating the basis on which it's been made.

TIPPING J:

It's, in a sense, a term of the offer which becomes incapable of fulfilment.

MR BRYERS:

Quite so Sir, and in the lower courts I submitted, well, if there is a settlement arising out of this correspondence, how is it to be enforced because the

settlement was we'll pay you $250,000 and we'll withdraw the leave application but you – it's no longer possible to do it as Your Honour's pointed out.

BLANCHARD J:

Do you say that was a concurrent obligation that the leave application had to be withdrawn at the same time as the payment was made?

MR BRYERS:

Well yes. It was part of the deal.

ELIAS CJ:

Well then shouldn't we be looking at case law on terms of offers to see whether this is an essential term?

MR BRYERS:

Well I – we've put before you Ma'am all the cases we've been able to find on that issue and those are the cases in tabs 2 through to 8.

TIPPING J:

Have you found any textbook that discusses the matter in more depth than just simply saying a condition can be expressed or implied?

MR BRYERS:

No Sir.

ELIAS CJ:

Well you're really saying it's an express condition aren't you?

MR BRYERS:

That was the original – the case has always been on this basis. That there was an express term or alternatively it was a term to be implied or alternatively reliance upon the so called global approach.

TIPPING J:

I can't imagine that the global approach would get you anywhere. If it isn't either an express or an implied term of the offer –

ELIAS CJ:

It's kitchen sink.

TIPPING J:

It's, yes, kitchen sink and plug hole.

MR BRYERS:

Well the difficulty that we've struck with the implied or express term approach, apart from the reluctance of the Courts to even include the term, are is then in weighing repercussions and, well Justice McGrath was just putting to me how the case doesn't compare favourably with previous cases. The reason that the global approach is more attractive from the appellant's point of view is because of its focus on the parties intentions rather than focusing on previous cases where similar events have occurred. In other words in my submission the effect of the event should be looked at from the point of view of a person standing in Dysart's shoes, not from the point of view of comparing it with previous cases.

TIPPING J:

Is it fair to suggest, Mr Bryers, that what this document, constituting the offer, conveys is that in conveyancing terms there will be an exchange of money for document i.e. the discontinuance?

MR BRYERS:

Yes.

TIPPING J:

Or an undertaking to file the discontinuance?

MR BRYERS:

Yes.

TIPPING J:

That was the procedure, the mechanics if you like, that the parties had in mind to effect their settlement. I don't see that there's any escape from – or subject to hearing, contrary argument. It's not easy to see an escape from that as being the procedural, if you want to concentrate on procedure, the procedural contemplation.

MR BRYERS:

I've not denied that Sir –

TIPPING J:

I'm not saying that's against you.

MR BRYERS:

I'm suggesting that underlying that procedural assumption is a further assumption, namely that the leave application has not been dealt with.

TIPPING J:

Well that must follow.

MR BRYERS:

Yes.

TIPPING J:

You can't perform one part of the conveyancing settlement if leave's already been granted.

MR BRYERS:

That's correct Sir, that's exactly the argument.

TIPPING J:

I mean I'm surprised in a way that the easiness with which that proposition was brushed aside in the lower courts because even if you characterise it as procedural, it is the implementation of the agreement.

MR BRYERS:

Yes, I agree.

TIPPING J:

In terms, that is. That is exactly what the offer presupposes will be the mechanics of the settlement.

MR BRYERS:

As I've attempted to point out, the settlement which is found to be binding on the Nielsens, is incapable of being performed. They cannot withdraw the leave application as they promised to do.

TIPPING J:

What I would like to hear from the other side is, how you can simply say well that doesn't matter, when the parties have set up, if there is an agreement, the parties have set up the machinery which is to be implemented and it can't now happen. Now I'll be interested to hear from Mr Godinet as to how one just simply says well, that doesn't matter.

ELIAS CJ:

I think that's an invitation perhaps to move on, but before you do –

TIPPING J:

No, not necessarily.

ELIAS CJ:

Or maybe to sit down.

TIPPING J:

No, no, no, not at all.

ELIAS CJ:

But before you do, I'd like you to go back to these cases, 1 to 3 you said in your – because they do –

MR BRYERS:

Well, no, one's the old – the previous decision between the two parties put in there just so that –

ELIAS CJ:

But the statements of principle –

MR BRYERS:

It's 2 through to 8.

ELIAS CJ:

But the two principles – sorry, not 1, but 2, the principles are circumstances have altered so as to make it utterly unsuitable and absurd, they're all pitched pretty high aren't they, and the subsequent cases use – talk about new offer for a new risk, so it is a question of how substantial the change in circumstances is.

MR BRYERS:

Well that was the approach taken in the earlier cases, and I again submit that it suffers from the defect that the change – the significance of the change is not something to be weighed in the abstract, it must be sheeted home to the intentions of the parties involved in the negotiation.

TIPPING J:

If it is a question of degree, what is your submission as to the proper degree of change?

MR BRYERS:

Well, on my approach Sir, the answer to that is, if a person standing in the shoes of Dysart would have appreciated that the offer would have been different as a result of that event, then it lapses.

McGRATH J:

Is that a different test, would you accept, to *Krupp* and *Macrae*?

MR BRYERS:

Absolutely Sir.

McGRATH J:

Yes, but if that's so, I mean I don't know if you want to go to those cases, but if you accept that's so, I could really move on to *Canning*, because I'm not quite sure why you bring the life insurance case into this.

MR BRYERS:

Why I've?

McGRATH J:

Yes, I mean, others might want to discuss the other cases, but I don't see, I'm not quite sure how the *Canning* case, the life insurance case where the man fell off a cliff, I'm not sure quite how that is relevant here.

TIPPING J:

He no longer had a life.

McGRATH J:

No, he did have a life, that was the –

ELIAS CJ:

The problem.

McGRATH J:

He wasn't quite as well.

TIPPING J:

He didn't die?

McGRATH J:

I take it you do accept that you don't get anything from the tests of Justice Bingham, as he then was, or from the Scottish case? And I would have agreed with that.

MR BRYERS:

Perhaps I should talk about the life insurance cases first, the significance of them, I think, is two-fold, I mean, first they stand for the proposition that if there is a change in circumstances, then an offer may become incapable of being accepted, that's the basic proposition. In those cases, of course, the change was described as a material change of risk, which has some analogy with the present case.

McGRATH J:

But of course, in life insurance cases, you are dealing with an area which the whole subject of the contract is the assumption of a risk, and it seems to me that's not so here. You've – a contract of life insurance, the insurer assumes the risk that someone will live for a certain time, and if they don't then they have to pay out. Now, it seems to me that obviously a change before the contract is concluded in the wellbeing, the health of a person is a matter of major significance but that doesn't apply where the change in risk is really for a collateral matter, as I see it, whether leave to appeal has been granted or not.

MR BRYERS:

Well clearly the situation is – I mean, I –

McGRATH J:

No, whether leave to appeal has been granted.

MR BRYERS:

I accept Sir the situations are obviously different but people involved in litigation are involved in, I suppose, a risky enterprise and what leads to settlements is in fact an assessment of risk. Now it's not the same sort of assessment as you'd make of life of a prospective insurance client but nevertheless a similar process is going on I would suggest and the significance of the event that occurred here was change the risk. Change the risk for both parties in terms of win/lose.

McGRATH J:

Well I do accept that, that there was a change of risk once leave to appeal had been granted but I'm not sure it's quite the same as a case where the whole contract is consumed with assuming a risk. I think they're distinguishable.

MR BRYERS:

It's not as extreme, no. Now there was another case Sir you wanted to – oh Mr Justice Bingham's case. That was *Krupp Handel*. Well the principles involved in these cases again have some relevance to the present case but the circumstances of course are different because in each of these cases, as has been pointed out in the lower courts and again this morning, the cases were effectively determined by interim or final awards by the time the offeree decided to try and accept the offer. I accept that that situation is different from that here but as the Court of Appeal itself recognised that's not to say that something that falls short of such a change is inadequate to cause an offer to lapse. The other point –

McGRATH J:

I understand that but if you take the test that comes out of Mr Justice Bingham's decision at page 180 in the first full paragraph on the right hand column. It really – he decided that case on the basis that settlement of the entire claim had become impossible, didn't he?

MR BRYERS:

Yes and I suppose there's an analogy here that the withdrawing of the leave application had become impossible.

TIPPING J:

But Mr Bryers I wonder if it would be helpful to go back a paragraph to the foot of –

ELIAS CJ:

Sorry what page?

TIPPING J:

The left hand column of 180 in the Lloyd's Law Report where His Lordship says at the last five lines, "However in my judgment it is plain that the offer made by the defendants in terms assumed that the entire claim made by the plaintiff was unresolved." Now I would have thought you might be able to argue that here the offer assumed that all issues remained unresolved, i.e. the time point, the leave point and obviously ex hypothesis the substantive appeal.

MR BRYERS:

The substantive appeal, yes.

TIPPING J:

So there is, I would have thought, quite a distinct analogy in the reasoning that led His Lordship up to the paragraph to which reference was made a moment ago.

MR BRYERS:

Yes I accept that observation with gratitude Sir. That –

ELIAS CJ:

Well except that the entire claim is quite clearly a reference to the claim, the substantive dispute.

MR BRYERS:

That's also the case here Ma'am because the offer that was being made was to settle the whole dispute.

ELIAS CJ:

Well exactly but isn't that a point against you because, as I indicated to you, following the leave determination the dispute still remained on foot?

MR BRYERS:

I'm not sure if we're talking at cross-purposes Ma'am. If the offer had been accepted before the leave application was granted then there would have been a complete settlement immune to the litigation.

ELIAS CJ:

And if the offer had been accepted without dispute after the leave judgment had been given, it too would have been a settlement of the entire dispute?

MR BRYERS:

Yes, well that's of course why we're here because –

ELIAS CJ:

Yes.

MR BRYERS:

– the respondent's purported to accept it in those circumstances.

ELIAS CJ:

I'm simply saying that the entire claim referred to in this judgment, the equivalent is the entire dispute, the substantive dispute between the parties.

MR BRYERS:

I see the critical difference between the two cases Ma'am, in the event which subsequently occurred rather than in the commencement point. In both this case and that case, the offeror set out to settle the entire litigation and there's

commonality there but the difference is the event which occurred here, was there was a making of an interim award which substantially settled everything and that, perhaps not surprisingly, was held to cause the offer to lapse. Now, the appellant's case here isn't as good as that but the appellant nevertheless says, this was a sufficiently material change to make it obvious to Dysart that the offer was no longer available because if it had been known that leave was going to be granted, a different offer would have been made.

TIPPING J:

Or it's highly likely that a different offer would have been made perhaps –

MR BRYERS:

It's near enough certain Sir because the respondents put in the record a subsequent offer that was made after leave was granted and I think it was for about $100,000, so that just shows how –

TIPPING J:

That could be a bit self-serving –

MR BRYERS:

– the difference was perceived. I beg your pardon?

TIPPING J:

It could be a bit self-serving, Mr Bryers.

ELIAS CJ:

I'm just wondering about where all this takes us, whether it really means that the context has to, in all cases of disputed settlement, take account of the shifting risks in the litigation known to the parties?

MR BRYERS:

The Court of Appeal did have something to say about that at paragraph 27 on page 62 of the case. They talk there about various factors, such as withdrawal of legal aid in order to provide security for costs, financial

pressures from third parties and the like. I would distinguish Ma'am between factors which –

ELIAS CJ:

You are in a stronger position because there is the express reference to the leave application in the letter.

MR BRYERS:

Yes. This is why Ma'am I keep emphasising the context and the terms of the offer because while undoubtedly there are all sorts of factors which can affect the party's decision to settle or not, I would not accept that any change of circumstances means an offer lapses. It has to be something which a reasonable person in the shoes of the offeree – I'm repeating myself obviously, would acknowledge or would realise, made the offer no longer open for acceptance. A number of the factors here for example, financial pressures that a plaintiff may be under from third parties are, I would suggest, subjective. Considerations that would have no relevance to whether or not an offer would lapse.

BLANCHARD J:

If one applies the words of the Lord President in the Scottish case of *Macrae*, can it really be said that the offer is now utterly unsuitable and absurd simply because leave has been granted?

MR BRYERS:

I would find it difficult to justify that conclusion, Sir. I have approached these cases on the basis that they're an unreliable guide in many respects, simply because the test that's adopted in each of them is different, one from another. I've mentioned that the utterly unsuitable and absurd test appears only in the *Macrae* case, and in the insurance company cases, they focused on whether or not there was a change in matters materially affecting the risk.

BLANCHARD J:

That's a typical insurance law term, though.

MR BRYERS:

Quite so.

ELIAS CJ:

It goes to the heart of that contract.

MR BRYERS:

In *Bright v Low* it was thought sufficient merely to say that the change of circumstances was important.

McGRATH J:

I think if you go to Lord Shand in the Scottish case, you get the idea of being so material a change of circumstance, it was no longer open to accept the tender and you might feel more comfortable with that.

MR BRYERS:

Yes.

McGRATH J:

But you've still got to – there's still a question of the degree, and obviously it has to be something pretty substantial.

MR BRYERS:

And then perhaps just to complete this, the *Krupp* case of course talked about impossibility of performance which is very relevant here, if the change of circumstances makes performance impossible.

BLANCHARD J:

Well it doesn't, really, because there's an equivalent to withdrawing the leave application and that's withdrawing the appeal. They are only technically different, both have the same result, the case doesn't go on.

MR BRYERS:

Yes, that's true but you're settling, Sir, a different set of risks once the leave application is granted from the position that the parties were it before it was dealt with.

TIPPING J:

I think that's the key of your argument, isn't it, that looking at it in a sensible, commercial way, the degree of risk has materially changed.

MR BRYERS:

Yes.

TIPPING J:

Or has changed enough, whatever the precise semantics of it are, to bring the offer to an end.

MR BRYERS:

Yes.

TIPPING J:

I think that has to be the nub of your argument really, doesn't it?

MR BRYERS:

Yes.

WILSON J:

And following on from that, it's unlikely that the offeror would have made the same offer after having overcome the twin hurdles of out of time and satisfying the leave criteria.

MR BRYERS:

Exactly. And to go further, that all of that must have been obvious to a reasonable person standing in the shoes of Dysart.

BLANCHARD J:

How do we assess whether it's unlikely the offeror would have made the same offer?

ELIAS CJ:

It'd have to be as plain as the nose on your face type approach, wouldn't it?

MR BRYERS:

I suppose that's – how do you assess it? It's common sense, with respect Sir, I mean, the risks had changed, you would not make the same offer once you'd surmounted the formidable hurdle of getting leave to appeal to this Court.

BLANCHARD J:

Well the grant of leave doesn't mean that you're going to win the case, it doesn't even mean that the Court thinks you're going to win the case. Leave could be granted simply because there is thought to have been some kind of error in the way in which the Court of Appeal expressed itself, but assuming that there was such an error, and I don't know whether there was or not, it doesn't follow that the result is necessarily going to be the same because the job of this Court is to correct error of law, but sometimes, once you've corrected the error of law, it doesn't lead to a different result.

MR BRYERS:

One understands all of that, with respect Sir, but nevertheless, any litigant starting out to appeal to this Court does face the difficulty of getting leave, and in that particular case, the basis upon which leave was sought was, well let's say it wasn't a strong case, it didn't appear to be a strong case, because the appellant was relying upon the miscarriage of justice ground, where this Court has made it clear that leave will only be granted in exceptional circumstances. As it happens, the decision this Court made on the leave application suggests that there might have been, in fact, a question of wider import involved in the case, but from the point of view of the parties at the time, the context was, leave application, which faced pretty formidable difficulties, worsened by the fact that the appeal hadn't been served and it appeared that an application for

leave to bring it out of time was concerned, was necessary. So the appellant was in a very weak position apparently, at the time the offer was made.

BLANCHARD J:

But I think anyone would have been likely to give advice that the technical failure to serve in strict compliance with the rules, was never likely to influence the Court's decision whether or not to grant leave. This is not a case of simply not filing an appeal, as I understand it, the appeal was filed in time, but the process was not served in accordance with the rules, it was served on the barrister, rather than the solicitor, something like that wasn't it?

MR BRYERS:

That was said in the lower court but I think in fact the true situation was that it wasn't served at all. What happened was that this Court, the registry wrote to the respondent's solicitors, advising that the appeal had been filed and I think, seeing a copy of it, at any rate, the respondent's learned of the filing of the appeal through the registry in this Court.

BLANCHARD J:

And did they learn of it in time or out of time?

MR BRYERS:

In time.

BLANCHARD J:

So it was very much a technicality, because they actually got to know about it.

MR BRYERS:

Certainly Sir, that would have been the appellant's submission, if it had got to that stage.

BLANCHARD J:

Well that was never going to –

TIPPING J:

It doesn't seem to have troubled the leave Court.

MR BRYERS:

It does not.

TIPPING J:

I wonder whether there is another dimension that shouldn't be – another dimension to this risk question that should be borne in mind, it's not huge, but the costs dynamics must change significantly when you're facing an applicant who has been granted leave from the point of view of the respondent to the appeal, that you're then, win, lose or draw, you're then at significant risk as to having to spend quite a lot more money, and so it's not just the balance of risk, if you like, in relation to the judgment sum, it's the balance of risk as to all the other commercial implications, if you like, of now having to face a full-scale appeal.

MR BRYERS:

Yes.

TIPPING J:

From the purely – looking at it from a broad commercial point of view, I suppose the argument is that the ball game is now significantly different, putting it very colloquially.

MR BRYERS:

That's the argument. That's the argument, and I say, obvious to the respondent that that was the case.

ELIAS CJ:

Mr Bryers, is there more that you want to add?

MR BRYERS:

No I think that's it Ma'am.

ELIAS CJ:

Thank you Mr Bryers.

MR BRYERS:

I assume that I'll respond to my learned friend's submission?

ELIAS CJ:

Yes.

MR GODINET:

Thank you Ma'am. I've endeavored on behalf of the respondent to try and keep this as simple as possible. In line with my submissions, there's an underlying proposition that this was, the offer that was made was a complete settlement of all matters between parties, all matters, not the leave application, but the substantive appeal to the Supreme Court, to this Court, and also in respect of all the other enforcement proceedings that were going on at the time. And that is to take up your point Ma'am the heading of that offer. It's not intituled leave application Supreme Court. It's the subject matter in the email.

TIPPING J:

Well they weren't paying 250,000 just to buy off the leave – to compromise the leave application. I think no one could be in any doubt about that.

MR GODINET:

Yes I agree with that, but it takes – Your Honour it takes it to the point that this was everything off the table, gone. Take this, we're out. Why is there a need to imply a term as has been sought by the appellant? The term it's thought that the offer would lapse upon the terminating event which would be the arrival of the Supreme Court judgment granted here. Why is it absolutely necessary if you're talking about the stages of implying a term into a contract. It doesn't meet the five stage test set down. It's not so obvious, that doesn't need to be said, and it isn't required to give efficacy to the contract. So why are we – why is it necessary?

TIPPING J:

You are exactly equating implication of terms into contracts with implication of terms into offers. Is that sound?

MR GODINET:

In this particular instance I think it is Sir.

BLANCHARD J:

You've got some support for that, Mr Godinet, in Lord Justice Pearson's judgment in *Financings Ltd v Stimson* I think, where he does talk about business efficacy. The bottom of page 392. Though of course it's a rather different situation from the one before us.

TIPPING J:

It could be put against you that the officious bystander if that is to be the test, will say well of course it lapses because the balance of risk has substantially altered. That's I think what Mr Bryers would rejoin to your saying it's not so obvious.

MR GODINET:

This is a situation Sir where the context is known to both parties. An offer is tendered in the full knowledge that there is a leave application pending to this Court. Notwithstanding its clearly insurmountable difficulties that the appellant felt it was facing but it didn't make the offer. Sorry, it made the offer in complete settlement of the matter. The substantive proceeding to this Court didn't tie it to the leave application and Your Honours mentioned earlier that what's the difference between settlement of the leave application with substantive. It's the whole kitchen sink. It's gone. As to risk Sir, as to risk, this is not, in my submission, a situation where because leave is actually given that my odds have improved and I'm really asking the Court to imply a term so

that I can actually look back and make a lesser offer? That can't be right Sir because the parties knew what was facing them.

WILSON J:

Just to test that. Realistically if a hypothetical legal adviser had been asked to advise the appellant what would be a reasonable offer to make, if that request had been made first at the time this offer was made, or if a similar request had been made after leave was granted, isn't the reality that in all probability, the two offers would have differed significantly?

MR GODINET:

Yes, I would have to agree with that Sir. This wasn't the case here, and we're stuck with what is the case here, that Mr Swan, for the appellant, was in full knowledge of what was happening. And if I can turn it to, because Mr Bryers has raised the issue of an ambush because standing in the – a reasonable man standing in the shoes of Dysart would say of course the offer was subject to that implied term, because that is the only reference in that offer, the reference, as to paying it on Monday at which time the leave application can be granted, that is the only words in that offer that the appellant can seize upon. It gives him an in, so to speak, for that implied term to be incorporated. As to an ambush, it can't be further from reality. It's an ambush if you turn it on its head, where the appellant says, "Because of those words, paying it on Monday, at which time the leave application will be discontinued", that's an ambush by using that to say that there was an expressed term and/or an implied term to that effect.

Your Honours, the issue is, was this offer open for acceptance? If – and it was, until it was accepted by the respondent. It wasn't withdrawn and, as I have referred to in my submissions, the –

TIPPING J:

Are you relying on the fact it wasn't withdrawn between 12.30 and 1.15?

MR GODINET:

Yes Sir. Mr Swan's offer on the 9th of August at 9.38, payment of $250,000 in full in settlement of the matter, payment on Monday at which time the leave application will be discontinued. At 12.30, this Court grants leave, at 1.12 pm, the same day, Mr Ropati accepts the offer. At 2.38, Mr Swan writes his, what I call, self-serving letter, in my submission, that of course it was subject to an implied term and that condition is no longer capable of acceptance. Mr Swan, in his affidavit, states that notwithstanding the initial view that I held that it no longer applied, which of course Justice Priestley in the High Court correctly ignored, what did Mr Swan actually do? He went and took instructions. Now, either the offer had lapsed upon the arrival of the Supreme Court judgment to grant leave, or it hadn't.

TIPPING J:

But he might have been wanting to get instructions as to whether, notwithstanding it had lapsed, it would in effect be resurrected. I mean, I think this, with respect, is a rather – it doesn't really address the crucial point, whether it had in fact lapsed. The fact that what he thought or didn't think, has that got much to do with it?

MR GODINET:

No Sir, but what he did, what he did, he went and took instructions. He had ample time to withdraw the offer and he says so in his affidavit, he received it, I think, in his office at 12.40, some 10 minutes after the Supreme Court.

TIPPING J:

But he's either right that it didn't have to be withdrawn, or he's wrong. The fact that he went to take instructions is what I'm having difficulty understanding how it bears on the issue at all.

MR GODINET:

Well Sir, as I've said, it's quite different from post-contract conduct, which there is possibility of looking at, if it's mutual, from the mutual view of the

parties, but I'm not saying about post-contractual conduct, I'm saying it's contemporaneous.

McGRATH J:

I hear Gibbons Holdings coming on.

TIPPING J:

I think I'd keep off that territory if I were you Mr Godinet, it's fertile soil.

MR GODINET:

Yes Sir. I'm really limiting it to, it being contemporaneous conduct and that was seized upon by Justice Priestley and by the Court of Appeal in an ultimate paragraph of their judgment. What he was saying then, it was not so obvious. What he's saying now before the Court of Appeal and it's what he's saying now, was not so obvious, is not, was not so obvious then. So, why are we going down that road, it was a complete settlement. Sir, you asked about the – it being analogous to a conveyancing settlement where –

TIPPING J:

I think my brother Blanchard may have come to your rescue slightly in that respect. Let's just hear what you have to say?

MR GODINET:

Well, Sir, the consideration was that it wasn't tied just to this leave application. The whole consideration for it was the complete deal. Everything – there was no further dispute between the parties.

TIPPING J:

What do you say the principle should be for the implication of termination because the books all clearly accept that a condition in an offer can, as to termination, can be either expressed or implied. Do you have anything to propose as to the correct approach to when one implies a term of that kind into an offer?

MR GODINET:

I'll try my best Sir but in this particular case, tying it to this case, it comes back to the utterly absurd comments made by some of the Scot cases. Is it so utterly absurd? That's the test Sir.

TIPPING J:

What, it's utterly absurd to think that the offer would continue in these circumstances?

ELIAS CJ:

Or not continue.

MR GODINET:

Or not continue.

TIPPING J:

Well, we could put it either way.

MR GODINET:

It's not Sir because if Mr Swan wanted to frame this offer, tied to leave application, or put some other restriction on it, time limit, sunset clauses, as in fact –

TIPPING J:

You only need to imply a term if it's not expressed. I mean, with respect, this isn't helping. The question is, what should – you say it should be utterly, you know, the idea of being able to accept this offer in these changed circumstances should be utterly absurd before you deem it to have lapsed?

MR GODINET:

Yes Sir. What the words Sir, and it's coming back to the basic premise, what was offered, how was it expressed, what was offered and the words or the reference payment on Monday, payment on Monday at which time the leave application will be discontinued. That, that doesn't – that just gives them an in

to capitalise on the situation. It is not a term as sought by the applicant. Your Honours I don't know how far, further to take the respondent's claim because it's trying to keep it very, very simple. Either the offer was open for acceptance or it wasn't. The Court of Appeal looked at the issue as being perhaps – when it considered what Dysarts would have done if the offer had been declined, that it wouldn't accept it, and this goes to material change or risk. Dysarts could easily have accepted the offer even if the situation –

TIPPING J:

You obviously would wish us to state the test as significantly higher than the Court of Appeal's test which appears to have been change of circumstances of such significance that it cannot fairly be regarded as still open for acceptance.

MR GODINET:

Sir are we talking synonyms here or – it maybe a higher test but are we talking in synonyms or –

TIPPING J:

Well I'm suggesting to you the utterly absurd would tend to be rather a higher – more difficult test to satisfy than what appears to have been the Court of Appeal's test and – in the end, is it a question of fairness or unreasonableness, in the end, is it a question of whether it remains fair to – or it is unreasonable to hold the offeror to the offer in the changed circumstances or is that too amorphous a test or not high enough or?

MR GODINET:

Well Sir using the five stage of the BP case where if you're going to imply term, we'll get into a contract, I think the law laid down there is that it's got to be fair and reasonable. Fair and equitable, sorry Sir, fair and equitable.

TIPPING J:

I think the law is –

MR GODINET:

Reasonable and equitable.

TIPPING J:

– the term itself must be fair and equitable.

MR GODINET:

Reasonable and equitable Sir. But this appellant made the offer and I've referred to it in my submissions Sir. It's say what you mean and mean what you say and if I seize upon reference to what I submit, as we had submitted in the lower courts, is the complete machinery provision at the end. That's all that's left to be done. Pay us on Monday and that is the end of everything.

McGRATH J:

But what I think you're saying is that the only implied term you would contemplate in those circumstances is if the circumstances changed so significantly that the dispute had been resolved?

MR GODINET:

Yes Sir, I would. It's not as – yes. Because of the leave application, it wasn't the determination of the final issue between the parties. It would have been different if there were a judgment pending out of the lower court and the Court of Appeal. That's quite distinct from this particular situation here and it has been – the respondent has been trying to keep it as less complicated as possible. You don't need to. There is a uniform test and that test if there's going to be a significant or material change, and that will apply in each factual situation, in this particular factual situation Sir I'm saying to Your Honours I'm saying that because the parties knew that there was a risk out there or there was the possibility of – there was an undetermined leave application, the offer was made in those terms. You can't get away from that and that's the context and Dysarts will very well have accepted the offer because it – had it been reversed, because of the commercial reality of the situation. Because what was being offered was cash on Monday. Cash on Monday and you make it – you'd bring in all the commercial reasons why you would. You would even have to deal with the costs of litigation going to the Supreme Court, there was

also risk there, so you accept all those and you say yes, I'll take that offer because it's still on the table and it wasn't withdrawn. Your Honours, I don't know if I can take the matter any further for the respondent.

ELIAS CJ:

Thank you Mr Godinet. We'll take the morning adjournment now.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.45 AM

ELIAS CJ:

Yes Mr Bryers?

MR BRYERS:

As the argument has developed, it seems to me with respect that the position we've arrived at is that the critical question is in terms of the third limb of the Court of Appeal's implied terms, whether the change of circumstances was of such significance that the offer could not fairly be regarded as still open for acceptance. Now on that point in answer to questions from Justice Wilson my learned friend accepted, as I followed it, the proposition that it would have been obvious to a legal adviser that a different offer would be made after leave was granted as compared with the situation before leave was granted.

Now the moment that concession is made, in my submission, the appellant's case must prevail because it follows that the respondent and its legal advisers knew that the appellant would have made a different offer once leave was granted and the moment you arrive at that position logically I would suggest it would be unfair to allow the respondent to accept the offer and enforce the so called contract. In the end, that's because the parties have not made an agreement. They knew the appellant didn't intend that the offer they were purporting to accept would have been made by the appellant after the change

of circumstances. That's really all I want to say by way of reply unless there's any other points.

ELIAS CJ:

Thank you Mr Bryers. We'll reserve our decision. Thank you counsel for your help.

COURT ADJOURNS: 11.49 AM