IN THE SUPREME COURT OF NEW ZEALAND SC 39/2013

[2014] NZSC Trans 27

BETWEEN **VIKRAM KUMAR**

NIRUPAMA KUMAR

First Appellants

ROBERT JAMES SELWYN

Second Appellant

MICHAEL DONALDSON

PATRICIA BRONWYN DONALDSON

Third Appellants

AND **STATION PROPERTIES LIMITED (IN RECEIVERSHIP AND LIQUIDATION)**

Respondent

Hearing:	8 December 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	R M Kelly for the Appellants D J Goddard QC and M J Tingey for the Respondent

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CIVIL APPEAL
(APPLICATION BY RESPONDENT FOR RECALL OF JUDGMENT)

MR GODDARD QC:

May it please the Court, I appear with my learned friend Mr Tingey for the applicant.

ELIAS CJ:

Yes thank you Mr Goddard, Mr Tingey.

MS KELLY:

May it please the Court I appear by myself today for the respondent to this application.

ELIAS CJ:

Thank you Ms Kelly. Yes Mr Goddard. We think we would be assisted if – by going through the sequence a little bit and starting perhaps with the findings of the Judge in the High Court then the argument that was addressed to the Court of Appeal and then coming onto the argument that was addressed to us.

MR GODDARD QC:

I'm very happy to do that Your Honour and that's almost exactly what I had planned to do. Can I do two things first, can I just ask whether the Court is intending to sit its usual afternoon hours or have two sessions on the High Court timetable?

ELIAS CJ:

Well it rather depends how long it takes. I think if we're going on after four then we'll take an adjournment at 3.30. So perhaps we can review it before 3.30.

MR GODDARD QC:

Yes Your Honour, it's just if I'm going to step through all that history and the transcript and the Court of Appeal and this Court, it's hard to do properly and very fast.

ELIAS CJ:

Yes, and some of us may have trouble finding some of the material.

MR GODDARD QC:

We'll just take it a step at a time. In an endeavour to follow that sort of logical chain and to make finding references easy, I've prepared my usual road map and if I can, just through Madam Registrar, provide to the Court.

ELIAS CJ:

Thank you.

MR GODDARD QC:

And I tried to collect together every reference to submissions in the Court of Appeal judgments and the Court of Appeal and this Court transcripts in both Courts in this and I think it's helpful to begin, as your Your Honour suggested, in the High Court and the critical paragraph is the one I refer to in item 1 of my road map, the agreement between the parties and Judge's findings on that. So if the Court has volume of the case on appeal and it's under –

ELIAS CJ:

The different piles that I had in my room have been helpfully muddled. So I'm going to take a while to find things I think.

MR GODDARD QC:

Not at all Your Honour this is the –

ELIAS CJ:

Yes we have volume 1 I think.

MR GODDARD QC:

A risk of being away is that other people bring their own order to your papers.

ELIAS CJ:

Yes.

MR GODDARD QC:

So under tab 4 we have the High Court judgment and one of the issues before the High Court was well what are the documents that constitute the contract between the parties and the Judge's findings on this are at paragraph 75, which is page 123 of the case on appeal. What His Honour found at 75 and this is what Station accepted in the Court of Appeal, is that the contract wasn't confined just to the agreement for sale and purchase, rather the agreement between the parties, His Honour said, should be taken to refer to the contract comprised in and then what we have is a list of five things, the 20 September email, the 20 September letter, the agreement instructions,

the price list and the sale and purchase agreement. So it's worth just pausing to locate those because I will be coming back to them to explain what's being said at various points.

So the agreement for sale and purchase, if I could ask the Court to take out volume 4 on the case on appeal, under tab 20, there are the identical, in all material respects, agreements for sale and purchase for the three appellants in this Courts, the Donaldsons, the Selwyns and the Kumars. And if we look at the Donaldson sale and purchase agreement, that begins on page 758, it's in the usual fairly substantial standard form with additional terms to reflect the nature of the contract and the only two provisions of this that I'm going to take the Court to, one because it matters and one because I raised it in argument earlier, the Court said it didn't matter and I accept that but it's helpful background. First of all clause 6.2 which is on page 768. So this is a substitute for the standard –

ELIAS CJ:
Sorry what page is it on?

MR GODDARD QC:
768 Your Honour.

ELIAS CJ:
Yes, thank you.

MR GODDARD QC:
A substitute for the standard form, clause 6.2 and what 6.2 says in paragraph 1 is, "The chattels are delivered to their purchaser in their state of repair as at the date of this agreement, fair wear and tear accepted." And then critically, "But failure so to deliver the chattels shall only create a right of compensation." That was referred to in the judgment of this Court and I'll come back to it but the way I described at the substantive hearing, the way I've described it again now, is that this is actually express agreement, that it's not essentially that non-delivery of chattels sounds in compensation, not in a right to refuse to perform or to cancel. And the other clause that is potentially relevant, that I submitted was relevant before but the Court didn't accept that and I am proceeding today on that basis, is over on page 775. This is in clause 28.

GLAZEBROOK J:

I'm just trying to work out how to mark these because of course mine is already marked.

ELIAS CJ:

Different colour.

GLAZEBROOK J:

So I'm going to try a different colour at the top.

MR GODDARD QC:

Yes mine is looking like a multicoloured hedgehog.

GLAZEBROOK J:

Yes, 775 was it?

MR GODDARD QC:

775 Your Honour. I've got green for today, as to last year's pink and blue. So 28, body corporate, first of all there's a reference to the rules of the body corporate and then 28.2, two types of agreement contemplated, "The vendor shall procure the body corporate to enter into an agreement for the provision of body corporate secretarial services with such party as the vendor may nominate prior to settlement date." So that's an obligation to procure a secretarial service as agreement, not important today. The second sentence is the one I spent some time on at the previous hearing, "The vendor may procure the body corporate to enter into a building manager's agreement in the same or similar form enclosed with a professional building management company to be nominated by the vendor prior to settlement date." Now I come to this but the Court said and I fully accept it, that this is talking about a different sort of agreement. This is not talking about a management agreement but I spent some time on it because I was emphasising the "may" and that's important to the submission that it was not conceded that there was an obligation to provide a management agreement. However misguided my reference to this clause may have been, one of the reasons I referred to it was to say it's just "may" not "must".

ELIAS CJ:

But if it's not relevant why does the "may" assist?

MR GODDARD QC:

Because in looking at whether there was a concession, it's important that I was arguing that there was no obligation in reliance on a number of things, one of which was this "may" and the Court will see that when we go to the transcript, it will become more relevant.

ELIAS CJ:

But I'm sorry I thought you were just saying that you accept that 28.2 as the Court said is irrelevant, so you're not relying on this clause?

MR GODDARD QC:

I'm not relying on this clause today, no.

ELIAS CJ:

Thank you.

MR GODDARD QC:

What I will be focussing on when I come to it, are the other documents that the High Court held formed part of the contract between the parties. These are under tab 19 of volume 4 and they are first of all the email, the 20 September email which begins on page 749 and which runs over to 751 and I'll do the detail later but just again to situate ourselves now, Your Honours will see that over on page 750, there is a major heading "progress" and then there is a small heading –

GLAZEBROOK J:

So – oh okay, no sorry got it.

MR GODDARD QC:

And then a subheading "Layout". "Layout" just above half-way down the page. "Layout, we've managed to include several more apartments in the fabric of the building providing more income. The design has been altered to allow for a management arrangement to be run from house 3. This means the management rights be sold to the highest bidder. Around 25,000 per unit is the market rate providing further income", I think that should say "to the company. The sale and purchase contracts do not include a management agreement at this stage, however this will be made available during construction along with the furniture package." And then there's a discussion about the two options for purchasing a unit and I'll need to

come back to those, one buy outright, which means no gazump clause and two buy as an underwrite with the gazump clause and then accompanying that, also dated 20 September 2005, is the letter which His Honour held and it's common ground, was part of the contract that begins at 752. "Dear Forum Select Bowen View investor purchaser." And there's a discussion about deposits that are required, some arrangements to be entered into with lenders and then just over or about two-thirds of the way down the page, the two relevant paragraphs, "The sale agreement needs to include the furniture package/air conditioning/heating package, full lists of the contents of this item will be made available and as you are a shareholder will be at cost plus 10%. We have set a budget and have work to this. The public will pay a marked up price determined by a third party valuation. This is clearly more profit to the project." And then the next paragraph, "The vendor intends to arrange for the benefit of its shareholder as an option, a serviced apartment management agreement. Decisions to be considered would be a number of weeks for personal usage, operator and brand and whether the income would be pooled or tied to each unit. If pooled this would require a prospectus." I'll come back to that but again what we see here is the possibility of a management agreement being identified, the fact some critical decisions have yet to be made about what it would look like being identified, including who the operator would be and critically whether the income would be pooled, in other words all the income from all the units goes into a single pool and you have a share of it or whether you get the income from each unit and quite rightly what's noted is if pooled this would require a prospectus because it would be a participatory security, you would have to offer it in a prospectus and a decision would then be made by each purchaser about whether or not to acquire that participatory security. It's quite clear that it doesn't contemplate any commitment to take it up at this stage. That would be inconsistent with all the outstanding issues and with the need to comply with the Securities Act in that scenario.

There's nothing relevant to the management agreement issue on page 753 but on 754, in the bit in the middle of the page that –

ELIAS CJ:

Sorry you're taking us to the primary evidence and it may be very helpful but –

MR GODDARD QC:

This is the last page that I want to go and it's just so that Your Honour can understand the rather cryptic references in the judgments and the transcripts back to these.

ELIAS CJ:
I see, thank you.

MR GODDARD QC:
It will make much more sense I promise with this background.

ELIAS CJ:
Thank you.

MR GODDARD QC:
So the last page I wanted to take the Court to, in the middle of this page 754, the bit that was clearly highlighted in some original version, "Prior to completion an up-to-date furniture package arrangement along with air conditioning and heating will be mandatory. A property management agreement will be offered", again that word "offered pre-settlement. We expect settlement to be approximately April 2007 and then over the page, I won't go to the detail, is the price schedule for the various units with notes that "for use of service department, air conditioning, heating and furniture package is required and that the furniture package is mandatory with the price to be made available six months prior to completion." So that's what all the submissions are referring to, the agreement for sale and purchase and the side letters and what I'm going to do, because I think this may be where some confusion has crept in, is to distinguish between the documents which form part of the contract, the side letters and their content because that is what – so because what the documents were has been common ground since the Court of Appeal but what obligations they imposed has not.

So Your Honour, Station's position and the Courts below. I don't think it's especially helpful to Your Honour to see the wide range of issues that were argued in the High Court. Basically everything was up for grabs as I say in my 2.1. Station argued that the side letters the Court's just seen did not form part of the agreement between it and each purchaser. If they had contractual effect, it was said then the obligations were owed by another company in the McEwan Group, they weren't Station's obligations at all. Station also argued in the alternative that there was no obligation

to provide a management agreement and that any side letter terms were not essentially, breaches were not substantial.

His Honour rejected the argument about the content of the contracts and then coming back to the High Court judgment, volume 1 –

GLAZEBROOK J:
Sorry can I just check the alternative, just so I've got it absolutely clear in terms of the argument because I just missed getting it down. The alternative was what I'm sorry? So it they said they didn't have contractual effect and if they did it was not their obligation, somebody else's and the alternative?

MR GODDARD QC:
It's the last three lines of the my 2.1 Your Honour. So it's that there was no obligation to provide a management agreement.

GLAZEBROOK J:
Oh okay, thank you that's fine.

MR GODDARD QC:
And that any side letter terms were not essential, breaches of them were not substantial. So there was a hierarchy of responses to the side letters in the High Court. Station said, "They're not our promises, if they are promises at all. Second, if they are our promises they're only promises in relation to the 1% and the furniture package. The management agreement is just an indication of intention and third, whatever the obligations were under that it wasn't essential."

And His Honour basically didn't accept any of that. All of those submissions were rejected. I have taken the Court to paragraph 75 of the High Court judgment finding that the contract between Station and each purchaser included the items listed in 75 which we've just looked at. His Honour then proceeded in the next 10 paragraphs to reject the purchasers' obligation that there was no obligation to purchase, that it was just an option.

Then His Honour turns to the question from page 126 onwards, did the settlement date arrive and His Honour, after going through the issues in relation to the practical completion certificate in some detail, reaches the conclusion at page 132,

paragraphs 112 and 113, His Honour said, “It was common ground that to satisfy the definition of settlement date all three of the events in clause 14.15 had to be completed and that included having a valid certificate of practical completion.” His Honour said, “It follows from the absence of a valid of certificate of practical completion the defendants are correct to submit the settlement date never arrived, it was not open to the plaintiff therefore to rely on the terms of the agreements to make time of the essence and insist on settlement. For these reasons I accept the submission for the defendants that the failure of the plaintiff to obtain a practical completion certificate in accordance with the contractual arrangements meant that it could not require the defendants to settle, that is fatal to the plaintiff’s claim.” Just to remind the Court, looking ahead, that argument was rejected by the Court of Appeal and that was the focus of the appeal to this Court and this Court upheld the Court of Appeal on this point, disagreed with the High Court Judge.

We come to then to, over the page in the High Court judgment 133, was the plaintiff ready, willing and able to settle? In case I should be wrong about that His Honour said, “I’ve also considered the effect of clause 9.12 of the agreements which provided that a settlement notice would be effective only if the parties serving it at the time services are ready, willing and able to proceed to settle” and that defence, the defendant’s argument that that wasn’t met is founded on the three propositions at 116 that the terms of the contract required the plaintiff prior to or at settlement to pay a 1% incentive to provide the furniture component of the air conditioning, heating and furniture package and to enter into a management agreement of the units, importantly to enable a sale free of GST as a going concern. And the Court will see that it’s that GST issue that loomed large really in the Court of Appeal. But that’s what was argued in the High Court by the defendants, by the purchasers.

His Honour found at 120, over the page, that despite suggestions from the receiver, Mr Graham, to the contrary regarding furniture, the plaintiff was not in a position to meet its obligations on settlement either at the time settlement demands were first made or more latterly when the plaintiff was plainly insolvent and entirely depending on outside funding. So His Honour found that the vendor couldn’t perform.

Then at 121 His Honour records the argument that if those three items were required to be provided under the contract, the failure or inability of the plaintiff to meet those terms and conditions was not sufficiently material or substantial to justify the defendant’s refusal to settle. At 123 His Honour said, “Taken individually it’s

arguable that the failure to provide a 1% discount on the purchase price or a 30,000 furniture package or to have in place a management contract for the operation of the development of serviced apartments were not sufficiently material to justify a refusal by the defendants to settle their purchases."

Then 124, "Critical finding. In the context of this case however, I consider the defendants were entitled to regard the breaches of those obligations by the plaintiff as sufficiently substantial or material to justify refusing to complete the purchase when the plaintiff demanded it. And the background to that finding, the events set out at 125, 126, at 127 His Honour said, "I'm satisfied that the terms of the 20 September email and the agreement instructions went further than raising a management contract as a possibility." So this is where His Honour is rejecting just an intention idea. "The defendants were told in the email the design of the development had been altered to accommodate a management agreement. The email and the instructions both said that a management agreement will be made available or offered before settlement." At 128 His Honour rejects a mathematical analysis of the amounts of the benefits not provided and says, "In my view the failure of the plaintiff to put itself a position to provide what it had promised in terms of the purchase fee, the furniture package and the management agreement was essential to the bargain it had struck with the defendants. The plaintiff says it had an informal arrangement with a respected hotel manager, Select Hotels to manage the property. It's clear however the precarious financial position of SPL prevented any firm arrangements being put in place and so at 129 the plaintiff's breaches were material and substantial, they justified the defendant's refusal to settle." And that really deals with the relevant issues in the High Court.

So Station appealed and initially Station filed what looks to have been, I wasn't involved at the time, pretty much a holding appeal in which Station challenged every finding that the High Court Judge made but that was reviewed and refined and we see the notice of appeal on which the matter proceeded in, and I'm sorry about the proliferation of bundles, a bundle, quite a slim one, with tabs A through E, that's entitled "Bundle of documents relating to the memorandum by the respondent seeking recall of the Court's judgment."

WILLIAM YOUNG J:

Have you set – didn't you put the finalised appeal in this bundle here?

MR GODDARD QC:

Yes Your Honour's probably right. That might just be what I need to take –

WILLIAM YOUNG J:

The one that's –

MR GODDARD QC:

Yes Your Honour's right, so let's just stay with the fatter supplementary bundle of documents relating to the application, yes thank you Sir, that will speed things up. Under tab 1.

ELIAS CJ:

It may not speed things up. I've got it. Yes I had the other one.

MR GODDARD QC:

So does Your Honour have it? It's numbered 1 through 8.

ELIAS CJ:

Yes.

MR GODDARD QC:

And it is the main thing to work off today.

McGRATH J:

So can we call that bundle 2?

MR GODDARD QC:

I think that's an excellent idea Your Honour, something to be said for numbers. I think if we call that volume 2 for today's purposes.

ELIAS CJ:

What's 1?

MR GODDARD QC:

And 1 is the slender one with letters A through E, entitled "bundle of documents relating to the memorandum". These were the attachments to the original memorandum on recall.

ELIAS CJ:

Yes.

MR GODDARD QC:

Provided in a more helpful form in a single bound volume. So you've got volumes 1 and 2. Grateful to Justice McGrath for that obvious suggestion which escaped us that they could be numbered. So tab 1, this is the notice of appeal that was before the Court of Appeal and if I take the Court to the grounds of appeal on page 2 of the notice. The grounds of the appellant's appeal are, paragraph 2, "The appellants consider the parts of the judgment identified in paragraph D and C above are wrong in that and it's A it's critical, the appellant, Station, was not obliged under the agreement to sign a management agreement prior to or at settlement and therefore its failure to do so cannot have not been in breach of the agreements." So that expressly puts at issue the requirement to have a management agreement in place.

WILLIAM YOUNG J:

It doesn't really. The trouble is it puts it, doesn't it, in a very ambiguous way.

MR GODDARD QC:

Let me –

WILLIAM YOUNG J:

Well you understand the point I'm making, don't you? Instead of saying, "There is no agreement and therefore this isn't a problem", it says, "We were not obliged under the agreement to do something very particular."

MR GODDARD QC:

It could certainly have been expressed more clearly but I don't think any doubt once we go through the written submissions and the oral argument of both parties, that everyone, and the issues list, that everyone knew what was in issue.

ARNOLD J:

So what are you saying the argument was, there was no contractual obligation at all in relation to the management agreement or there was a contractual obligation but it was simply to effectively nominate a, or offer a operator prior to settlement and that was met?

MR GODDARD QC:

The argument at one time more liked one and at other times looked more like the other, I think it would be fair to say and I'll take the Court to all the relevant passages and the written and oral submissions that the argument that there was no obligation at all that "may" was the key word, was "may" but also at times the submissions appear to proceed on the assumption that there was some sort of obligation in there but it was merely to make preliminary arrangements and propose them.

ARNOLD J:

Right.

MR GODDARD QC:

And then just coming back to the notice of –

GLAZEBROOK J:

When you say "no obligation at all", that means it may if they wish to provide is that –

MR GODDARD QC:

Yes, if they saw it as desirable.

GLAZEBROOK J:

Sorry just clarifying thank you.

MR GODDARD QC:

Yes absolutely. So may, as in really may, not may meaning must or must make reasonable efforts or anything like that, just may. And then B picks that up again, "Even if the appellant was obliged to sign a management agreement prior to or at settlement, applying the relevant threshold, the appellant's failure to do so and to perform other terms at B, the other side letter terms was not material or substantial but rather could be remedied" and so on. So that was the notice of appeal and then I think it's helpful to go next to the –

ELIAS CJ:

Well I must say that 2A does seem to be way too particular to have been – to cover the two alternatives you say were advanced at one time or the other.

MR GODDARD QC:

It could certainly be more happily drafted but it –

ELIAS CJ:

Well it's very specific. It's that – it's simply saying that there was no obligation to sign an management agreement.

ARNOLD J:

And the rest of that paragraph, the other subparagraphs all refer to the three terms which can only be contractual basis, putting aside what the content might have been.

MR GODDARD QC:

I think that is a reference to the language used below rather than an acceptance of everything that went with it. I think if I go through the rest of what happened.

ELIAS CJ:

All right but I'm just flagging that 2A seems to me to be about the content of the agreement rather than whether there was an obligation.

MR GODDARD QC:

What is I think very clear be put in issue though and this is all I need for the purposes of this application is whether any obligation had been breached because the concession recorded by this Court, in my respectful submission incorrectly, was a concession that the obligation had been breached and that very clearly was not being accepted at this point and that comes through even –

GLAZEBROOK J:

Well it was a recording – it was just a recording wasn't it of what was said in the Court of Appeal judgment at paragraph 10 or are you referring to something else? And I might have the paragraph of the Court of Appeal judgment wrong.

MR GODDARD QC:

I think it was 3 and that's not quite how I understood it but again, if I could just do what Her Honour the Chief Justice asked me to do and step through the history, I think then it will be clear what was and was not an issue at each stage and if we go now to volume 1 for the purposes of this application, the bundle of documents, what we have under D is the list of issues for the Court of Appeal. The parties didn't

manage to agree on a list of issues, obviously. There were separate ones. The appellant's stations one has as paragraph 5 the issue whether the appellant breached an obligation to the respondents in relation to a management agreement for the development.

WILLIAM YOUNG J:
It's still all rolled up, isn't it?

MR GODDARD QC:
It is still all rolled up.

WILLIAM YOUNG J:
So instead of being – there was no agreement and anyway we can breach it.

MR GODDARD QC:
Yes. And then 6, whether the High Court erred in finding that the following constituted material of substantial breaches essential to the bargain and C is failure to put in place a management agreement for the apartment complex assuming the answer to paragraph – I think that should be 5 above is yes, so was there a breach and if there was did it matter? And then the next tab, tab E, is the issues list of the respondent. This actually is perhaps a little bit clearer than the appellant's. Issue one, settlement date. Issue two, the side agreements, and then various other issues. Then right at the end, page 4, miscellaneous side issues in relation to a response to appellant's case, paragraph 15. As to the management agreement, in view of ground 2A in the amended notice of appeal, did the appellant commit itself to selling the management rights prior to settlement. So it's quite clear that the respondents in the Court of Appeal knew that one of the matters in issue was whether there was a commitment to sell the management rights, in other words, to have a firm arrangement in place with a manager prior to settlement.

So off to the Court of Appeal and I received from the Court of Appeal this morning a transcript of the hearing. I assume Your Honours have it.

ELIAS CJ:
No, I think you received it from us.

MR GODDARD QC:

No, I received it from the registry of the Court of Appeal.

ELIAS CJ:
I see, yes.

MR GODDARD QC:
I understand this Court asked for it last week and we received it this morning and Ms Kelly was travelling at that time and has only just been given a copy by me before the hearing began, but I didn't think to make copies for the Court.

ELIAS CJ:
We have them.

MR GODDARD QC:
If I can go to some key references and they're in my footnote 1. Page 14 is a good place to start. Mr Tingey appearing for Station.

GLAZEBROOK J:
Did you want to say anything about 13 or is it 13 you're referring to? There's a rather odd exchanges with yes and no and it's a misunderstanding.

MR GODDARD QC:
It gets cleared up. Perhaps if we go to 11, then, where the exchange begins, top of page 11, Tingey says, "So, Sir, the position in respect of that, the obligation under the sale and purchase agreement is not to provide a signed agreement. I imagine we come on to that as well so we need to go through these." His Honour say, "Well, that's what you say. It's disputed."

ELIAS CJ:
I am trying to dredge this from my most imperfect memory, but it's slightly unrealistic, isn't it, because your client had made it clear that there wasn't going to be any management agreement, is that right? So as to whether there's a signed agreement I don't quite understand the continued emphasis on that.

MR GODDARD QC:
That was used, as I understand the argument goes, as shorthand for a finalised one, a completed one that was capable of acceptance by the purchaser as opposed to

what they were sent which was the standard terms used by a particular hotel that, all being well, it was hopeful it would be put in place at some time.

ELIAS CJ:

I see, so someone had agreed to take it on?

MR GODDARD QC:

They'd indicated interest. They'd provided information about their business. They provided some standard terms. But nothing had been locked down so what is absolutely common ground is that it was not the case at the various times that settlement was called for and the Courts held that that was not justified anyway, that settlement was not due, there was no formal offer of a management agreement capable of acceptance by each purchaser if they wanted to enter into it. There were still noises being made about, it's unlikely we'll be able to do it, but you know. I'll come back to that later.

So then at 13, Your Honour Justice Glazebrook's point about the exchange, Justice Randerson said they were saying the side agreements don't apply, "they" being Station, Mr Tingey's clients, that's clear from the previous page, and continued to say that, "They were never terms of the agreement even in front of Justice Toogood?" "Yes." "And you're not disputing that they're terms of the arrangement now, are you?" "Yes." "You're not disputing?" "No, no, but there's a number of points in relation to this," so I think Mr Tingey saw at that point that that had been a reasonably confusing exchange and this is what brings us into the bit that is helpful. "The second point is that there's now a materiality issue, there has to be a material breach." Justice Randerson, "That's right." Mr Tingey, "It's on page 14 and so for instance on that 1% is not material in any view, isn't material to the primary obligation, ready, willing and able to do that. The other matters, the three matters raised are all ancillary." Justice Randerson, "I understand that, so if they're not material – " "They're not." Justice Randerson, "You were going to go through all three. What about the management agreements? Were they ever put in place?" Mr Tingey, "No, but they weren't required to be." So that's a clear statement of the argument that they weren't required to be put in place, which is used, I think, as a synonym for signed throughout and then Mr Tingey is cross-examined very effectively by Justice Randerson about the other elements and the position clarified in relation to those. But if we come over now to page 23, at this point the Court says, "Oh, we should give you your uninterrupted 15 minutes," and they almost managed

that. So beginning at 23, Mr Tingey says, beginning at line 10, "The other obligations that I need to go on and explain each of them because the position is different, either weren't obligations as were found by His Honour in respect of the management agreement or were not material or Station was excused from performing because of the prior reputed conduct," and the 1% and the furniture are discussed down through the rest of 23 and then over at the foot over 24 –

ELIAS CJ:
Is that a correct characterisation of the finding in the High Court?

MR GODDARD QC:
His Honour found they were obligations and what he's saying is they weren't obligations like His Honour said. So His Honour was wrong, they weren't obligations, is what my learned friend was saying. Then over at the foot of 24 Mr Tingey, "And the management agreement, and I'll come on to detail in this, the position is that the finding of His Honour as to what the obligation is not accepted. It wasn't on the contract or the documents to provide a binding management agreement for the properties. It was to procure a form of agreement and to select an operator," so that's the watered-down version that Your Honour Justice Young identified. An operator was selected but also referenced materiality, and then down to line 9, "So it's a real issue. There's also a question about what that's worth because, of course, being offered an agreement provides no value in itself. It depends what the agreement says and if the agreement was onerous it was of no value to them, so in my submission in relation to the materiality of that agreement the Court can't add any real value to it when its terms weren't agreed or the value of it wasn't agreed," so that's the devoid of content point.

Then I think probably it's touched on at 43 and 46 but the next page is 48 where Ms East, dealing with the detailed evidence –

ARNOLD J:
Forty-three is important, though, isn't it, because this is all put in terms of clause 28.2?

MR GODDARD QC:
It was dealt with under 28.2 and the side agreements and it was said it was proceeded on the basis that they were the same thing.

ARNOLD J:

Yes.

MR GODDARD QC:

But what is clear is that in reliance on that the argument was made that it was a "may" not a "shall".

ARNOLD J:

Yes understand.

MR GODDARD QC:

Yes but it's not the only basis and that's why I am going now to 48. So there's East at line 15.

GLAZEBROOK J:

Sorry I just want to – you said the argument was being put on the basis that 28.2 and the side agreement management agreements were the same thing and therefore reliance on "may", is that what you said?

MR GODDARD QC:

It was put in terms of them being the same thing but it was said that both were in language of optionality, intention not of obligation.

GLAZEBROOK J:

And where do you say that's said? Oh is that at 48 rather than 43?

MR GODDARD QC:

Yes it is. So 43, His Honour Justice Arnold is exactly right, the emphasis there is on 28.2, the "may procure" in relation to 28.2 and then over at 48, line 15 –

GLAZEBROOK J:

Okay so it's not on 43?

MR GODDARD QC:

No.

GLAZEBROOK J:
Just being absolutely clear.

MR GODDARD QC:
It's absolutely not, no.

GLAZEBROOK J:
So I'm sorry to –

MR GODDARD QC:
No, no I agree that in the circumstances of this it's as well to be absolutely precise about what happened and what's at issue and that's why I've, in my footnote 1, provided every reference I could find but I've bolded the ones that I think actually are illuminated and I stand to be corrected if I got my emphasis wrong.

So 48, Ms East going through the detail of the correspondence and talking about the side letters, line 15. The next paragraph the vendor intends to arrange and we say that wording is important "intends to arrange" in terms of what the management agreement obligation was for the benefit of shareholder as an option and so forth. So there's emphasis on "intends to arrange" in the side letter as being consistent with that "may" in 28.2.

And then coming over to what is probably the most helpful passage, it begins at 146. Back to Mr Tingey again. Top of the page. So we've got Mr Tingey begins on 145 but then over the page second line, "I was now going to consider the additional terms, the point in relation to that, there's a contractual interpretation issue about what was required in relation to the management agreement. It is accepted that the other obligations were requirements." So the 1%, the furniture, were requirements. "My learned junior, Ms East took you to the clause, contractual clause, which said the vendor may procure." So that's the 28.2 reference and the other documents provided other obligations and then coming down to 11, "In my submission, reading those clauses together", so that's looking at 28.2, "and the side agreements, the paramountcy of the clause is the one in the written agreement which makes it clear the obligation wasn't to deliver a written agreement."

ARNOLD J:
So that's a reference to 28.2 again?

MR GODDARD QC:
It's saying you should read them together and 28.2 says it's just "may".

ARNOLD J:
Right.

MR GODDARD QC:
Yes.

ARNOLD J:
And that's consistent with the way it was put in the written submission?

MR GODDARD QC:
Yes.

ARNOLD J:

MR GODDARD QC:
And then the materiality issue is discussed. At the foot of the page Justice Randerson asks the question that obviously occurred to the majority in this Court, perhaps in even more forceful form. "I suppose the management agreement might have had some nominal value to an investor who wasn't intending to live in the property. Mr Tingey, well it may or may not have made that a detrimental value to an investment because they didn't like the terms but they would be stuck with it so it goes both ways. If you wanted to live in the property yourself it's of no value. If you want it for an investment it depends what it says and where the", I think that should be "and whether the terms are commercially advantageous or not." So I mean it's a value of, it's an uncertain value which they weren't relying upon so in my submission must be a zero value. Justice O'Regan – I think Justice Toogood said about having a whole complex managed by, you know, helping or whatever it was would've been advantageous because that would have created some value for the complex as a whole." Was a theme that came through again in the majority judgment. "Mr Tingey, what he says" I think there must a "that" missing. "He says that there was absolutely no evidence to support that. He made that statement. There was no evidence about the value of the management agreement before the Court and again I say well it depends on the terms, you know, of helping with charging, which we

noticed in Queenstown from other cases. Mr Tingey tries to give some evidence at this point. But if the management agreement was onerous it would devalue the property because you'd be stuck with a binding obligation to Hilton, couldn't lease it someone else." Justice O'Regan points out that he's not there to give expert evidence. Mr Tingey says, "Well take it as a hypothetical example." "Yes" says the Judge.

Over the page, "Although based on the real example, hypothetically the position is you can't value that because you don't know the terms of the contract they relate to and then there's some discussion of repudiation and the law and over at 149 comes back to the Judge's findings in the High Court, line 5, I refer there in the submissions to the management agreement His Honour findings without any evidence and I've already gone through that.

And then if we go to the way this was approached by counsel for the purchasers, I think that's quite helpful in the Court of Appeal. At 171 Justice Randerson says, in the middle of the page, "I understand that, the question is he, Mr Tingey, right about that or was it something that could have been easily remedied, therefore not fundamental as the Judge found. At the moment I must say I am really struggling to see how the provision of furniture and the management arrangement could be treated as fundamental." Ms Kelly, "Well it's not merely 40,000 because the implications of the management agreement flows into GST requirements."

And then if we come across to where this is dealt with in detail at 208, page 208, my learned friend Ms Kelly says at line 31, "So let me come to the management agreement. How is the management agreement…"

GLAZEBROOK J:
Sorry I missed the page number.

MR GODDARD QC:
Sorry Your Honour 208.

GLAZEBROOK J:
208, thank you, sorry it was my fault I was marking something.

MR GODDARD QC:

No. I'm torn between trying to zip through this quickly and doing it thoroughly and I keep getting the balance slightly wrong and talking too fast. 208, line 31, "So let me come to the management agreement, how is the management agreement failure capable of being remedied on settlement by abatement in price. It simply can't be. Impact on the purchasers of the failure of the management agreement is profound because they cannot therefore claim GST back and that's a great deal more than 1%." And Mr Tingey said, "Yes a management agreement can't be quantified." Then Justice O'Regan asks, "What would have been involved in getting that management agreement? Would it have been a major?" Ms Kelly, "No idea, never tried to do one." Justice O'Regan, "One would've thought it wouldn't be." Ms Kelly, "Does apparently involve significant correspondence." And then some discussion about returns. Justice Randerson, "That wasn't what was contracted to you." Ms Kelly, "Well there was no contract for the management agreement." Referring I think to a firm one with purchasers." "No" says Justice Randerson, "In relation to the contract between Station and your clients there wasn't any obligation to provide a management agreement with any particular characteristics including return on investment." And Ms Kelly says, "Well His Honour found the 20 September email was a contractual document, it comprised part of the contract." "Yes" said Justice Randerson, "But it didn't say there must be a management agreement that gives you a 20% return on investment or 10 or five or anything else. So it could've been a dud management agreement, it still would've been a management agreement." Ms Kelly, "Yes but any management agreement would have had the GST implication which was the big ticket item."

So the way this put in the Court of Appeal was that the management agreement was important because it would enable sale as a going concern and therefore enable the purchasers not to pay GST but the position is found by the Court of Appeal, not challenged before this Court, was that they weren't going to be in a position to avoid paying GST at the time of purchase but they were in a position to enter into a management agreement afterwards and recover the GST, so they were no worse off and that wasn't challenged on appeal.

So the significance that was attributed to the management agreement was not – it was accepted that it could be a dud, that it might not have had any intrinsic value but what about GST, said the purchasers and that was dismissed by the Court of Appeal and that wasn't challenged and in reply, given the way that had run, Mr Tingey only

dealt with the GST issue and explained why that was wrong in terms that the Court of Appeal ultimately accepted.

I should of course have taken the Court to the written submissions in the Court of Appeal by Station. They're back in volume 1, under letter C and we can jump straight to page 20 and there's the heading “The additional terms” and the High Court findings are summarised at paragraph 60.

GLAZEBROOK J:
You’re just going back to – is it fair to say that in the Court of Appeal the argument was that there was a management agreement obligation and it was binding but the value of it was the GST side from –

MR GODDARD QC:
From the purchasers.

GLAZEBROOK J:
So the purchasers’ point of view?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
But that’s fair to put it that way?

MR GODDARD QC:
Yes absolutely, the purchasers were saying there was an obligation and it was –

GLAZEBROOK J:
Obligation and its value was in the GST.

MR GODDARD QC:
And critically it was an obligation to have it in place because of the GST consequences. That was the only benefit identified in argument from having it in place and that was wrong.

ELIAS CJ:

And you say “accepted to be wrong ultimately in the Court of Appeal”.

MR GODDARD QC:
Yes. Which is why in my submission unsurprising – yes it was accepted and not challenge in the application for leave. Yes and I will come to that as well because that’s very important.

So then we come to or rather rewind to, because logically I would’ve gone to it first, Station’s written submissions on appeal before the Court of Appeal, volume 1, tab C, page 20, “The additional terms”. Paragraph 60 sets out what the High Court held. 61, “Station accepts that it did not provide a furniture package or pay the purchaser a purchaser’s fee, however it appeals the findings that (a) it breached its obligation in relation to the management agreement.” And that has latent within it the same ambiguity that Your Honour Justice Young identified earlier, I accept that but it’s pretty clear that there's no acceptance of a breach of obligation of the management agreement and (b) consequence of failure to perform the additional terms was that the respondents were entitled to cancel, disagrees with that.

ELIAS CJ:
Well it seems to be indicating an obligation, “It reached its obligation”.

MR GODDARD QC:
And then the same lack of perfect clarity but clear rejection of any breach which is what’s important.

ELIAS CJ:
Yes, yes.

MR GODDARD QC:
Comes through in the detailed discussion of that at paragraphs 63 through 69. So 69, “His Honour held that Station failed to either offer or make available a management agreement pre-settlement. His Honour misstated the content of any obligation to obtain a management agreement.” So whether there was one was not conceded but what it’s saying is if there was one, if there was any obligation it was misstated. There’s a reference to clause 28.2 and then 65, “It is clear from wording in the clause Station had the option of arranging a management agreement hence the use of the words ‘may procure’ and if Station elected to procure a building

management agreement its only obligation prior to settlement was to nominate a professional building management company. The limited nature of the obligation is logical. After settlement the new apartment owners would form the body corporate, the body corporate would enter into the agreement it said. The evidence at trial showed Station did elect to procure a management agreement and in doing so complied with its obligation to nominate." Mr Groves gave evidence on that.

68, this deals with the alternative point, did this come from the side letters? "His Honour pointed to two documents sent from Station to potential purchasers that in His Honour's view went further than raising the management agreement as a possibility. Those documents are consistent with the terms of clause 28.2 and provide that (a) a management agreement will be made available during construction, (b) the vendor intends to arrangement for the benefit of its shareholder as an option the serviced apartment management agreement. The implication from His Honour's judgment though not stated expressly, is that Station had to formally execute a management agreement prior to or at settlement. However neither of the above communications go that far. At most they indicate an intention on Station's part to investigate management companies, select an appropriate company and nominate that company to the purchasers. All of which Station did in accordance with 28.2. Accordingly Station submits that it did not breach any obligation in respect of a management agreement." So it's not accepted that there was an obligation, the language is at most they do this and it said that if –

ARNOLD J:
Sorry, are you saying it wasn't accepted that there was any contractual obligation or are you saying that it's the form in which the Judge put it wasn't accepted?

MR GODDARD QC:
As I read 69, what is being rejected is the finding of the Judge 68 that this went further than raising the management agreement as a possibility. So was it simply identified as a possibility or was there a promise to provide it? That's the reference back is. And that's consistent with the first sentence of 69, that the implication is that Station had to formally execute a management agreement, in other words have one in place.

ARNOLD J:

Right, so yes I understand that but I'm still trying to put my finger on whether what was being said was yes there's a contractual obligation but it's only an obligation to effectively use best endeavours to identify somebody and put them forward.

MR GODDARD QC:

As I read the submissions, both were being argued but with more emphasis on the second, that there was no obligation, it was just "may do this", "intends to this" but given how badly that had gone down below, the emphasis seemed to be rather on but if there is some obligation to be spelt out in there it's to do much less than the Judge said.

ARNOLD J:

But this is all under the heading "Station performed its obligations in relation to the management agreement." It's not consistent with an idea that it didn't have any at all.

MR GODDARD QC:

The heading isn't no but I think to hold people to the precise wording of every heading is a bit rough.

ARNOLD J:

For myself I find it difficult in this sequence of paragraphs to see anything that says we have no obligation at all.

MR GODDARD QC:

What is – I understand Your Honour's difficulty with that. What I need to be able to show though and what I think is very clear is that what was said was that any obligation there was fell short of having to have a management agreement in place.

ARNOLD J:

I accept that entirely, yes that's fine.

MR GODDARD QC:

And fell far short of acknowledging in particular that it had to be in place in respect of all units in the establishment because you don't have to have it in place at all, obviously is doesn't have to be in place for everything and that's what's really important.

ARNOLD J:
Well no that's another question which you come to which is what sort of management agreement are they talking about?

MR GODDARD QC:
Well again if what we're looking for is a concession in the Court of Appeal, what we have a clear argument that there was no precision at all as to its nature and a fortiori no positive commitment that it be ubiquitous, universal.

ARNOLD J:
So could a management agreement under clause 28.2 be other than covering the whole?

MR GODDARD QC:
At 28.21, which is about building management services which as Your Honour pointed in the judgment, is of a different character I think from a management agreement. I mean I accept absolutely Your Honour's point about that but that would be entered into by the body corporate as 28.2 says.

ARNOLD J:
Oh absolutely. All we're trying to do is trying to understand what argument was being made.

MR GODDARD QC:
I think there was an element of confusion about relationship between 28.2 and the side letters.

ARNOLD J:
Right.

MR GODDARD QC:
I am absolutely comfortable with that. It's not ideal but it's what it was but there's a big gap between an element of confusion and a concession.

ARNOLD J:

Well perhaps forget about the word “concession”. I guess the point may be if it’s not challenged then it’s, if you like, an accepted underlying basis for the argument.

MR GODDARD QC:

But what was challenged was that there was any definition at all of the terms of the arrangement. What was challenged is that it had to be in place by settlement, critically and third, it was never suggested in anything in here that this is something that would be locked in pre-settlement in a way that imposed it on each and every purchaser whether they wanted it or not. That’s the very antithesis again of not having an obligation to have anything in place. And yet that’s fundamental to any assumption about uniformity because if all you're going to have is a proposal to be put to each purchaser under the separate contract with each purchaser, then it’s open to people to say no and I’ll come back to that when I deal with the side agreements but that’s especially clear when we look at the fact that it was still not clear in the documents relied on to establish some sort of obligation whether there would be unit specific management agreements or pooling and if pooling a prospectus. So clearly there's a lot of water to flow under the bridge before anything that could amount to an obligation to have your unit managed was in play.

GLAZEBROOK J:

Well I think you really have to look at two different things because on the document you took us to, it actually said at one point that each purchaser could decide whether they were going to be part of that management agreement or not.

MR GODDARD QC:

Mmm.

GLAZEBROOK J:

So the argument, as I understood from the Court of Appeal, was that it was an option as to whether it has that management agreement in place at all was on Station and then separately if it decided to have it in place then the purchasers could have an option as to whether to enter into it.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

And I'm not sure whether that second bit, to be honest I'm now not totally certain whether that second bit was part of the argument in the Court of Appeal but in any event it doesn't really matter because those are two separate things.

MR GODDARD QC:

They're two separate things. The first one was explicit in the Court of Appeal but there was also some wobbling of the kind that Justice Arnold identified. The second one was implicit in what was said.

GLAZEBROOK J:

But in any event it doesn't really matter, the second one, I would have thought.

MR GODDARD QC:

Well it was squarely on the table in this Court and it's very important when it comes to the assumptions that underpin the majority judgment about ubiquity uniformity.

GLAZEBROOK J:

Well you can get to that later.

ELIAS CJ:

Can I just ask how you think you're going Mr Goddard?

MR GODDARD QC:

Slowly.

ELIAS CJ:

Yes.

MR GODDARD QC:

But I'm done with the Court of Appeal.

ELIAS CJ:

Yes.

MR GODDARD QC:

But there is –

GLAZEBROOK J:

Can I just note that in the respondent's written submissions, on a quick look I couldn't see anything about GST or certainly not the tying that you put them as being the only reason that the management agreement was compulsory was because of GST, it was just an assertion that the management agreement was compulsory, pointing out that the clause 28.2 was different, well at least there were three other clauses, two of which put it as an obligation. But I couldn't see on a quick flick anything that said the only reason it was compulsory was because of GST.

MR GODDARD QC:

No Your Honour's right. Your Honour I think is referring, and we're in volume 2, under tab 2, on page 12 of the submissions for the purchasers in the Court of Appeal.

GLAZEBROOK J:

I mean she was challenging whether they were in agreement and then also challenging whether they were important to the purchasers by pointing out the correspondence et cetera.

MR GODDARD QC:

They were referred to in several places but there was no separate argument about their essentiality or about their importance and orally that was tied to GST. It's worth just in terms of whether it was common ground in the Court of Appeal that this was in play, noticing while we're in those submissions –

ELIAS CJ:

Is this at tab 3?

MR GODDARD QC:

Tab 2 Your Honour of volume 2. Not the most logical order but they come up in different times sorry but page 12 of that, paragraph 40. This is the point Your Honour Justice Glazebrook was making a second ago, first as to the management agreement – oh so 39, "the appellant's position of furniture and 1% is to concede non-performance but argue non-materiality or alternatively causation by respondent's breach just so management agreement obligation alleged to have been performed. First as to the management agreement, clause 28.2 is only one of four contractual references to the appellant's management agreement commitment, the other three are set out in the side letters. The finding that these documents were constituent

parts of the contract was not appealed absolutely. 42, the agreement instructions say a property management agreement will be offered pre-settlement. This goes beyond the statement of intention asserted by the appellant and amounts to a commitment, seen together with the design change effected to accommodate a manager's unit, the necessary conclusion that His Honour was fully justified in making the finding that the appellant was obliged to procure a management agreement."

So horns were locked on this issue. Was it just a statement of intention or was it a commitment? And even with the benefit of the scrutiny that we're bringing to this now we can find some ambiguity in what was put by the appellants. It's quite clear that Ms Kelly understood that they were saying it was just a statement of intention and setting out to explain why that was wrong.

Court of Appeal judgment is the next thing to go to. When I said I'd left the Court of Appeal I wasn't quite right, sorry. So volume 1 on the case on appeal, Court of Appeal judgment begins on page 140 and the paragraph that this Court referred to in footnotes on a number of occasions is paragraph 3 which sets out the purchasers' arguments about the additional terms. "So prior to the ASPs being signed respondents' letter representations were made to him. They also asserted that certain additional terms were agreed to. These were not mentioned in the ASP but in summary were that Station want three things including third, arrange a management agreement for all apartments in the complex." Now this is the paragraph that this Court footnotes on a couple of occasions and says this wasn't contested and I think we've seen enough in the submissions to see that in relation to the third of those that is, in respectful submission, not right and that's recorded in this judgment. The two most helpful places to go to are first of all paragraph 24 on page 148. So 23 sets out clause 28.2 and then 24, "We accept that the precise nature of any obligation on a part of Station to provide a management agreement is ambiguous and that it's reasonably arguable that the contractual terms set out in the ASPs should override any other representations made prior to execution of the ASPs. However for reasons we later discuss we do not think it matters whether there was a contractual obligation to provide a concluded management agreement at the time of settlement or whether, as Mr Tingey submitted, Station had the option of procuring a management agreement if it chose to do so nor do we think it matters whether Station's only obligation at best was to nominate a building management company prior to settlement."

ELIAS CJ:
And that's because it wasn't material.

MR GODDARD QC:
Yes. So the Court understood that Mr Tingey was saying it was just an option for Station to procure this. If it had an obligation it was at best to nominate a building management company prior to settlement and the same reference to Mr Tingey's argument is found in paragraphs 75 and following. We go over to 75, under the heading "The management agreements. Final matter advanced by Ms Kelly was failure to obtain the management agreements." Mr Groves gave evidence on that. "We accept that Station had nominated a manager but the arrangement was not in place at the time settlement was called for or at any later time before Station cancelled for repudiation by the respondents." So those are the facts. There was a nomination but there was no arrangement in place.

76, "Even assuming" and then a very important, one, two, three, four, five words for present purposes, "Contrary to Mr Tingey's submission that the obligation was to actually have a management agreement in place, we find ourselves in disagreement with the view of the Judge this was a material factor. I say this on the evidence that had the respondents been willing to proceed with the transactions it would've been a simple matter for a management agreement to have been put in place or for an appropriate allowance to have been made against the purchase price." So they're saying Mr Tingey was arguing there was no obligation to have one in place but even if he's wrong then that doesn't matter because it wouldn't be material and thus at – oh and the GST issue is dealt with in 77 and 78. The purchasers' GST argument is dismissed and at 79, "We conclude that none of the matters relied on is justifying the respondent's refusal to proceed with the ASPs whether taken singly or together constituted a material or substantial breach which could have justified the respondents not proceeding with the transactions.
Then the appeal to this Court.

ARNOLD J:
Well there are other passages in this judgment, are you going to –

MR GODDARD QC:
Oh I'm very happy to do that. So my learned friend relies on –

ARNOLD J:
82 and 86.

MR GODDARD QC:
Yes well 15 first of all.

ARNOLD J:
Also 14 and 15.

MR GODDARD QC:
Yes I was come to, so 14 and 15. My basic submission on these is that they have to be read in the context as a whole and against the acknowledgement –

ARNOLD J:
Well I go to this point I think about, I mean I tried to figure out whether there's a way of reconciling them and the only way you can do it is on the basis if there was an acceptance of a contractual obligation but the content of it was simply that it effectively gave Station the option of in effect a reasonable endeavours type thing to offer something.

MR GODDARD QC:
I don't read it in quite the same way. As Your Honour has pointed out already 28.2 and the side letters were being treated as if they talked about the same thing. That's what Mr Tingey's approach was and that's what the Court's approach was.

ARNOLD J:
Right.

MR GODDARD QC:
Your Honour suggested that's not right and (a) the Court's found that, so that's locked in but (b) I respectfully accept that Your Honour's right but what that meant is there was a contractual term. If you assume that 28.2 is talking about this, there was a term and I think there was confusion about whether there's a term or whether there's an obligation and as I read this –

GLAZEBROOK J:

Well – oh sorry carry on, I thought you'd finished. Sorry finish.

MR GODDARD QC:

As I read the way this was being approached it was accepted that there was a term because 28.2 talked about this thing and it was seen as being the same thing but the question was what obligation was there under this term and it was said, "Well here it says 'may' and in the side letters it says 'intends' so there's probably nothing but if there is then it's an election but if that election is made, which is the language we saw earlier, then the obligation is to nominate someone." And that's I think how – that's how I can reconcile what was said.

ELIAS CJ:

What is a nomination in this context?

MR GODDARD QC:

Saying we nominate this person as our preferred manager and the body corporate may well wish to enter, you know, we've set up communications and the body corporate may want to do deal.

ELIAS CJ:

To do a deal.

MR GODDARD QC:

So 14 in the Court of Appeal judgment sets out the text of –

ARNOLD J:

Well the relevance of it is it defines the side agreements in terms of the allegations in paragraph 3 and then it says at 15, "It's no longer in dispute that the side agreements, having been defined in paragraph 3, did constitute contractual terms."

MR GODDARD QC:

I see Your Honour is referring to the first bullet point in 14, "We will call these additional terms the side agreements" and then 15, "It's no longer in dispute that the side agreements did…." See Your Honour I can only read that as a reference to the documents because when you look at those other paragraphs it's impossible to reconcile them without that.

ARNOLD J:

Well either it's not stated with the proper qualifications or you have to do something anyway to make sense of it.

MR GODDARD QC:

You do and that it seems to me is the natural way to do it because that is in fact what was not in dispute, was that these documents were of contractual force, that had been challenged that was dropped from the notice of appeal.

ELIAS CJ:

What was the contractual force though?

MR GODDARD QC:

Well the 1% was binding, the furniture package was binding. So it's accepted –

ELIAS CJ:

But what was of contractual force in the management agreement?

MR GODDARD QC:

No not in the management agreement Your Honour, the side letters.

ELIAS CJ:

In the side letters.

MR GODDARD QC:

The side letters had -

ELIAS CJ:

No relating to the management agreement.

MR GODDARD QC:

In my submission nothing.

ELIAS CJ:

Well why call it contractual?

MR GODDARD QC:

Because the document was part of the contract. There's the point –

GLAZEBROOK J:
But that's not what's said here and not what was conceded at 13 and 14 of the submissions. It just says that it was required to be put in place. It was the option argument that was being made, not that it wasn't a contractual was it?

MR GODDARD QC:
No I think that first of all there had been an argument that the contract was just the formal agreement for sale and purchase, there was the entire agreement term which Your Honour Justice Young discusses in the judgment and it was said, "Look these were not part of the contract with Station." That was rejected by the High Court Judge and that's the argument that was not pursued before the Court of Appeal. It was accepted that these were part of the contract but it was still necessary to take these letters which contained all sorts of information and chatty stuff and predictions about what was going to happen and work out what of them actually was of contractual effect and it's common ground before the Court of Appeal and before this Court the 1% promise had contractual effect, common ground before both Courts that the furniture package had contractual effect. It was not common ground before either the Court of Appeal or this Court that the statements of intention about the management agreement had contractual force and I'll come to the way I dealt with that in this Court which is where, at the risk of being shot down later, I think it becomes clearest. That's a very brave thing I suspect to say but we'll see how we go.

So 15 Your Honour's pointed out and just to see if I can save, 86 is the other one that's referred to by my learned friend. The Court of Appeal says, "For the reasons given we're satisfied Station was entitled to cancel for repudiation of the contracts by the respondents and to recover damages from its losses. As Mr Tingey acknowledged Station would be required to make appropriate allowance for its failure to pay the 1% fee or to provide the furniture and the management contract." My learned friend says, "Well how can there be a failure unless there was an obligation?" And what, in my submission, is apparent from the submissions is that it was dealt with on the basis but if there is an obligation you could make an allowance for it.

ARNOLD J:

And what the Court says in 82 is what, wrong? The bottom of 164 and the top of 165.

MR GODDARD QC:

That's right so far as the 1%. No that wasn't accepted on appeal here but again this Court has decided that against. So it was in issue.

ARNOLD J:

The Judge found that they were bound to do so and that is no longer challenged.

MR GODDARD QC:

Sorry Your Honour.

ARNOLD J:

So is that – you'd have to say can't be right.

MR GODDARD QC:

At least so far as the management agreement is concerned, yes absolutely and again that seems to me, with respect, to be very clear from 76, just a couple of pages earlier and 24. The Court's expressly noted that Mr Tingey was not being that conciliatory. Now I really am in this Court now and it will speed up a lot because I've covered a lot of my arguments as I've gone through but I'm conscious it's half past. Does Your Honour –

ELIAS CJ:

Yes well we'll take a 10 minute adjournment now, thank you. How much longer do you expect to be Mr Goddard, realistically? We have of course read your submissions but this is additional material that's useful for us to be taken through.

MR GODDARD QC:

And it is very much responding to what I thought the Court wanted to do and what Your Honour asked me to do. I think it will take me another half hour.

ELIAS CJ:

Yes that's fine.

COURT ADJOURNS: 3.32 PM

COURT RESUMES: 3.47 PM

MR GODDARD QC:

So the Court of Appeal allowed Station's appeal on this management agreement issue. It proceeded on the basis that it wasn't deciding whether there was an obligation to actually have a management agreement in place but that even if there was that wouldn't be material because it would've been a simple matter for a management contract to have been in place or for an appropriate allowance to have been made against the purchase price. And that's the critical thing. Whatever the exact shade of subtlety about existence of obligation, non-existence of obligation was, what was very clear is that it was being argued that there was no obligation to actually have a management agreement in place and that was noted by the Court of Appeal and it was deliberately not decided.

Then, and I'm going to do this at lightning speed, 3, the position in this Court, 3.1, the application for leave to appeal which is, I won't to go it, in volume 1 on the case on appeal, does not contain the word "side agreement" or "side letter" or "management agreement". There's no reference to any of them. The focus is on the certificate of practical completion and a couple of procedural issues in the Court of Appeal. So there was no application for leave to appeal to this Court in relation to the findings on the side agreements. That understanding of the scope of the application for leave was expressly noted by Station in its submissions opposing leave. That's in volume 2, under tab 4, paragraph 6 on page 3. The position in relation to the additional terms is summarised in one paragraph, including noting in the additional terms, "The Court of Appeal held that although Station may have been in breach of the additional terms, those breaches were simply not material or substantial and my submission is a fair summary of 76 and following and then the last sentence, "The applicants have not sought leave to appeal the findings on the additional terms." And that is very clearly the position looking at the application and more particularly the leave submissions which the Court has. They're under tab 3 but I won't go to them in the interests of time.

What then happened is the Court declined leave on the procedural issues that had been sought but it granted leave in relation to Station's entitlement to cancel in broad terms.

ELIAS CJ:

Sorry have you taken us to the application for leave to appeal?

MR GODDARD QC:

No because – but let's go to it, case on appeal volume 1, tab 1. So basically what we have in paragraph 1 is, "Failing to find contractual certification and practical completion was an essential term. Two, failing to find that that essential term required strict compliance. Failing to find the plaintiff knowingly called for settlement at a time when it was not entitled to do so." That's the certificate of practical completion again. Four, "Making a factual finding as to practical completion being achieved when there was manifest insufficiency of evidence." Practical completion again. And then we get into five, "Drawing inferences and assuming facts not in evidence." It said the Court of Appeal erred in process misapplying the test for essentiality of terms.

ELIAS CJ:

But isn't this a reference to the findings on the side agreements, that they weren't material?

MR GODDARD QC:

It's so general that it could be but when we get to the submissions it's clear that it's all about the certificate of practical completion.

ELIAS CJ:

Right.

MR GODDARD QC:

So Your Honour's right that it's so incredibly general, 6 and 7, that it could be about anything but it's not and I'll show Your Honour that.

McGRATH J:

And leave was given in general terms?

MR GODDARD QC:

Leave was given in very general terms. So 8 and 9, more process issues and just since Your Honour and Chief Justice has asked that, let's go to volume 2, tab 3. What we see is paragraph 9 identifies the points of law to be considered and that explains this. Your Honour will see –

McGRATH J:

Which – are we in volume 2?

MR GODDARD QC:

Volume 2, yes tab –

McGRATH J:

The other volume.

MR GODDARD QC:

Sorry not the case on appeal, volume 2 for today.

GLAZEBROOK J:

And where are we?

MR GODDARD QC:

No, no volume 2, tab 3, page 3. There's a narrative of facts and then we get to the points of law and the points of law deal with those issues of essentiality of terms and strictness of compliance in relation to the contractual requirements as to certification of practical completion. Subsidiary point materiality of evidence as to seriousness of consequences of breach of –

ELIAS CJ:

Well so are you saying that there was a point as to materiality of evidence of consequences applied to the other point?

MR GODDARD QC:

This is the complaint about – these are all explained as we go on and really what I would be doing if I went through it, is just reading it to show that it's not about the management agreements. But let me go quickly through that. Under the heading "why leave should be granted" beginning on 4, "Resolving the compliance requirement for essential terms", if the Court reads this you will see in particular on the heading on page 5 and the discussion all the way through to 20 which is also about the CCPC, this all about the certification of practical completion. The side agreements, management agreements, not mentioned anywhere in this. Then issue

2, “involving obligation of a purchaser when conditions precedent have not been met.”

GLAZEBROOK J:
Is the argument that they should be held to the notice or was it open to them, as they clearly did in their submissions, to include the side agreements? I’m just trying to get –

MR GODDARD QC:
Absolutely. So the purchasers –

GLAZEBROOK J:
Well so what is the submission, that if you have a notice of appeal you can't expand it if it falls –

MR GODDARD QC:
No, no if leave is granted in broader terms you can argue that. This is responding to the argument made by the purchasers that pursuant to rule 20A –

GLAZEBROOK J:
Okay, all right.

MR GODDARD QC:
– we should have said something about this and all I’m saying is but it wasn’t on the table.

GLAZEBROOK J:
All right, now I understand the context.

MR GODDARD QC:
And my submission is that it would be positively undesirable for a respondent to be putting forward arguments about matters that are not the subject of the application for leave. The Court could rightly be critical.

ARNOLD J:
So what are you talking about in the written submissions? Once leave is given or the submissions opposing leave?

MR GODDARD QC:
Submissions opposing leave.

ARNOLD J:
Right, well obviously, yes.

ELIAS CJ:
You're simply talking about the failure to give notice but you're supporting a judgment on other grounds.

MR GODDARD QC:
Yes and I'm saying well we didn't need to.

ELIAS CJ:
Because you're saying there wasn't –

MR GODDARD QC:
Because this wasn't in play.

ELIAS CJ:
Yes.

MR GODDARD QC:
And I think that's very clear.

ARNOLD J:
But you don't, the way you give notice is in your written submissions on the appeal, the substantive appeal.

MR GODDARD QC:
Opposing leave is what rule 20A says. So rule 20A says that if you want to uphold it on different grounds then you must do that in your submissions opposing leave and because leave wasn't sought on this topic it wasn't in but –

ARNOLD J:
All right sorry, I thought it was just a reference to the submissions more generally.

MR GODDARD QC:

No, it's expressed and again in my bundle of authorities, under – well actually I mean it's from placement that I have drawn that inference. Your Honour's right that it just – we've got rule 20 which says what the submissions must deal with in relation to applications for leave and opposing leave and then immediately after that and not in the part on the substantive appeals at all comes rule 20A which says, "If a respondent does not wish the judgment appealed from to be varied" because of course if you want it varied you have to give a notice of cross appeal at that time, "but intends to support it on another ground, being a ground the Court appealed from, did not decide or decided erroneously the respondent must give notice of that intention in the respondent's written submissions."

ARNOLD J:

Well I had interpreted that, I must say, as the written submissions on the argument.

MR GODDARD QC:

And that's not how I understand it because of where it's placed in the rules and the quite separate –

ARNOLD J:

Anyway let's not waste time.

MR GODDARD QC:

But you're right. That's how I understood it in any event. So I don't need to spend on that issue because I think that I've covered that ground and that's was why I was there.

GLAZEBROOK J:

I understand why you were taking him to that, yes.

MR GODDARD QC:

So and that leave was quite in broad terms and I absolutely accept that given the terms in which leave was granted, it was open to the purchasers to run this argument in the Court and similarly it was open to Station to respond on any basis available to it. And that this was in play, as I say in my 3.4, was recognised by my learned friend Ms Kelly in her written submissions and her oral submissions but actually, and in the

written submissions there was then no argument to support the contention that a management agreement had to be in place and that it had to be a ubiquitous one, a uniform that applied to all apartments. I note the pages of the purchasers' submissions in this Court where a chunk of the High Court judgment is repeated but there was no independent argument set out on the point and they needed to establish that. They didn't have the benefit of a finding in the Court of Appeal in their favour on this issue, so they needed to persuade this Court that there was such a term.

GLAZEBROOK J:
Can't they say the Court of Appeal was wrong, we want the High Court reinstated? That's what people often do.

MR GODDARD QC:
But they need to explain why.

GLAZEBROOK J:
Well if they say the High Court found that and we want the High Court reinstated then presumably for the reasons the High Court Judge found is the submission.

MR GODDARD QC:
Yes and so that's why I say they didn't do anything more than quote that, there was nothing else. Your Honour's right that can be.

GLAZEBROOK J:
No further argument but you don't have to if you think that's enough.

MR GODDARD QC:
That the Judge has nailed it. But what Station then did was in its written submissions, to emphasise the non-essentiality of having a management agreement in place pre-settlement. The question of whether the obligation existed which had been left open in the Court of Appeal and which wasn't expressly addressed in the appellants' submissions also wasn't tackled in the sort of detail that I dealt with it orally but it was certainly not conceded and the absence of any agreement about the content of such an obligation was addressed and I give the reference.

Then I think the scope of the oral argument is illuminating in terms of how both parties understood this. I'm in volume 2, under tab 7, the transcript of this Court, and if we go to page 104, the top of the page 104, I'm saying none of these terms, the terms in the side agreement were agreed to be essential. Neither the High Court nor the Court of Appeal found them to be essential but the Court went on to consider the effect of non-performance, that's where there was disagreement in the High Court and the Court of Appeal, and note that in paragraph 8.10 I go through why it's not essential, 1% –

ELIAS CJ:
I'm sorry, I'm looking at the wrong thing. Is this 103?

MR GODDARD QC:
It's 104 Your Honour.

ELIAS CJ:
Of the transcript in this Court?

MR GODDARD QC:
Yes. I start at 103 but it's quite a long passage, I manage to get to almost two pages without a question on this one. And then, so I've dealt with the 1% at the top of 104. I've dealt with the furniture package in the next paragraph, and then turning to the management agreement, and Your Honour Justice Arnold asked about putting a value on this. That was a question that Your Honour addressed to my learned friend earlier in the hearing. "If the purchasers wanted to show the effect of being deprived of the management agreement was substantial, they needed to call some evidence about that and there was none. As a matter of common sense it's difficult to see how they could show that being offered the option of a management agreement in circumstances where the terms were completely up in the air would have any particular value to them because the value of the agreement would depend on its terms. Some management agreements would have little or no value; some might have a negative value."

Your Honour the Chief Justice said, "Is it really a question though of putting a value on it? Can't it be thought that it is self-evidently important?" And then Justice Arnold puts the point that –

ELIAS CJ:

I was about to ask a similar question right now, so at least I'm consistent.

MR GODDARD QC:

And Your Honour has not, in fact, forgotten all about it as Your Honour suggested you had during your peregrinations. Justice Arnold put the same question to me in some detail ending, "So in that sense it's pretty obvious having something there was something that most of these investors would've been pretty important to most of these investors wouldn't it?" and I said, "What one has to ask is whether having it in place before settlement had a value that couldn't be achieved by then entering into it after settlement." Your Honour asked me if that wasn't slightly unrealistic. Referred to time problems and uncertainty problems, contraction costs, and then at the foot of the page, "It was always only going to be offered as an option in terms of the pre-contractual correspondence that was held to form part of the wider agreement. So it was always on the cards that some apartment owners would not take the management contract that was offered, either because they wanted to live in the apartment or because they didn't see it as a good offer."

Over the page, Your Honour says, "Yes, but how does that deal with the problem?" And this is a critical point. It's one that's been consistent, in my submissions, throughout Station's approach. "So the first step is that we're not talking here about a management agreement that necessarily encompassed the whole of the property. Second, in terms of asking whether it was essential it's difficult, if one looks at the language of the two letters referring to this intention, which is very much as one of a number of incidental matters in a signed agreement to spell out that the parties had agreed that it was essential and it could plainly be breached in ways that were large or small, it could be performed in ways that conferred very little benefit." And I'm not going to have time to go to this but I'm obviously picking up here the point that this Court made in *Paper Reclaim v Aotearoa International Ltd* in the context of damages. That when you're assessing damages you assume performance in the manner that is least onerous for the defendant and least beneficial to the plaintiff, and the same as a matter of principle must apply where there's a choice about ways to perform when you're considering essentiality and when you're considering substantiality in breach. If I owe you, Justice McGrath, an obligation in contract to do something, and I could do something very small or something very big, consistent with the contract, when asking whether it was agreed to be essential, the question is whether it was agreed to be essential having regard to the ability to perform it small

ways or great, and when one asks whether the consequences of breach are substantial, you have to look at it on the basis that I would've done the least that I could consistent with the contract and ask if that's substantial. That's *Paper Reclaim*. I don't think that's controversial but it's important.

Your Honour Justice Young, "Would it not have been possible just to get a real estate agent to agree to manage the apartment for 10% return or something?" Absolutely, so I suppose the first point to make is how easily this could have been done. And then I go to the point where it wasn't raised, and the notice of opposition to summary judgment wasn't in the affidavits, no complaints at the time. Your Honour Justice Arnold asked about arrangements for a management unit and then I think turning over to 108, I begin at the top of 108, that's the first reference to it, that's the furniture package and stuff and we turn over to 752, this is the material that was sent out and in the sixth paragraph the vendor intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement, decisions to be considered would be a number of weeks of personal usage, operator and brand, and whether the income would be pooled and tied to each unit. If pooled this would require a prospectus. So it's all – " Your Honour Justice Young leaps in, "Pretty loose." I say, yes, pretty loose, anything pretty much would do this, and then the other reference to it is over on 754. The second of the obscured paragraphs of property management agreement will be offered pre-settlement. Then I come down through tab 20, the actual contracts. Go to 28.2, the last two lines, "My understanding is that there wasn't one," that is an attached agreement, "But what is important about this clause which is in the signed contract is that it talks about the vendor may procure."

Now there was an unresolved issue before the Court of Appeal about whether when one reads all these documents together, this was merely an option for the vendor and if that was relevant that would be my submission today that this provision makes it clear that the only contractual obligation – that there was no contractual obligation and that the letters are a statement of expectation, a statement of intention, so there was no term requiring one to be provided at all, it's the only way one can reconcile these documents, but what the Court of Appeal said was even if there was an obligation, not deciding this, then it was not agreed to be essential and it's very hard to see how it could've been agreed to be essentially when in the formal agreement what you have is merely a may procure. In terms of effect, as I have said ,that was a matter which needed to proved with evidence and there just wasn't any and the

complete failure to raise the issue in opposition to summary judgment suggests it wasn't perceived in that way." And then the next paragraph I said I'm trying to prune, rather than prove, what I'm going to do as vigorously as possible, I think.

And then lastly 111, actually starting back at 110, half way down the page, 4.1, which is probably a road map reference, "None of these terms was agreed to be essential." I go through why that, the various 1% furniture, talk about construction of the contract at the foot of 110 and then at the top of 111 I say at 4.5, "The effect of non-performance would not be substantial." I went through that and I noted that in relation to the management agreement. There was no evidence whether quantitative in terms of valuing it or qualitative to suggest that the sort of arrangement that might have been put in place, consistent with this contract, had some material value to the purchasers and it certainly would've been open if it was an obligation to provide such an agreement at all, and the principal agreement suggests that it wasn't, but if it was required then it could've been met by the sort of arrangement with a local real estate agent that Your Honour Justice Arnold referred to earlier, which would not have had a material value-enhancing value." And I then fix that, I rephrase. And then, middle of the page, in response to Justice McGrath, "So the agreement was just a management agreement in form. No substance, you're saying. No details, Your Honour the Chief Justice. "There was no, no detail that would enable one to say that it would have significant value if performed, and that is very consistent with the way in which it was approached in the principal agreement where it just said "may" provide one. But even if it was "must" there's no room to say that it had to have certain attributes which would ensure that it was valuable and value enhancing."

So I'm absolutely running together this Court has said improperly clause 28 and the side agreements, but I am also very clearly making the submission that there was no obligation to have a management agreement in place. That if there was one then it could be satisfied in a range of ways great and small and that all that was required was to offer it, this is my point back at 106, which means that it wouldn't necessarily encompass the whole of the property because people might or might not take it up.

So then I need, I think, to do in the 10 minutes left to me, two things. The first is just go very quickly to this Court's judgment, which is under tab 8 of the same volume, and then to go back to those side letters and look at what they provide for. The judgment of this Court, the key passages are, first of all, paragraph 76. 76, this Court said, as we've said or the majority said, "Station accepted it was contractually bound

by the three side agreements concerning payment of a fee of 1% of the purchase price of the relevant apartment, the provision of a 30,000 furniture package and the arranging of a management contract, enabling the units to be operated as serviced apartments. In my submission the last of those was not correct, depending on what one understands by "arranging" but broadly, certainly in the written submissions, it was clear that there was no acceptance of that and it becomes clearer when we move on that we were to some extent at cross purposes.

Paragraph 78, after discussing the 1% fee in 77, this Court said, "This brings us to the side agreements in relation to the furniture package and the management agreement, deal with these together because both are related to the possibility the complex will be operated as serviced apartments. Station's requirement that purchasers take the furniture package enabled it to ensure uniformed furnishing of a sufficient standard to be attractive to a potential purchaser of the development or to operate under a management agreement. And then footnote 59, "Artificial to consider these in isolation as was the approach of the Court of Appeal and is the approach of Justice William Young." And then a critical sentence, "Moreover we emphasise that Station's obligation in relation to the management agreement undisputed in either the Court of Appeal or in this Court was to arrange a management agreement for all apartments in the complex." Now just –

WILLIAM YOUNG J:
Sorry what paragraph is that?

MR GODDARD QC:
That's footnote 59 of paragraph 78 and that in my –

GLAZEBROOK J:
On the – sorry can I just check, if we take out the word "arrange" and have "offer", on one interpretation of the argument in the Court of Appeal it was to offer the management agreement to all of the people in the complex and then up to them whether they accepted it or not, on one interpretation of what was said in the Court of Appeal.

MR GODDARD QC:
Even on the interpretation most favourable to the purchasers in terms of what was conceded, it wasn't to offer something capable of acceptance, it was to nominate

someone and send out their standard terms which was what was done. The argument was that that was enough.

GLAZEBROOK J:

But I'm really saying it wasn't – it was accepted that that was to everybody in the complex, not Station could pick and choose individual people.

MR GODDARD QC:

Yes but it was to send out something –

GLAZEBROOK J:

No I understand the –

MR GODDARD QC:

It was not capable of acceptance.

GLAZEBROOK J:

Yes I don't mean "offer" in and offer and acceptance sense, I just mean "offer" in a well propose, propose is perhaps a better word.

MR GODDARD QC:

Proposal, a proposal.

GLAZEBROOK J:

Propose.

MR GODDARD QC:

Yes. This is when I think words like "arrange" have become a little bit slippery here and again I think there's been some mutual misunderstanding. If we go over to 85, the Court sets out Station's position including writing on 7 August to say that, "No furniture package or management agreement was in place and none was put in place before it ultimately cancelled the agreements in 2010. As previously noted Station accepts it was in breach of its contractual obligations in this respect" and if 'put in place' means have entered into then again it's very clearly, in my respectful submission, not the case. That was never conceded in either Court.

Then we come over to 90 and this is the clearest statement of the Court's understand of Station's position. It's critical to the reasoning and it is again in my respectful submission not right. 90 refers to the Judge's observations about the prospect of having in place a well regarded management company, notes that assuming no on sale of either the development or individual units, investing in a complex where the apartments are uniformly, the Court said furnished and operated as serviced rental accommodation is a fundamentally different proposition. Parenthetically that might be so but that's not what was on the table, "from a group of individuals acquiring apartments and then making their own arrangements." Comment about passive and active investments, risk profiles. Then the majority says at line 3, "It follows that we do not agree with Justice William Young's assessment that Station's contractual obligation to provide a management agreement could have been satisfied simply by Station making some form of minimalist management arrangement such as an arrangement with a real estate agent to manage the appellant's units. We see this as inconsistent with Station's contractual obligation as alleged by the appellants and ultimately not challenged by Station which as the Court of Appeal recorded which was to arrange a management agreement for all apartments in the complex." Now if "arrange" means put it in place, then that was very plainly not the position in the Court of Appeal, very plainly not the position here.

And at 91, again last sentence, "To advance its proposals for the development Station had to furnish all the units to a uniform standard, sold and unsold and put a management agreement in place." And again that certainly was not conceded and the basis for that reasoning of the majority is the concession referred to immediately above.

I won't go to Your Honour Justice William Young's judgment in the interests of time. I need to stop in five minutes. So what I want to do now is identify why the concession that was attributed to Station matters. Why, if the Court had not acted on the basis of this misapprehension about what Station was saying, the result would be different. So I need to go to volume 4 of the case on appeal. I begin at 5.1 with an acknowledgment of what I got wrong which was my argument about 28.2. The Court perfectly understood my argument about that, the Court rejected it and the Court was right. So that's easy.

ELIAS CJ:

So where are we in volume 4?

MR GODDARD QC:
Volume 4 I want to go to the side letters, they were under tab 19.

ELIAS CJ:
Thank you.

MR GODDARD QC:
So what do they say about the management agreement? Because this is where any obligation must be found. Nothing in the principal agreement because 28.2 is about something different and the Court was unanimous on that.

McGRATH J:
This is in your road map is it?

MR GODDARD QC:
Yes at 5.2 Your Honour.

McGRATH J:
Thank you.

MR GODDARD QC:
So 5.1 is where I say –

ELIAS CJ:
It doesn't mean to say of course it's self-contained. It's part of the overall agreement, it's just that there's no specific term apart from 28.2 which you accept doesn't apply.

MR GODDARD QC:
Yes, to the – it's part of it including the entire agreement clause.

ELIAS CJ:
Yes.

MR GODDARD QC:
It was accepted that the entire agreement embraced the immediate correspondence but you're right it's all interlinked.

ELIAS CJ:

Yes.

MR GODDARD QC:

But that's rather helpful to me than not because that shows that it's a very detailed commercial contract with detailed provision for all sorts of matters and an entire agreement clause. And then what one has to do is accepting that these form part of the contract, work out what obligation, if any, they impose in relation to management agreements and we have only three direct references to this. The first is the one on page 750 in relation to layout which talks about altering the design to allow for a management arrangement to be run from house 3. This means the management rights will be sold to the highest bidder, 25,000 per unit is the market rate. That of course is for the benefit of the shareholders, it's not for purchasers, although there is some overlap. Providing further income to the company. Sale and purchase contracts do not include a management agreement at this stage. That's an acknowledgement that there is no contractual provision for a management agreement at this stage. "However this will be made available." So "made available", not "imposed" but "made available" during construction along with the furniture package.

ELIAS CJ:

But "will" not "may"?

MR GODDARD QC:

Yes and I'll come back to that. Then there are two ways you can purchaser, buy outright, in which case the company is committed to selling to you and can't on-sell your unit. You can do whatever you want with it or buy as an underwrite. And then there's the gazump clause. But critically, the same date, same package of communications, we get to the letter on 752. This is the second place this is discussed, in the paragraph which is three from the bottom, "The vendor intends to arrange for the benefit of its shareholder, as an option a serviced apartment management agreement."

GLAZEBROOK J:

Who's option is that?

MR GODDARD QC:

That there is referring to an option for each purchaser as I read it.

GLAZEBROOK J:

That's what I would have thought.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

So you're not contending –

MR GODDARD QC:

No.

GLAZEBROOK J:

Thank you.

MR GODDARD QC:

No I rely on the "intends to arrange".

GLAZEBROOK J:

No, no I understand that.

MR GODDARD QC:

But the "as an option" is for each purchaser.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

And, but that's very –

ELIAS CJ:

Well in the – I'm just wondering about that emphasis because in the context of the letter at 750 one could read "intends to arrange" as "will arrange".

MR GODDARD QC:

Yes, that's possible. My first submission is that it's just a statement of intention. I can understand how the Court could take a different view, it doesn't matter to my argument. Much more important to my argument is the "as an option", ie each purchaser can say yay or nay. So there's no assurance of uniformity. You know that you might say but everyone else might say no or that two or three of you might say yes and everyone else might say no. So no assurance of uniformity and second you –

ELIAS CJ:

Sorry why is the uniformity?

MR GODDARD QC:

Because the Court attributed it –

WILLIAM YOUNG J:

Because it said that it has to be offered effectively like a hotel with all units operated by a single operator on which basis any recalcitrant purchaser could scuttle the whole deal by not signing up.

ELIAS CJ:

Well any who signs up will be subject.

WILLIAM YOUNG J:

No it's suggested the whole complex must be managed on that basis.

MR GODDARD QC:

And that was the concession that was attributed to me which wasn't made and which has and plays an essential role in this Court's – the majority's reasoning on essentiality and substantiality. And then the other bit that's important here –

ELIAS CJ:

I'm just wondering though whether if you're right in the argument you're putting to us that that concession wasn't made, whether it necessarily, you know, where it goes but perhaps you're going to come onto that.

MR GODDARD QC:

That's what I'm now dealing with.

ELIAS CJ:

I see.

MR GODDARD QC:

And the next sentence is also, the next two sentences are very important. So it intends to arrange. "Decisions to be considered would be a number weeks for personal usage, how much can you use it yourself if you take up the agreement. Operator and brand, who's going to do it, no details yet and whether the income would be pooled or tied to each unit." So not even a decision made on whether you get what's gained from letting your apartment or whether you have a pooling arrangement, with the very important note, "If pooled this would require a prospectus." Now there's any number of cases on this issue that if you have pooling of income, it's a participatory security. So you're required to have a prospectus unless you come within one of the Securities Commission's financial services exemption notices and the prospectus of course has attached to it all those rules about setting out the offer, providing the terms and then you've got a choice about whether or not to take it. So this could be a security with a wide range of different features which purchasers might or might not take and you'd expect any arrangement of this kind to have some sort of minimum threshold. If you get a pooled arrangement and no one takes it up, obviously you've got nothing but one person takes it up thinking it's really cool for them and no one else does, it seems most unlikely it would happen. So the whole thing is clearly contingent on a number of things being negotiated and sorted out and then the next reference to the management agreement is over on 754. A property management agreement will be offered pre-settlement and Your Honour will say again to me, the Chief Justice, "Well it says 'will'", I accept that. I say it's all got to be read together, could go one way, could go the other. I prefer in tens obviously but it doesn't matter because if it's "will" it's only offered with all the uncertainty still wrapped into here and all the unpredictability about whether it gets taken up by some, any or many which means that there's no promise of uniformity of outcome. And that really is what I deal with in my 5.2.

ARNOLD J:

Should note too that at 755, where you've got the price list, there's the air conditioning and heating and all the rest of it and the little note, "For use as a

serviced apartment air conditioning, heating and furniture package is required." So that's along with all the other stuff.

MR GODDARD QC:
But if you don't want to use it as a serviced apartment then if you just intend to live in it it's not required and it's quite clear –

WILLIAM YOUNG J:
Well the furniture package was mandatory wasn't it?

MR GODDARD QC:
Sorry?

WILLIAM YOUNG J:
Didn't the agreement say the furniture package was mandatory?

MR GODDARD QC:
The correspondence did but that's on the basis that everyone wanted to sell.

GLAZEBROOK J:
755 says the furniture package is mandatory.

MR GODDARD QC:
Yes that's where it is, Your Honour is right.

GLAZEBROOK J:
So it is in the side agreement?

MR GODDARD QC:
It is. It's in the side letter, yes it is. This is part of it, that's what the Judge held and that's not contested. But critically again the management agreement is not mandatory. What is mandatory is identified here. It's very clear that's going to be an offer. So you don't have to take it up and if you don't have to take it up, then even if you had to buy some furniture, you don't have, in my submission, you could say, "No I don't want the furniture because I'm not going to do that." It's just that it was assumed that everyone was wanting to do that but in any event you could sell it again.

GLAZEBROOK J:

Well if a furniture package is mandatory means it's mandatory doesn't it, you can't say, "I don't want it". You have to pay for it, whether you use it for firewood is up to you but –

MR GODDARD QC:

Yes Your Honour is probably right.

ELIAS CJ:

And in any event it's not, I mean if things have gone well it wouldn't have been a one opportunity option probably to opt in, so you'd want a standard so that those who had purchased for their own occupancy might, at a later stage, opt into the managed timesharing arrangement.

MR GODDARD QC:

There's no promise that that would continue to be possible.

ELIAS CJ:

No.

MR GODDARD QC:

And if you had in the meantime refurnished and, you know, put new curtains in, in accordance with your taste and that involved bold zebra print curtains –

ELIAS CJ:

Well that might make it unlikely for you to be admitted later on.

MR GODDARD QC:

Yes exactly and I factored in cases where exactly that sort of issue has come up. People have wanted to join later and they've been told, "Well you have to comply with our 1000 page requirements to be operated by Hilton first." But anyway you're right, people would start with what was assumed to be necessary.

So my 5.2, language of intention which I accept there's room for argument about because of the wills as well but critically (b), "It's an option, it's something to be offered or made available potential via prospectus inconsistent", not just not

supported by this language but "positively inconsistent with language used to suggest that it would be mandatory for a purchaser to enter into such an agreement or…"

GLAZEBROOK J:
But you keep skating between the purchaser entering into it and mandatory to offer it.

MR GODDARD QC:
But I'm trying to deal with what the – the concession that was attributed to Station was that there would be one in place for all units and clearly not right in my submission.

GLAZEBROOK J:
Well there available for all units would actually have been the concession made if it – not necessarily – well the concession made that the obligation, if there was an obligation, was to offer a management agreement.

MR GODDARD QC:
To each of these purchasers, which still not all purchasers in the apartment because the prospect of sales to the public is consistently referred to in each of these documents. So again that's a very important part of this, there was no promise that this would be offered to the members of the public to whom this would be marketed.

WILLIAM YOUNG J:
Well the finding you're against is at the end of paragraph 90 of the Supreme Court judgment and that is that there was to be arranged a management agreement for all apartments in the complex.

MR GODDARD QC:
Exactly Your Honour.

WILLIAM YOUNG J:
And in the context that I understood it, it was that basically every – any purchaser could complain unless all other apartments were subject to such an agreement, that's what I understood the judgment to be.

MR GODDARD QC:
That's what I understood the majority to be saying and that is inconsistent with –

ELIAS CJ:

Well we're not going to discuss what it means.

MR GODDARD QC:

But that is indeed how I read it and that is the finding that I challenge. It is –

ELIAS CJ:

But "all" does mean "any" in some contexts Mr Goddard and whether it means that here, I don't know. But if it did, if it – all right, but where does it goes in terms of if that is an error?

MR GODDARD QC:

If that is an error and the assumption that what would be offered would necessarily have some value is an error, because my other related point is that there was no precision about what would be in the agreement.

ELIAS CJ:

Well I'm not sure, yes all right I understand that.

MR GODDARD QC:

And there are many people who choose, you know, can and do choose not to participate in this sort of arrangement if they have a choice. It's quite common for the owner at the time when they own all the units to enter into a long-term agreement for 30 or 40 years with a manager and then to sell the unit subject to the agreement. If you do that then you have the assurance everything is in but that was never what was proposed here. It was clearly going to be an offer people would get to make choices about and they would get to make those choices depending on whether they found the terms attractive or not and there's every prospect that you would've got different reactions depending on what the terms looked like. Pooling or non-pooling. You might have wanted your apartment. The provision might have been for no weeks for personal use and people might have loved Queenstown and wanted to spend winter there –

ELIAS CJ:

But pooling, realistically, wasn't a goer because of the requirement of a prospectus.

MR GODDARD QC:
People regularly did it.

ELIAS CJ:
I know it happens but it wasn't going to happen in this one.

MR GODDARD QC:
But at the time that that was entered into there was no reason to think that.

ELIAS CJ:
Yes, that's probably right, yes.

MR GODDARD QC:
You have to –

WILLIAM YOUNG J:
It was mentioned in the –

ELIAS CJ:
It was mentioned –

MR GODDARD QC:
Yes, it was expressly mentioned. You have to rewind all the way back to that time, 2006, pre-GFC. There was a lot of talk about pooling and prospectuses then and we can't bring hindsight to bear on assessing whether it was agreed to be essential at the time.

I've gone much longer than I said. I've given the Court my earlier written submissions. The Court has this note but I do want to emphasise that in my submission it would've been wholly consistent with what was in these side letters to offer a basic management agreement with a local real estate agent, of the kind that many people enter into for their Queenstown homes, or holiday homes. It would've been perfectly realistic to offer a very onerous obligation with a management company with high fees and significant obligations in relation to maintenance contributions, which many people would quite rationally have seen as unattractive.

So what that means is first, there was no assurance of uniformity and everyone must have realised that. Just as they could refuse so could the other offerees. Second, it would make no sense to agree to be essential something that amorphous and uncertain, which could be performed at very little benefit, or even disbenefit to you, and third, for the same reason, when you're assessing substantiality of breach, it could have been negligible or even a good thing not to be offered the best deal they could do at that time, because the world had changed a lot by the time that came to be negotiated and that's the time for assessing whether a breach was likely to be substantial. I refer to the analysis –

ELIAS CJ:

Do you really need to take us to any more, I'm just very conscious that Ms Kelly needs to have a fair crack Mr Goddard.

MR GODDARD QC:

Absolutely. So the rest of the analysis of this I don't need to go through in section 5 and section 6 the case has the cases, the Court's very familiar with them. There's obviously the special position of a final Court of Appeal because there's nowhere else to go and that was emphasised by the House of Lords *In Re Pinochet* and it was referred to with approval by the New Zealand Court of Appeal in *R v Smith* [2003] 2 NZLR 617 (CA), I've provided the references. There's also the very helpful and very, in my submission, directly applicable analysis of the circumstances for intervention in *Taylor v Lawrence* [2003] QB 528.

Unless there's anything I can assist the Court with I will stop.

ELIAS CJ:

No, thank you Mr Goddard.

MS KELLY:

Thank you Your Honours. The first thing to say is that I have no prospect of addressing all the matters arising out of my learned friend's submissions in any time less than he took, so I'm sorry about that. I'll just proceed until you tell me to stop but if having heard me on that you want to –

ELIAS CJ:

Well let's carry on and see where you get to.

MS KELLY:
Thank you Ma'am.

ELIAS CJ:
But you shouldn't feel under too much constraint Ms Kelly.

MS KELLY:
Thank you Your Honour. The second thing to say is that I have just received the transcript of the Court of Appeal when I arrived at Court today so I haven't had any opportunity to review that and depending on the position at the end, I may seek leave to address that in writing after today. There are two bases on which the Court could approach this point of recall and one is a microscopic and forensic view of what was decided in the various Courts and what was appealed from various Courts, and the alternative is to take a broad view and to say, well does this seriously impact upon the decision this Court has made. If one looks first to the microscopic approach the first document to look at, in my submission, is the notice of appeal to the Court of Appeal brought by Station. Now my learned friend took you to this document but skipped, in my submission, the critical page, and that page is in bundle 2, what we're calling bundle 2, the white bundle of today, at tab 1, at page 1.

The critical point to note is that this is an appeal from part of the judgment of the High Court. It is not a whole judgment appeal. So in the very first paragraph the parts of the judgment appealed from are set out. The relevant paragraph is paragraph (b). The finding that the following constituted material and substantial breaches of the agreement by the appellant and that includes the management agreement. So there's no part identified here that there was no obligation. Then in paragraph (c) in case there's any lack of clarity about that absence, paragraph (c) actually refers to those issues as the breaches set out in paragraph (b). There's a concession in the notice of appeal that the failure to provide the management agreement, to put in place the management agreement, was a breach.

Then if one turns to the page my learned friend took you to, and that's the next page, at paragraph 2 of the grounds. Now these are not the parts appealed from, these are the grounds now. At paragraph 2(a) there is a contest in support of that part appeal from referred to on the previous page, there's a contest to the content of the management agreement obligation.

Now my learned friend is heard today, and in his written submissions, and his recall application, to solve this bit of confusion. There was no confusion in my mind when I read it. That what was being appealed was the part which dealt with content and not the obligation itself. Not the obligation being that of Station, because that had been contested below, and not that Station had breached it, but that the content of it was being – sorry, not that Station had failed to perform it, but the content of the agreement, of the obligation was what was in contest. Now that's supported by the further references in paragraphs (b), (c), (d) and (e) in which the notice of appeal sets out further grounds going to the failure to perform. Now if the appellant writing this notice of appeal wanted to preserve the option of saying there was no obligation, here's the time to say so. In paragraph (c) there is an open acknowledgement of the failure to perform the three terms identified, and in paragraph (d) and in paragraph (e). So it was not before the Court of Appeal that Station had failed to perform as a live issue, because that was conceded. What was before the Court of Appeal was what did Station have to do.

ELIAS CJ:
But the performance must be referable to the obligation and, as you say, the extent of the obligation was in contention.

MS KELLY:
There's no contest as to the – the content, but the existence of the obligation, and whether Station had failed to perform it, whatever it was, whatever it was, was not in contest. Whether that amounted to a breach was in contest, and whether Station had to sign was in contest.

Now turning then to the submissions by Station in the Court of Appeal, I think that's in bundle 1. Yes it's in bundle 1 at tab C and at paragraph 60 and following. Now there's been some discussion today about the confusion between procuring or signing on the one hand and arranging on the other. Now Station has conceded at paragraph 65, that it had the option, let's leave aside the option, of arranging a management agreement and if elected to procure a management agreement, it's only obligation was to nominate somebody, put up a name.

The question was asked of Mr Goddard, "What is procuring or what does nomination involve?" The learned Chief Justice's question, "What does nomination involve?" It's

not about picking a name out of a hat as is evident from the case on appeal at page 756 and 757, that's volume 4, the blue volume, case on appeal. 756 is an email dated 10 November 2005. Already in November 2005 Station reports at the bottom of the page that, "We're in talks with Accor Hotel and their subsidiaries and also Break Free. We hope to pin something down in the coming weeks." Bear in mind this is a pre-contractual correspondence. This correspondence predates the contracts by five months. The contracts were dated May 2006.

So before the contract was entered into Station is representing what sort of management agreement it's talking about. It's not the real estate agent in Queenstown, it's a major hotel operator. In April 2006, on the next page, page 757, Station is still reporting its negotiations now with Stella Resorts Group. It talks about completing feasibility study and projections, will assemble sales documentation, a guaranteed return. Finishes by saying, "We'll have the projection and management agreements." Again pre-dating the contracts Station is defining what it was talking about to its purchasers. Plainly there was material upon which Mr Justice Toogood could properly say what was being contemplated was a whole of apartment management agreement. There was material to support that, contrary to the submission made in the Court of Appeal.

Thirdly, if one comes forward in the same volume to the instructions at page 753, sorry page 754. The contract had to be accepted in its totality, there were no changes allowed. So the idea that these purchasers could pick and choose whether they wanted bits and not other bits is nonsensical because at page 754 at note 3, "NB please do not change any aspect of the sale and purchase agreements." You will recall that these documents were sent out in September 2005, were not signed by Station, that is were not accepted by Station and made contractual until 2006. The purchasers did not have control over the terms except to accept Station's deal on a take it or leave it basis. They were not negotiating terms here and that's reflected in all the references you've been taken to about the mandatory furniture packages, for use of service department. There is no question that this might have been an opportunity for little Mum and Dad to buy an apartment to go and live in, in Queenstown, this was not ever what the package was about. The package was as part of an investment, investor's forum project, marketed to investors, Justice Toogood found, for use as a serviced apartment complex.

The possibility that various purchasers could pick and choose as to whether to accept a management agreement and negotiate its terms is fanciful with respect. That's because Station always controlled the terms of the agreement by the gazump clause. If the purchaser didn't want to do what Station wanted it to do, Station could without any obligation rely on clause 37, the gazump clause, and terminate. Now there was no obligation on Station to justify it, if it wanted to rely upon that clause. It could simply require the purchaser to comply with its requirements or dump the purchaser. So Station had within its hand at all times the capacity to control the conduct of the purchasers.

ELIAS CJ:
Sorry Ms Kelly I'm just – I'm getting a little lost in terms –

MS KELLY:
I'm sorry.

ELIAS CJ:
No, no in terms of the point before us today.

MS KELLY:
Yes, all right, I suppose what I've tried to do is to answer in a logical order some of the submissions made earlier today.

ELIAS CJ:
Yes.

MS KELLY:
But I'm nearly finished doing this part if that's helpful.

ELIAS CJ:
Yes, carry on, that's fine.

MS KELLY:
Yes one final point arising out a submission made repeatedly this afternoon, I say that with no disrespect of course but the reference to pooling and the requirement of a prospectus for pooling. That deals with the pooling of income arising from rental. That has nothing to do with the management of the apartments. It's quite possible

for the apartments to have been separately managed. Sorry managed as a whole for the entire complex and for money not to be pooled and that is what that reference to pooling makes clear. It's not decided yet whether to pool the income or whether to attribute the income to individual apartments. So the pooling is a red herring.

All right if I can then return to my point about the difference in notices of appeal. The notice of appeal or the application to this Court was obviously for leave but it was for leave to appeal the whole of the judgment. If I can take you to bundle 2, tab 3. No sorry that's the wrong one. I'm sorry Your Honour I just have misplaced where the application for leave to appeal is.

ARNOLD J:
It will be in volume 1 of the Supreme Court.

MS KELLY:
Yes you're quite right, sorry about that. Yes the application at tab 1, volume 1 and again the first page being the relevant one, rather than the ones to which you were taken which deal with grounds.

ELIAS CJ:
I'm sorry I'm lost. Which one is it?

MS KELLY:
It's volume 1 of the case on appeal, the pink one, at tab 1, and the first page, the appellants giving notice that we apply for leave of the Supreme Court to appeal against the whole – appeal to the Court against the whole of the decision of the Court of Appeal, in distinct contrast to the notice of appeal to the Court of Appeal. So it was clear to the applicant upon the receipt of this application that the whole of this, of the Court of Appeal's decision, was in jeopardy and if it wanted to retain any part of the Court of Appeal's position, it was required to file a rule 20A notice. The applicant didn't overlook it. When I say the "applicant" I should say Station just to be clear. Station did not overlook it. It wasn't a mistake or an oversight. It distinctly turned its mind to it and said, no, we won't' do that. As paragraph 6 of its response to the application, submissions make clear. Paragraph 6 makes clear that Station turns its mind to whether to defend any part of the Court of Appeal decision and –

GLAZEBROOK J:

Whereabouts is that?

WILLIAM YOUNG J:
It doesn't have to give a notice if it wants to defend a part of a Court of Appeal decision. It's meant to give notice if it wishes to uphold a Court of Appeal decision on another basis.

MS KELLY:
I'm sorry, you're right.

WILLIAM YOUNG J:
Now it's got a finding from the Court of Appeal that whatever the position was over the management agreement obligation, it was not one which was material and it was one which would have been simple to comply with.

MS KELLY:
Yes, I'm sorry –

WILLIAM YOUNG J:
Now if that's, it's on that view of the maintenance agreement obligation it won, so there was nothing to give a notice over was there?

MS KELLY:
I'd say in response to that that Station knew, Station knew that the whole of the decision of the Court of Appeal was in jeopardy and if it wanted to defend the final position of the Court of Appeal on grounds not decided by a Court, namely the matter referred to at paragraph 86 of the Court of Appeal's judgment, it had to give notice. If Station wanted to be heard to say the Court of Appeal failed to decide Mr Tingey's submission. Mr Tingey's submission being that it didn't have an obligation, Station did not have an obligation to put in place, to sign a management agreement. If it decided, having left that open, Station wanted to be heard here to say, no that should be allowed to be argued here, it had to put in a rule 20A notice in my submission.

McGRATH J:
Ms Kelly, can I just ask you to look at the third volume that the solicitors for your opponents have put forwards, tab 1.

ELIAS CJ:

Sorry, which do you mean by the third volume?

McGRATH J:

It's the volume of the joint bundle of authorities.

ELIAS CJ:

Oh, authorities.

McGRATH J:

And under the first tab it's got the rule, and if you look at rule 20A, if you just look at the final paragraph on that page where it sets out the rule, which is the first substantial page in that section. It's, I draw your attention to that paragraph.

MS KELLY:

I'm struggling to find the bundle that you're referring to Your Honour.

McGRATH J:

It's the volume which I think is being called the joint bundle of authorities relating to the application for recall.

MS KELLY:

Yes.

McGRATH J:

And we looked at it earlier because it sets out rule 20A.

MS KELLY:

Yes.

McGRATH J:

Now if you look at the first page after the title page, you'll see 20A is there?

MS KELLY:

Yes.

McGRATH J:

Now what I want to put to you is the final paragraph on that page, as to whether that summarises what the rule is effectively requiring. It says that, "If a respondent seeks any variation to the formal judgment of the Court of Appeal it must apply for leave to appeal, we're not in that situation. It then says, "This rule applies where the respondent is content with the judgment but contends there is another way in which the conclusion can be justified."

MS KELLY:
Absolutely.

McGRATH J:
And you accept that that's –

MS KELLY:
Yes, absolutely. That is my point. That is –

ELIAS CJ:
Well this is commentary, isn't it?

MS KELLY:
That's right, that's right, but the, if Station could not rely on the earlier repudiation of the purchasers to justify its non-performance of the management agreement term, well then it was going to, will have to rely on the content of the management agreement term which the Court of Appeal had not decided and Station was aware that that content was up for grabs because in its submissions at paragraph 6 it averted to the fact that the materiality and the breach and the content of the management agreement term had not been raised by the purchasers.

WILLIAM YOUNG J:
Could it not take from paragraph 76 of the Court of Appeal judgment that the Court of Appeal was either that there wasn't an obligation or if there was it was insufficiently material to justify cancellation.

MS KELLY:
It risked this Court making the contrary decision. It, unless Station was –

WILLIAM YOUNG J:

Sorry, I think you misunderstand me. Could it not say we're happy to rest with the position that the Court of Appeal got to, as recorded in paragraph 76 of this judgment? Namely that there's no obligation, or if there is, it is insufficiently material to warrant cancellation.

MS KELLY:
It could have rested with that but it would have been contrary – if this Court found to the contrary as to the materiality –

WILLIAM YOUNG J:
But of course, of course but it doesn't need to give a rule 20A notice to rely on paragraph 76 of the Court of Appeal judgment, to rely on an argument that is consistent with rule – paragraph 76 of the Court of Appeal judgment. I'm probably slightly less sympathetic to your argument than the others but I do, for myself I think the rule 20A issue is a bit of a red herring.

ELIAS CJ:
Well, I wondered really, Ms Kelly, whether, I'm sure this Court would be reluctant to decide this appeal on effectively a pleading point. You made the submission that in your submission it comes within rule 20A. is there really much more to be said than that?

MS KELLY:
Only that it takes the purchasers by surprise that when there is no pleading point taken, there is no written submission made as to whether Station had breached this obligation, and to have it raised in a sort of a rushed part of an afternoon in oral submissions, for Station to be allowed to rely upon that is not consistent with a fair hearing for the purchasers, let me put it that way. The purchasers came to the Court not understanding that Station was going to raise the points Mr Goddard raised late in the day orally. So I take that no further.
GLAZEBROOK J:
Where does that take you to a degree because if they are properly raised then in a recall, and if it was recalled you'd be able to address those properly.

MS KELLY:
Well to some extent it jeopardises the purchasers because, well the hearing's been held, and it's been conducted on a certain basis of what the issues were. The

function of the pleading point is not merely technical, it's to rule out certain arguments that could have been raised and could have been made. Now even today I'm surprised by the width of the submissions that have been made because, unlike Mr Goddard, I have been involved in the proceedings since the High Court, and various assertions as to the background of the case are simply not consistent with the record and I make no criticism of my learned friend in that but I say when things are raised without notice, and by way of a road map that I haven't seen before I arrive at Court today, well then that makes it very difficult for me to respond to them.

ELIAS CJ:
Sorry, I had thought that you were addressing us on the fact that the arguments which have emerged as the pivot for the recall application, were not put on the table adequately at the earlier hearing.

MS KELLY:
That's my point.

ELIAS CJ:
But you're now raising an issue as to the conduct of this application hearing.

MS KELLY:
Well I say it's consistent with that. Today we've heard many times that there's a muddling of the language between signing, procuring and arranging. Now Station's position in the Court of Appeal was quite contrary to that. Station said –

ELIAS CJ:
Well that's really the issue that you need to address us on I think.

MS KELLY:
Yes.

ELIAS CJ:
Because that's really what Mr Goddard's been taking us through.

MS KELLY:
Yes Your Honour I'm coming to that. I'm saying that in the Court of Appeal the issue was not about Station having an obligation and that's been raised today, whether

Station had any obligation as to a management agreement or whether it was simply an option. Station could or could not do anything because it had option. That point was made today for the first time. But in the Court of Appeal it was accepted that there was an obligation but whether it went as far as to require Station to sign a management agreement. So signing and arranging were distinguished in the Court of Appeal. Today we've gone one further step to say well there's an entire question about whether there's any obligation at all.

ELIAS CJ:

Well the issue is whether there was a concession that there was an obligation and the point of Mr Goddard taking us to what was actually said in the Court of Appeal, in written submissions and in oral submissions, was to seek to persuade us that there was never a concession.

MS KELLY:

I say that the concession was adopted – was exemplified, was demonstrated by Station's failure to challenge the finding of Justice Toogood. Justice Toogood found that there was an obligation on Station to provide an agreement for the entire complex. Station appealed part of that and said it wasn't for the entire complex it – no, no sorry, Station appealed part of that and said it didn't have to sign it. The Court of Appeal didn't decide that and yet Station didn't come to this Court saying, "Please decide it." So Station has, by its conduct, accepted or not challenged is the word that your judgment uses, not challenged the position about the obligation that was left undetermined by the Court of Appeal.

So to the extent that there is mud in the water, that's conceded but it's mud that's been kicked up by Station and its failure to properly articulate in its notice of appeal and its conduct in the Court of Appeal and its conduct in this Court as to what its position is. So the purchasers are at a disadvantage when a litigant is entitled to come after a hearing and judgment to say, "Let us have another shot." As to what the actual content of the management agreement obligation is, the two alternatives are seen to be embodied by the words "may" and "will". Now we have concurrently contractual documents variously describing that obligation as "may" and "will". What Station's real argument is about is to invite the Court to prioritise in the contractual hierarchy if you like, the formal sale and purchase agreement over the side letters. Now that's not what, even the term "side letters", that's not what Justice Toogood found and which was not challenged, that those letters had contractual force.

WILLIAM YOUNG J:

I think there's a second issue as to whether the management agreement, well actually I think there's a number of issues but I think there is a second issue as to whether, assuming a management agreement obligation, it had to be one that encompassed the complex as a whole or whether it was sufficient that it was one which individual purchasers could pick up if they wanted to. Now if it's the latter, it could arguably be answered, be met or discharged by a real estate agent. If it's running the complex like it's a hotel which seems to have been envisaged, then it couldn't be dealt with easily by the local real estate agent, so I think that's a second quite important issue as to content.

MS KELLY:

Thank you and I adopt that distinction. That's quite right with respect but similarly with here, in the Court of Appeal the extent of the obligation was raised for the first time in the hearing, whether it was for an individual apartment or whether it was for the entire complex was raised in the hearing and – so we come today and we have new nuances ascribed to the management agreement obligation which we haven't heard before. So it does, with respect, appear that without recourse back to the pre-contractual documents which are essential in deciding what the management obligation was. Station has invited the Court and the Court below, Court of Appeal level, to variously interpret the obligation depending on the benefits of the day.

Station's concession is embodied by, in my submission, its failure to properly raise the point from the Court of Appeal to this Court. When the Court of Appeal did not determine the issue which is now raised today in Station's favour, Station needed to put that on the table before the hearing of this Court and it didn't do so. Moreover, Station's documentation, as I have shown you already, has been to accede to its failure to perform without wanting to call them breaches. Now in paragraph 90 of the judgment of this Court, in my submission the matter was determined and whether it was – sorry I'll just turn that up.

ELIAS CJ:

Is this the transcript you're taking us to?

MS KELLY:

No I'm talking about the judgment. It's at tab 8 of bundle 2 where the final sentence the Court says, "We see this as inconsistent –

GLAZEBROOK J:
Final sentence of what paragraph sorry?

MS KELLY:
90.

GLAZEBROOK J:
Thank you.

MS KELLY:
Yes 90 of the judgment.

ELIAS CJ:
But this is the point of the application for re-hearing. So taking us to this as authority isn't terrifically convincing.

MS KELLY:
I'm developing an argument that the Court, I don't know if the Court did make a mistake as to any formal concession but I'm submitting to you that a reader of the judgment would quite properly infer that the Court has determined the very point that is the subject of the recall application and the determination of the point is not necessarily in reliance upon any concession but an historical record.

ELIAS CJ:
Well except that there could be something said against it which because of the concession the Court may not have appreciated. That's the issue really for us here.

MS KELLY:
Well the issue is whether this Court actually turned its mind to the content of the management agreement and whether this Court turned its mind to whether Station had breached it or merely accepted that –

WILLIAM YOUNG J:

Well I'll put a hypothesis to you. I turned my mind to the existence of it, the majority took the view that it was controlled by the course the litigation had take up until the point when it was left with us.

MS KELLY:
That's a proposition?

WILLIAM YOUNG J:
Well it's a proposition I'm putting to you.

MS KELLY:
Yes, well if that's a proposition it may or may not be consistent with the last sentence of 90 and 99.

WILLIAM YOUNG J:
Well 90, "We see this as inconsistent with Station's contractual obligation as alleged by the appellants and not challenged by Station which was, as the Court of Appeal recorded, to arrange a management agreement for all apartments in the complex." Now that is obviously Station now challenges that. Paragraph 3 which is the footnote references in fact to the purchasers' argument.

ARNOLD J:
Then that's picked up, as I pointed out, in paragraph 14 and accepted in 15.

WILLIAM YOUNG J:
Yes, so there are mixed signals there. There are a number of passages that go one way and some that go the other.

MS KELLY:
And in my written submissions I refer to the possibility that the Court has actually turned its mind and determined something and simply be referencing it as similar to something that it considers the Court of Appeal had determined, and this is further extended at paragraph 99 of the judgment, where the last sentence to which my learned friend takes issue in his memorandum, "By contrast, Station had signalled its likely breach of what we have determined to be essential terms." my learned friend takes issue with that but the Court has determined a likely breach, as signalled by Station, and the essentiality of the term, so I'm not sure that the Court has relied

upon the concession that's the basis for the recall application. It's certainly not clear to me as somebody who participated in the hearing and read the judgment that that's the case. Certainly the Court makes reference at various points to Station's failure to challenge or Station's acceptance. The argument boils down to me, to one where it should be said that the Court's entitled to rely upon Station's conduct of its own litigation, and if Station fails to properly put in issue a point well the Court is entitled to say well it's not, not challenged it.

Similarly at paragraph 76 of the judgment the Court's own description of the content of the management agreement obligation was a precise description of its content, the Court noting that the Court of Appeal took a certain position and it did involve the arranging of a management agreement contract, but it did not involve the requirement to sign one, doesn't change the effect of the Court's determination.

So, just to return to my learned friend's points this afternoon. I'm sorry, Your Honour, I'm just gathering my thoughts so that I don't take you to matters I don't think I need to now. As to the management agreement obligation, the effort over a series of years, from November 2005 to July 2008, to procure a management agreement operator, belies the minimalist interpretation of the obligation. Whether the obligation was to sign –

ELIAS CJ:
That's really not the – I don't think that's the point of the application for rehearing, the minimalist point which is what divided the Court, it's rather whether there were concessions made about the obligation.

MS KELLY:
Certainly. I'm taking Your Honours to the submission made by my learned friend that once one accepts that the Station – if one could accept that Station didn't concede what the terms of the management obligation are, because Station's application is twofold obviously. It seeks to have this recalled and then it seeks to have determined what the terms of the management obligation actually. Now I was moving to that. If I don't need to move to that I can finish much more quickly.

ELIAS CJ:

No perhaps you'd better carry on. We better just hear it all but maybe we'll regroup and think where we're going after another 15 minutes or so but if you just carry on at this stage thank you.

MS KELLY:

Yes, all right. What was I saying? About whether it was assigned – yes.

GLAZEBROOK J:

You were talking about a minimalist interpretation.

MS KELLY:

Minimalist interpretation, that's right and whether there was an obligation to sign and whether it was merely an option for Station to introduce somebody who might be able to do it and do nothing. In my submission there can no serious submission made when one analyses the earlier material between the parties and the timeframe and the importance of the management agreement in the pre-contractual selling, if you like, of this package to the purchasers that the management agreement was crucial. Its combination with furniture and serviced apartment entitlement was crucial, just as this Court found.

I'm not in a position to address you on what was said in the Court of Appeal about the GST component because I haven't had an opportunity to review the Court of Appeal transcript at this point.

ELIAS CJ:

Well the point being made is that it was the GST component that all parties concentrated on, that the purchasers concentrated on, as the reason why the management arrangement was critical to the sale and purchase.

MS KELLY:

Yes, I certainly made reference to the GST component as being very significant but it wasn't the only thing. It was the thing that transformed the deal being sold to the purchasers from something that they may retire into, just like a retirement village complex or something that they would use as an investment vehicle. There was never any question on the part of any of the purchasers that they even chose which apartment they wanted themselves. They just looked at the data, as you've seen from what was sent to them prior to purchase and picked a value. They didn't know

where it was in the complex, they didn't have any of that information and they gave evidence as to this in the High Court. So there was never any intention for this to be anything other than an investment vehicle and for that the management agreement was a critical component.

As to the submission made earlier that this was an option and one should take the word "option" very seriously, can I take you to page 750 of the case on appeal, it's volume 4, the blue one.

ELIAS CJ:
What tab?

MS KELLY:
19, Your Honour. It's the 20 September email that is a contractual document and the use of the term "option" and the idea of option is made variously in contrast with its actual meaning, as I will take you to. The expression you've been given, shown, is that on page 752 in the 20 September letter. "The vendor intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement." Right, now coming on the same day was the email on 750 and at the bottom of that page is the gazump, the introduction of the gazump clause option and if you read that clause, the buyers an underwrite. On the top of page 751 it's asserted that, "When an offer is made you may either go unconditional on your purchase or agree for us to cancel the agreement and sell sharing a profit." Plainly deposing on the purchaser an option but an option which Mr Justice Toogood found was not actually that of the purchaser it was actually that of Station, when that translated into the contract. So clause 37 in the contract provides that option to the vendor.

Now similarly, in my submission, why the 20 September letter seems to say that the shareholder might have the option of entering into the management agreement or not, in fact it was an entitlement that Station took to itself. Station makes clear that it didn't have a – the contracts didn't at this point contain the property management agreement but it makes clear that it intends to make it a contractual obligation and it does that in page 750, in the middle under the heading "Layout". It says, "The design has been altered to allow for the management arrangement to be run from the house" and said, "The sale and purchase contracts do not include a management agreement at this stage." So again Station had the capacity to introduce as a

contractual obligation on the purchasers at a later stage and the way it had to do that was to determine the purchaser's compliance by means of the gazump clause. If the purchaser said no, Station could terminate.

So in all practical terms Station was in control of the content of the management agreement and able to impose it upon the entire complex, just as it had represented prior to the contracts that it would do. There's a circularity in the argument of the applicant today. It relies on its interpretation of the type of agreement it says can only have been the only type of agreement, being the optional individualised type of agreement. To say therefore Station couldn't impose it and therefore it can't be material. But if one looks at the totality of the pre-contractual conduct and what Station actually did do during the course of the construction in attempting over three years to try to get an operator, it's plain that something very different was envisaged by the management agreement and that Station could impose it by means of the clause 37.

I've actually been a great deal faster than I expected because of some things that I realise I don't have to say. Unless there's something else or anything in my submissions, of course, which I don't go through because I've assumed you've been content to read them?

ELIAS CJ:
No thank you Ms Kelly.

MS KELLY:
Thank you.

ELIAS CJ:
Matters in reply Mr Goddard.

MR GODDARD QC:
Just one point really arising out of Justice McGrath's question about the commentary rule 20A. Plainly this wasn't a case where Station was seeking any variation to the Court of Appeal's judgment, it was happy with it. So the question was whether it was intending to support it on another ground, a ground that wasn't decided and therefore needed to give notice at some point. It wasn't, in my submission, necessary to deal

with this argument in either the leave submissions or in the formal way my friend seems to suggest the substantive submissions for three reasons.

ELIAS CJ:

But, sorry and I do want to hear that but it may have been a good idea to and it may have been incumbent on the parties really to sharpen things up a bit given the history of the matter.

MR GODDARD QC:

It's hard listening to the argument today not to think that there was scope for some sharpening on both sides and I think that the language used in submissions –

ELIAS CJ:

If we're with you, you have effectively sought to support the Court of Appeal on the basis that there was no agreement, an argument that was made so lightly that it made very little impression and one wonders really where that leaves us. A full rehearing perhaps Mr Goddard?

MR GODDARD QC:

If that's where it goes, that's where it goes.

ELIAS CJ:

Mmm.

MR GODDARD QC:

And I think that's a matter that's in the discretion of the Court. What the appropriate response is. Is it a full rehearing? Is it a rehearing of this issue only? The others being treated as being decided.

ELIAS CJ:

Well it's a point that the Court of Appeal didn't decide.

MR GODDARD QC:

Yes. Well I think I have some sympathy for the reading of paragraph 77 in the Court of Appeal judgment suggested by His Honour Justice Young which is that they're saying if there's an obligation, which we doubt, then it's so minimal but I don't need to go that far.

ELIAS CJ:

It's hard really though to disentangle both aspects because in some ways it's the impression that they clearly had that it wasn't a substantial – it wasn't a material matter that may well have influenced the doubt that there was contractual force. If you take the view that actually this is a substantial matter which the majority did take into account, it probably pushes you further towards there being some contractual obligation. So it's quite hard to disentangle them.

MR GODDARD QC:

I agree and I think the way that Your Honour put it to my learned friend that content is everything rather than labelling something as contractual or not must, in my respectful submission, be right to say there's a contractual term but it merely imposes an obligation to raise something as a possibility or merely to provide anything in a wide range of agreements is to recognise an obligation that is so slight that it is on the verge of not being an obligation and I rely on the lack of precision about content both as a reason to find there was no obligation and alternatively as a reason why any obligation was not essential, why a breach was not substantial. So I accept absolutely Your Honour's point that these are not separate points and that's why I think the scope of a re-argument is something that, if the Court accepts my submission that there's been a misfire on process, will need to be carefully considered and obviously I'm very much in the hands of the Court on what the proper scope would be.

Just on how it came about, it is I think clear that that question about content and whether it was anything more than the most ephemeral of promises, was squarely on the table in the Court of Appeal and the Court said it didn't need to decide because if there was anything it was immaterial. That's on the reading most favourable to the purchasers. The reading suggested by His Honour Justice Young, which goes a little further because of that immateriality, I think is also well open but what happened after that was yes a challenge to the whole of the judgment by the purchasers because it was the whole of the result that they had a problem with but it's very clear when one is seeking leave in this Court that one needs to identify the specific points that one wants to argue. Leave is not at large and –

ELIAS CJ:

Well except we granted leave in those large terms.

GLAZEBROOK J:

And it was absolutely clear from the submissions that it was both the side agreements and the failure to perform them and the – if you look at the appellant's submissions.

MR GODDARD QC:

The substantive submissions, oh yes, oh yes.

GLAZEBROOK J:

Sorry not the leave submissions, I agree.

MR GODDARD QC:

No. So that was all I was going to say was that the suggestion that something should have been done under rule 20A and the leave submissions cannot, with respect, be right because there was absolutely nothing to suggest in the submissions in support of leave that there was any challenge to this aspect of the Court of Appeal judgment and if one accepts that the reason it was seen as significant below was because of the GST consequences, which is how it was presented, given the clear answer to –

GLAZEBROOK J:

Well only in oral submissions, it wasn't even mentioned in the written submissions below.

WILLIAM YOUNG J:

It was pleaded though. That's the pleading of it actually focussed – going back to the statement defence focussed a lot on GST.

MR GODDARD QC:

His Honour is right. It was the reason that it was alleged to be critical was because of the GST consequences.

ELIAS CJ:

But the GST consequences, it's still a valid point, isn't it? Rather it's been leg glanced because it said, "Well you didn't have to have a completed agreement".

MR GODDARD QC:

No it's not a valid point because –

ELIAS CJ:
Isn't it?

MR GODDARD QC:
No, no.

ELIAS CJ:
Oh sorry I misunderstood that then.

MR GODDARD QC:
What the Court of Appeal said was that even if there was a management agreement, because the purchasers weren't registered for GST at the time the contract went unconditional, which was a lot earlier, they were never going to be exempt on purchase but they could, whether they had a management agreement at settlement or after settlement, they could pay the GST then get it back really quickly.

ELIAS CJ:
Yes, I see.

MR GODDARD QC:
So that bit the dust in terms that have never been raised again and it was absolutely proper for Station to proceed in the leave context on the assumption that the side agreements were not a matter being raised before this Court. Then the Court granted leave in broad terms, on cancellation. So at that point anything that was properly within the scope of the leave granted was able to be argued by both parties. That's critical. It can't be the case that the expansion of leave opened up arguments for the appellant but didn't open up the responses for the respondent. So both parties could pursue anything relevant to the leave that was granted, my friend did, raising issues about the side agreements but not going further than quoting a few paragraphs from the High Court judgment. That was responded essentially by emphasising what was seen as the simple direct and compelling approach in the Court of Appeal but also picking up very briefly the point about the complete lack of precision in relation to the content of the agreement.

ELIAS CJ:

Well but that cuts both ways though doesn't it? Because the issue before – in the litigation was whether the purchasers were obliged to settle.

MR GODDARD QC:
Whether Station was entitled to cancel was what the Court said.

ELIAS CJ:
Well yes sorry, yes.

MR GODDARD QC:
Which is the flip side of that I think.

ELIAS CJ:
Yes.

MR GODDARD QC:
And so they said we were – Station wasn't obliged to cancel because Station has indicated that it was clear that it would fail to perform the side agreements.

ELIAS CJ:
Yes.

MR GODDARD QC:
And what was said in response was, "But as the Court of Appeal said they weren't material and that's not surprising because they had no meaningful content."

ELIAS CJ:
But they may not – I'm not sure that I understand why that's determinative because if it was your obligation to put something up capable of being picked up and implemented, not to avoid using offer and acceptance and you were a long way from being in a position to do that, why isn't that the end of the story? I'm not sure that the fact that you don't have the content of these management agreements.

MR GODDARD QC:
The reason is that it would be a barrier to Station cancelling if and only if the purchasers were entitled to cancelled and had cancelled, as the Court said and that would be the case only if Station had made it clear that it would not perform and, and

this is the key thing, what it was not going to perform either had been agreed to be essential or would by breaching, have a substantial effect on benefits and you can't answer that question without making findings about the content of the term.

ELIAS CJ:

Well I'm not sure that that's right because it's not necessarily a question of valuing what's been lost to say that it is valuable in the context of the agreement.

MR GODDARD QC:

But the starting point must be to know what has been promised. You can't ask whether a promise is essential unless you know what has been promised. That it seems to me is fundamental.

ELIAS CJ:

Well it may be to provide something that in the context of this agreement was reasonable and then there's an issue as to what would be reasonable and Justice Young has got quite a different view of what would be reasonable perhaps.

MR GODDARD QC:

That might have been an argument that should have happened. The question of what the content was, was raised. It wasn't decided by this Court because the assumption was made that it had been conceded that there had to be a management agreement of a substantial kind in place for the whole agreement managed in a uniform way.

WILLIAM YOUNG J:

Yes what you can say is that the conclusion that the term was essential was based on an assessment of what that was.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Which in turn was based on what was thought to be the concessions and what was the finding of the Judge in the High Court.

GLAZEBROOK J:

That's a submission, it's not necessarily one that's accepted.

ELIAS CJ:
No that's the issue really.

MR GODDARD QC:
That's His Honour putting my submission to me and I agree. I am saying that the way this Court –

ELIAS CJ:
But there is an issue as to whether the, even accepting that there may not have been a concession, something that we will need to consider carefully given the material that you've taken us to, but whether that's determinative anyway of why the interests of justice would require a rehearing and you're saying in answer to that well we haven't explored exactly how valuable this lost opportunity. I'm flagging that you might not need to weigh it too nicely to form the view that in the context of this agreement it was important.

MR GODDARD QC:
In my submission in response, which I say the Court needed to consider but did not consider because it dealt with it by way of concession was firstly you could only get to essentiality of there was an obligation and certainly in my oral submissions I challenged that squarely and I was treated as having conceded it, so the Court didn't consider the pros and cons of that argument.

ELIAS CJ:
Did you cite us authority for that proposition?

MR GODDARD QC:
I just referred to the language.

ELIAS CJ:
Yes.

MR GODDARD QC:
So it's a matter of interpretation and the Court hasn't weighed the various terms.

GLAZEBROOK J:

Sorry, you say you made it clear in your oral submissions and only in the oral submissions that it wasn't conceded that there was an obligation, is that –

MR GODDARD QC:

I made it clear in my oral submissions that it was argued that there was not. I didn't have to say that it wasn't conceded because I didn't think we were talking about concessions, I was simply making an argument.

ELIAS CJ:

You made the argument, sorry I thought what we were talking about here was not the concession but that –

MR GODDARD QC:

Yes exactly, I didn't think so either.

ELIAS CJ:

But the fact that in your oral submissions –

GLAZEBROOK J:

Sorry a bad way of talking about it.

ELIAS CJ:

In your oral submissions –

MR GODDARD QC:

I said first, I said there's no obligation and I said there's no obligation for two reasons. I referred to the "may" in 28.2 which I've been told –

ELIAS CJ:

Yes and the fact that there was no agreement as to the terms and therefore no ability to weigh whether it was essential.

MR GODDARD QC:

And the language of intention in the side agreement.

ELIAS CJ:

Yes.

MR GODDARD QC:

And then I went on to say that if there was an agreement then it was so devoid of content, of all the things that you would expect to see specified if it mattered to the purchasers, who's going to be managing it, is this a one year commitment? Because that's not worth – I mean the term is extraordinarily important. Could you satisfy this by offering a one year one or five or 10? If you can't answer that –

ELIAS CJ:

But there's nothing here, there's absolutely nothing. You can't even assess whether it's reasonable in the context.

MR GODDARD QC:

No and so if an assessment of reasonableness was needed then the Court needed to hear argument on that because that was also squarely on the table.

ELIAS CJ:

But all we've got is nothing as opposed to what might be reasonable. If what's reasonable is anything more than nothing you don't make it do you?

MR GODDARD QC:

No that's not right Your Honour because the question is whether it was possible to satisfy the obligation by proposing something that could have been put in place after settlement as well as before, because then there's no downsize.

ELIAS CJ:

Yes.

MR GODDARD QC:

So that's the comparison. The comparison is did Station have to do something before settlement that it would not be perfectly simple to do afterwards?

ELIAS CJ:

And do you say you made the submission to us orally but without expanding on it? I'm not sure how any mistake as to concession affects the fact that you had an opportunity to address us on it at the hearing.

MR GODDARD QC:

And I did and in my submission it was necessary for the Court actually to engage with that brief submission, not as the majority did to treat it as conceded.

ELIAS CJ:

Well what did you put forward in support of it Mr Goddard?

MR GODDARD QC:

The –

ELIAS CJ:

And assertion?

MR GODDARD QC:

No the language of –

GLAZEBROOK J:

Which was dealt with in relation to 28.2. We possibly misunderstood but I don't think I'm going to beat myself up over it.

ELIAS CJ:

No I think Mr Goddard's conceded he misunderstood in terms of section 28.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

There was a reference, I mean they're really fleeting references, there are references to statements of intention and expectation, there's an assertion that an agreement would not necessarily be a whole of complex agreement and there was the adoption of my suggestion that it could be done by a real estate agent.

MR GODDARD QC:

Yes.

ELIAS CJ:

Pretty opportunistic.

WILLIAM YOUNG J:
But that's pretty much the long and the short of it, isn't it?

MR GODDARD QC:
Yes Sir.

GLAZEBROOK J:
And I would suggest that all of those were actually dealt with in the judgment. It wasn't dealt with by way of a concession. Those particular points were dealt with.

ELIAS CJ:
Well I'm not so worried about that because whether that is so is something we might not want to engage on at the moment but even accepting that there may have been a mistake as to concession, if you said everything that you wanted to say on that, once that concession point is removed that's it, isn't it?

MR GODDARD QC:
I didn't say everything that I would have wanted to say on it. If first the arguments that the Court developed for the benefit of my learned friend had been made by my learned friend and I had had to engage with them, you have to always choose in the course of a hearing and even writing written submissions, what appears to be at the forefront of the argument should be focussed on and what is secondary. It's a healthy discipline given that –

ELIAS CJ:
But you haven't said anything further to us today on these points.

MR GODDARD QC:
I thought I had rather.

WILLIAM YOUNG J:
Well he has.

ELIAS CJ:
Have you? Oh.

WILLIAM YOUNG J:
Yes it's the last part of his road map.

MR GODDARD QC:
Yes the last part of my road map is a detailed explanation of this issue and I would have liked to say, if I thought my friend was running the argument that the Court developed, if the Court had put to me those propositions, rather than appearing to be broadly comfortable.

GLAZEBROOK J:
What about at the top of – in the submissions I thought Justice Arnold had put that exactly to you, which is what prompted the points that you ended up making. If you look at the top of page, oh I think I might've marked this on something else.

ELIAS CJ:
So it's your paragraph 5 really that you – 5 point 3, 4 and 5 you would like to develop.

GLAZEBROOK J:
Sorry yes the top of page 105 of the hearing and it's Justice Arnold put those points explicitly to you about the importance of that particular contract which is what prompted the options stuff and discussions which otherwise may not have arisen.

MR GODDARD QC:
So let me deal with both those questions. First in response to Your Honour the Chief Justice, whose question was probably sandwiched sorry between Your Honours.

ELIAS CJ:
Sorry, no, no it was I just –

MR GODDARD QC:
Yes it's 5.2 through 5.5. Then yes Your Honour I made I thought was a short submission saying the easy route to the answer is to agree with the Court of Appeal but actually there is more to it and then at 105 Justice Arnold, that was where Your Honour was taking me, put this to me and I made the point that I made to the Chief Justice earlier, "You have to ask whether it had been in place before, has a value that couldn't be achieved by entering into it after." And then in response to further

questions I said that, well I developed briefly the point that it was just an option so some people wouldn't take and the content is so sparse that it couldn't be thought to be essential. Now I accept that that is a potted version of what I have said today but two things about that, first and most importantly, it is the antithesis of a concession about content and ubiquity of the management agreement. So the statements in the majority judgment in my submission are, with respect, wrong on that. Then we come to Your Honour the Chief Justice's question which was an elegantly phrased way of saying "So what, don't you end up in the same place anyway?" I think that's what Your Honour was saying to me and the answer is no you don't because I have every confidence that if this Court turns it mind to the analysis that I have outlined today and steps through the issues, assessing whether I am right or wrong on each of those steps, the Court may well reach a different conclusion and I would urge you to do so and there's the world of difference between saying we can just move on past this and not analyse it in detail because it's been conceded in saying well the issue has been taken with this, we need to think it through and we have all had the experience of when we engage with the fine detail of something and go through it step by step, finding we end up in a different place from where we otherwise expected we might and that's what in my respectful submission would have happened if the Court, rather than attributing a concession to Station which it didn't make, had engaged with the short version of the argument here or better still the more developed version that I have had the opportunity to outline today.

ELIAS CJ:

All right, we'll reserve our decision in this matter. Thank you counsel for your help.

COURT ADJOURNS:5.49 PM