

BETWEEN **GREYMOUTH GAS KAIMIRO LIMITED**
GREYMOUTH GAS PARAHAKI LIMITED
GREYMOUTH GAS TURANGI LIMITED
GREYMOUTH PETROLEUM TURANGI
LIMITED

First Appellants

AND **SWIFT ENERGY NEW ZEALAND LIMITED**

Second Appellant

AND **GXL ROYALTIES LIMITED**

Respondent

Hearing: 5 August 2010

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
William Young J

Appearances: M D O'Brien and B S Clarke for the First Appellants
G M G Joe for the Second Appellant
J S Kós QC with M A Corlett and O C Gascoigne for the
Respondent

CIVIL APPEAL

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MR O'BRIEN:

Yes, if Your Honours please, O'Brien and with me my friend, Mr Clarke for the first appellants.

ELIAS CJ:

Thank you Mr O'Brien, Mr Clarke.

MR JOE:

If Your Honours please, Joe for the second appellant.

5 **ELIAS CJ:**

Thank you Mr Joe.

MR KOS QC:

If Your Honours please, I appear with my learned friends, Mr Corlett and Mr Gascoigne for the respondent.

10 **ELIAS CJ:**

Thank you Mr Kós. Right Mr O'Brien.

MR O'BRIEN:

Thank you Ma'am. As Your Honours will have gathered it is for me to lead the case primarily for the appellants. Mr Joe's essentially supporting. I do have,
15 Your Honours, some notes of what I intend to be an oral argument but I've reduced it to writing to save Your Honours notes.

ELIAS CJ:

How long is the reduction?

MR O'BRIEN:

20 It runs Ma'am to some six and a half, seven pages.

BLANCHARD J:

Didn't we issue a practice note?

ELIAS CJ:

We have issued it.

MR O'BRIEN:

I missed that Your Honour.

BLANCHARD J:

Everybody's missed it unfortunately.

5 **ELIAS CJ:**

If it will help focus your argument put it in Mr O'Brien but we really are reluctant to receive yet more bits of paper. Does it depart from your written submissions?

MR O'BRIEN:

10 In the sense, Your Honour that, or Your Honours, that it really addresses my friend's submission and assumes that Your Honours have read, as I'm sure you have, the existing written submissions. It's an elaboration rather than a departure.

ELIAS CJ:

15 All right, we'll see.

MR O'BRIEN:

And I'm very happy to do it without giving it to Your Honours and I understand why you wouldn't want more papers but I thought it might save you taking notes.

20 **BLANCHARD J:**

We might as well take it.

ELIAS CJ:

We'll take it thank you.

MR O'BRIEN:

25 I've had two cases with Mr Stewart QC in the past month and it seems to be his habit to hand up a written argument so...

ELIAS CJ:

Yes it is.

MR O'BRIEN:

5 And I must admit I did tease him about it Your Honours so it's quite right for me now to be teased.

ELIAS CJ:

What is quite beguiling is if people say they have a page. Six pages in this sort of format is a little bit –

TIPPING J:

10 Six dense pages, without being pejorative of quality.

ELIAS CJ:

Yes.

BLANCHARD J:

I think the practice note puts a maximum of two pages doesn't it?

15 **ELIAS CJ:**

Does it? It's never observed. Yes Mr O'Brien.

MR O'BRIEN:

It will be by me, Your Honours, next time I'm sure.

ELIAS CJ:

20 But we have, as you say, we have read the written submissions but you may want to move on through the points you want to make.

MR O'BRIEN:

25 Skip through things, thank you. So Your Honours you know, obviously, what the appeal's about and that's covered in my paragraph 1, and what I then would go on to say, that GXL appears to accept, from its submission, this rule which we promote, that if a reason for refusal is collateral to the purpose of

the contract, ie. the purpose of the consent clause, then it can't be a good reason and the reason will therefore be unreasonable. And they essentially accept that in 6.13 of their contract but they submit, of course, that it has to be a sole reason, ie. the collateral reason has to be a sole reason and that where
5 a good reason is held it can't cancel the reason. It can't vitiate the bad reason.

TIPPING J:

That's the nub of this case isn't it?

MR O'BRIEN:

10 It is, Your Honour, and they say that that must be the case here because financial purpose is, by virtue of the clause, a good reason.

YOUNG J:

It's a prerequisite isn't it?

MR O'BRIEN:

15 Well they say it's a prerequisite Your Honour. We say it's one of the reasons why, and indeed a primary reason under the clause why, consent could be withheld. But not a prerequisite per se, or at least not in the sense that it stands separately –

YOUNG J:

20 But not on a literal interpretation. There could be an unreasonable withholding of consent permitted save where the financial standing requirement is satisfied.

MR O'BRIEN:

I'm sorry, Your Honour, I missed something in there?

YOUNG J:

Well you could have, on a very literal interpretation of the clause, the unreasonableness are only obligation, or the unreasonableness problem from the point of view of GXL, only bites if the financial standing –

5 **MR O'BRIEN:**

Is met.

YOUNG J:

– is satisfied.

MR O'BRIEN:

10 Yes, and that's the respondent's case. My submission to Your Honours is that's not the right way to approach the clause, and what we need to do is look at the clause in its context, and I referred Your Honours to this clause.

ELIAS CJ:

15 Do you accept that if you look at it in its – just look at the text, then it does describe the prerequisite? Why are you driven to context? Is it because you accept that the text is against you?

MR O'BRIEN:

I accept that the text is slightly awkward in the context of what I propose but I wouldn't say Your Honour that it's against me per se.

20 **ELIAS CJ:**

Well can then we start with it and can you explain why it's open?

BLANCHARD J:

Why it's awkward.

MR O'BRIEN:

25 Yes we can start with that and, indeed, if I can, at the risk of burdening Your Honours with extra papers, it occurred to me, and I've spoken to

my friend this morning, it occurred to me that nowhere have we – no one's given you the clause in the context of the deed. I have a –

ELIAS CJ:

5 Yes I'd like to see that because I do want to check whether the punctuation is as reproduced.

MR O'BRIEN:

Yes well I think it is Ma'am.

ELIAS CJ:

Yes.

10 **MR O'BRIEN:**

Because there's a copy in my friend's submission but we do have these for you.

TIPPING J:

You've got to ignore the comma really I think to make...

15 **ELIAS CJ:**

Well, arguably the comma puts it beyond doubt.

TIPPING J:

Well.

20 **McGRATH J:**

How much weight could you put upon a comma?

ELIAS CJ:

Well wasn't Lord Haw-Haw hanged on a comma?

MR O'BRIEN:

25 That's a very good question Your Honour. That's a very good question. How much weight does one put on a comma, and that in part is why I would

say, you must read this in context because the broad background context to this is that these clauses, these sorts of consent clauses are quite common. And what I put in my written submission here is that, contextually, we've got to start with this proposition.

5

Property and property interests are freely assignable. That's clearly a basic principle of common law. And why is that? Well because it's a natural incident of ownership because it promotes commerce and it promotes economic efficiency. So free assignability and then any fetter, which is what we have here, has to be read first in that context. Now the fetter might be –

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ELIAS CJ:

But as you say these clauses are commonplace.

MR O'BRIEN:

Indeed Ma'am, and the drafting of them, as Your Honours will know, varies from contract to contract. But unless there's some clear – my submission would be unless it's very clear, then the general tenor of these clauses is this. One, free assignability; two, if there's a fetter against assignment then it could be absolute. It could simply say there's no assignment, to be no assignment, or it could say there's to be no assignment without consent. Now in either of those cases, but particularly the latter, the counter party will always seek to restrain the fetter and the common way of doing that is to say that consent cannot be unreasonably withheld. Most commonly, of course, that appears in lease clauses and there, of course, the constringer is the owner of the property. Conversely, here the constringer is the holder of a royalty. The holder of the property is actually the permit holder.

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25

So, Your Honours, my submission is, to take you to my paper I've really covered the first page and a bit, is at 10. The requirement – and this is an issue between the parties – the requirement that the required consent not be unreasonably withheld, or not be withheld if certain criteria are met, whichever it is, confines the fetter and it's to the benefit of the would-be assignor: here,

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the permit holder. It's a requirement in favour of that party and it can't be waived by the counter party, ie. in this case GXL. It can't be waived.

5 So Your Honour, Justice Young, that doesn't quite answer the question yet of whether the –

YOUNG J:

Well let's just say the clause stopped at 6.2...

ELIAS CJ:

7.2.

10 **YOUNG J:**

7.2, I'm sorry. It was just a blank, may not assign without prior consent or a precondition to obtain prior consent. That would be entirely at the discretion of GXL, wouldn't it, because there's no legislative overlay?

MR O'BRIEN:

15 I think that's right Your Honour. I haven't recently seen any cases which suggests that a requirement not to unreasonably withhold is necessarily implied across the board. Of course there is in the landlord/tenant context. There's the Property Law Act which imports the requirement for reasonableness, otherwise I'm not sure there is. But if it's simply said no
20 assignment unless the grantor obtains the prior consent –

YOUNG J:

It stopped after grantee.

MR O'BRIEN:

25 Sorry, grant, yes. Then, no, we wouldn't. Let's accept for today's purposes then that we wouldn't have this overlay to act reasonably. I'm not sure that's correct Sir but in any event, pointless, and arises here because we go on to the next but I'm not sure...

YOUNG J:

Well it did seem that the clause does rather suggest that the obligation not to unreasonably withhold consent is confined to circumstances where there is adequate financial capacity. Now that's the obvious interpretation of the clause because it does seem to be what it says.

MR O'BRIEN:

Well my submission read, in context, and against that background I've just mentioned, and the factual background which I'll come to in a little more detail, no Your Honour I would say that the requirement not to unreasonably withhold consent just applies universally and not only where –

YOUNG J:

How do we, do we put some words in there then?

MR O'BRIEN:

No I think we just –

TIPPING J:

Well I think you're taking words out on that premise.

BLANCHARD J:

You have to take the "where" out don't you?

TIPPING J:

You have to take the "where" clause out.

BLANCHARD J:

It seems to me that the natural reading of this is that first of all it has to be established that there is sufficient financial capability, that's obviously an objective test, there's no need for a reasonableness requirement, it's simply a matter of the assignee does or does not measure up.

ELIAS CJ:

Is that not what Justice Young is suggesting?

YOUNG J:

I think that's what I said.

5

BLANCHARD J:

Was it? Oh, I'm sorry then, well I'm agreeing with you then. And then beyond that, if the assignee gets over that hurdle, then consent cannot otherwise be unreasonably withheld?

10 **MR O'BRIEN:**

Well Your Honour in my submission, that's a possible reading, but in my submission the reasonableness requirement is really intended to permeate both, so for example –

15 **BLANCHARD J:**

Why do you need reasonableness in relation to sufficient financial capability, those words by themselves are the test?

ELIAS CJ:

Particularly when it has to be established.

20

TIPPING J:

It's that is either a fact or it's not.

BLANCHARD J:

25 But it's objectively determined obviously.

MR O'BRIEN:

Well –

BLANCHARD J:

30 And if it's objectively determined, it's reasonably determined, you don't need –

MR O'BRIEN:

But by whom Your Honours, so –

BLANCHARD J:

5 By the Court.

TIPPING J:

By the Court.

MR O'BRIEN:

10 Well ultimately by the Court, Your Honours, but that's not where the parties
want to end up, so of course the parties want this clause to work in
circumstances where the permit holder wants to make an assignment of what
might be a very, very valuable asset in which it has invested a considerable
amount of money. It does not want to end up in a Court, so the application
15 which it makes, with respect, is not to the Court, of course it's to the
royalty holder, so it's for the royalty holder then to determine whether financial
capability has been established – to what standard. Well in my submission to
a reasonable standard. It's not black and white, it's never black and white – it
might be black and white sometimes, but it's certainly not always black and
20 white. There might be a multitude of questions about financial standing,
financial position, assets, liability, equity, markets –

ELIAS CJ:

But it's in the context of ability to pay the royalty?

MR O'BRIEN:

25 Yes, well with respect Your Honour, probably more at least initially in the
context of an ability to actually undertake the permit obligation.

ELIAS CJ:

Yes, yes.

MR O'BRIEN:

Which will be in this case initially at least, it will be exploration –

ELIAS CJ:

Yes.

5 **MR O'BRIEN:**

Do they have the wherewithal to conduct exploration, i.e. to discharge the work permit obligations? I assume Your Honours know that when exploration permits are granted, the Crown requires the explorer to agree to a set of work obligations, generally the drilling of a well –

10

McGRATH J:

Over the limited period of the –

MR O'BRIEN:

Five years, yes exploration permits are granted for a period of five years.

15 If within that five years a discovery is made, then the permit holder has the right to apply for a mining permit and has what is more or less a right to be granted one over the area of the relevant discovery essentially.

TIPPING J:

20 Mr O'Brien, can I just ask you this. Because what it seems to me what your argument amounts to, and I want you to displace this from my mind if I'm wrong, is this – that if on whatever test is appropriate, there is no sufficient financial capability, and GXL says there's no sufficient financial capability here, that valid reason can somehow or other be gazumped if they happen to
25 have in the back of their minds the view that your clients are a pack of bastards and they don't want to deal with them, putting it very colloquially. But that can't be right can it – if I have a contractual –

MR O'BRIEN:

No it can't, Your Honour, and it's not my point.

30

TIPPING J:

It's not your point?

MR O'BRIEN:

No, not quite, my point's similar but it's not that one.

5

TIPPING J:

Well where does your point differ from that?

MR O'BRIEN:

My point is this, that the clause, if I may – either this clause requires them to, sorry. Either the requirement not to unreasonably withhold consent applies to the question of financial capability or, even if it doesn't, the clause still requires the royalty holder to properly consider the question of financial capability and in either case if it has no concern whatsoever with that, no heed for financial capability because its interests lie elsewhere, and I'll come to that, then, so it's not an idea in the back of its mind, it's in the forefront of its mind, it is the reason why it's refusing consent, then it is not acting within the contract and that in itself is a breach and that entitles the applicant, in this case Swift, to transact, that's the argument.

20 **BLANCHARD J:**

Even if the assignee does not have the sufficient financial capability?

MR O'BRIEN:

In extremis, Your Honour, even if, but, it would be readily apparent to any Court later testing it, that if it was clear that the party did not have financial capability, sufficient financial capability, then that could easily be inferred as a reason actually operating on the mind of the consentor, in this case GXL. So in extremis, perhaps, but in reality no.

ELIAS CJ:

I'm really having trouble understanding what you mean by, "in extremis". Are you saying that your argument takes you to that extreme?

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MR O'BRIEN:

It could do in theory.

ELIAS CJ:

Well it has to, doesn't it?

5 **MR O'BRIEN:**

Well my answer, Your Honour, is in practise it wouldn't because if it was clear, then of course they would simply rely on it. Our, my argument's slightly different. The argument for the appellants is, to put it in a factual context, is this: that and the allegation is that GXL simply didn't care about
10 Greymouth's financial position, didn't give a hoot because it was driven by other reasons, so yes it got financial information from Greymouth as set out in the submissions and in the counter-claims but it didn't – and it purported to be concerned about it, but the allegation is and it's a factual question, is that it just didn't – it just didn't. So on Your Honour – Justice Blanchard's example, if
15 for example the applicant was insolvent, to take an extreme case, then my answer would be, well in a case like that then the consentor not wanting to consent would seize upon that reason or later the Court would infer it to the consentor but in another case such as here where there is clearly a financial base and a substantial financial base but further information is being
20 sought and the process is being delayed, then one can say that if it can be shown after a transaction has occurred that the assignor, Swift, was right in assuming that the consent respondent, GXL, couldn't care less about the financial position, then that demonstrates, well that can – that is an allegation that can be made, it's a matter that can be explored and if it's established –

25 **ELIAS CJ:**

How could, how could they possibly not be interested in the financial position?

MR O'BRIEN:

Well Your Honour, that – good question of course. That is, that leads us to that factual inquiry which we want to pursue, which Greymouth wants to
30 pursue at trial. How could they not be interested? Ma'am, if I could ask you

to turn to that memorandum I just gave you, the memorandum which attaches the royalty deed. We may be a page short, I'll give mine to my friend. At the back there's a map and the map shows three permit areas.

5 **ELIAS CJ:**

Is this directed to your so-called collateral purpose?

MR O'BRIEN:

Yes Ma'am. How could they not care? Because their interests lay elsewhere?

10

ELIAS CJ:

Well I know you say that but surely their interests as well must have been in the financial capacity?

15 **MR O'BRIEN:**

The allegation is that it didn't have any interest in it whatsoever, Ma'am.

TIPPING J:

20 You're going to have all sorts of problems here as to how dominant the collateral reason is.

MR O'BRIEN:

Yes, we are.

25 **TIPPING J:**

It's a slippery slope and I wouldn't want to commit commercial parties on what seems to me not very well worded to be an ordinary clause into that sort of murky water unless it's absolutely essential.

30 **MR O'BRIEN:**

Well the case for the appellants of course in the High Court, the case in this proceeding, is that it doesn't rely solely on that at all.

TIPPING J:

But this approach surely says that what ostensibly looks like a good reason can be completely overwhelmed by a bad reason?

5 **MR O'BRIEN:**

Yes, Your Honour, it does, if the respondent, if the application for consent doesn't care at all and doesn't turn its mind to the reason, the good reason or the potentially good reason. So the point is really –

10 **ELIAS CJ:**

But then you do need to read in words. You need to read “in if the assignee –” if the, who is it, the –

MR O'BRIEN:

15 I've called them, very difficult, Your Honour, I've come up with this word formulation “consent applicant”, usually a tenant of course, and the “consent respondent”, the party who receives it.

ELIAS CJ:

20 Well you still have to read in if the grantee cares whether a purchaser has sufficient financial capacity?

MR O'BRIEN:

25 Well, with respect, Your Honour, I submit not. That you just have to accept the proposition that in a consent clause like this where the consent respondent is required, the consent respondent is essentially required to consider the application. So an application is made. Now either they've got to not unreasonably withhold consent, if that applies across the board, or, alternatively, and at least, they have to consider the application and in
30 considering it they cannot have, they cannot refuse for reasons that are clearly collateral – clearly outside the contract. So if here we took out the words “shall not unreasonably withhold” or take out “unreasonably” then surely the clause simply reads, and of course I would leave the word in, but it

would surely read “which consent shall not be withheld where it is established that the assignee has sufficient financial capability.”

YOUNG J:

5 Well even so, it still doesn't help you, does it?

MR O'BRIEN:

Well I think it does, Your Honour, because establish to who? It's not to the Court, with respect, because that's a process that comes later. This has got
10 to work in practice on a day-to-day basis so where it's established to who. Well it must be to – established to the consent respondent, here the royalty holder.

YOUNG J:

15 So you say if the consent respondent bona fide, but perhaps in the mind of the Court later, wrongly, concludes that financial capability hasn't been established then there's no part or sign?

MR O'BRIEN:

20 Correct.

YOUNG J:

It's a near run thing and –

25 **MR O'BRIEN:**

Yes, bona fide, exactly, but if it mala fide, doesn't care about it because it is motivated by other matters, I mean it's in breach –

YOUNG J:

30 But aren't these sorts of clauses normally seen as objective unless it's expressed to be subjective?

MR O'BRIEN:

Well in a general consent clause, i.e. let's assume one which ended here at the word "withheld" so – which consent shall not be –

5 **YOUNG J:**

Yes, if it got there I agree –

MR O'BRIEN:

– unreasonably withheld.

10

YOUNG J:

– it would be subjective.

MR O'BRIEN:

15 Then it's a two-stage enquiry.

YOUNG J:

So partly subjective.

20 **MR O'BRIEN:**

Partly subjective, what's the actual reason? What's the actual reason? Secondly, was it a good reason?

ELIAS CJ:

25 I'm not sure that I would accept that it's subjective even so.

TIPPING J:

It doesn't say "where it is established to the reasonable satisfaction of the whoever etcetera." Now surely it would say that if that was what was
30 intended?

MR O'BRIEN:

Well it could, Your Honour, but it equally could say what it says which is, "shall not be unreasonably withheld where." It's established this –

TIPPING J:

I read this as saying, if financial capacity is established, the grantee shall not unreasonably refuse consent.

5 **ELIAS CJ:**

Yes.

MR O'BRIEN:

Yes but established, Your Honour, to –

10

TIPPING J:

So it all turns on established to whose satisfaction then. This is what this argument really turns on?

15 **MR O'BRIEN:**

Well on that alternative argument my primary argument, or one of my two arguments, is that the requirement not to unreasonably withhold permeates the whole clause and is there for the protection of the permit holder and the permit holder being the party with the greatest economic interest by far –

20

TIPPING J:

So your first argument –

MR O'BRIEN:

25 – would want that.

TIPPING J:

– is permeation of whole clause?

30 **MR O'BRIEN:**

Yes.

TIPPING J:

And your second argument is “established to the reasonable satisfaction of the grantee?”

5 **MR O'BRIEN:**

Yes.

BLANCHARD J:

10 You're really arguing that it's saying “reasonably sufficient financial capability?”

MR O'BRIEN:

Well inevitably there has to be a standard of sufficiency. There has to be. Even if it were purely objective, objective to what standard? To a standard of 15 reasonableness surely?

ELIAS CJ:

But this argument has nothing to do with your collateral motivation argument. This is simply a construction of how the financial capacity is to be established. 20

MR O'BRIEN:

It certainly is the latter, Your Honour, but it does also have to do with collateral purpose because my, because I say on that that if the clause directs, and I say this one does, the consent respondent GXL to – well my argument is it 25 only allows GXL, in respect of financial capability, to consider financial capability, assuming there are no other reasons or assuming that it doesn't allow any other reasons.

ELIAS CJ:

30 But is anyone arguing to the contrary in respect of financial capacity? It is only financial capacity that they're considering.

MR O'BRIEN:

Yes Ma'am, and the second step is that if you then take account or don't consider it and focus all of your attention on some collateral objective, then you're acting in breach.

5

ELIAS CJ:

Well I would have thought –

MR O'BRIEN:

10 And that's the argument on that, Your Honour.

ELIAS CJ:

I would have thought that the issue for trial is simply whether it is established that the assignee or transferee had sufficient financial capacity, and if the respondent has flagged away reliance on any other reason, why don't you close on that and have it determined?

15

MR O'BRIEN:

Well the answers are several, Your Honour, but first it's not for them to flag away the reasonableness requirement and of course we accept they don't have any other reason other than financial.

20

BLANCHARD J:

They can flag it away if it doesn't relate to the sufficient financial capability.

25

MR O'BRIEN:

And if, Your Honour, with respect, and if the unreasonable requirement doesn't permeate the whole clause.

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BLANCHARD J:

That's what I'm saying.

MR O'BRIEN:

Yes. Well they –

BLANCHARD J:

And that's what they're purporting to do.

MR O'BRIEN:

5 Yes and as to that, again, two answers. One, the unreasonableness
requirement permeates the whole clause. That when you stand back that
surely was the intention. I'll come back to that in a minute. And secondly, but
even if I'm wrong on that, there's still a requirement for GXL to consider an
application for consent and in considering it, it can only have regard to
10 financial matters. If it has regard to other things, if they're the only things it
has regard to, then they're collateral and they're not permitted and there's a
breach. So I get, in my submission, the plaintiffs, counter-claim plaintiffs,
Swift and GXL, could get there either way. Now why don't we just flag it away
and focus on financial, why don't they? Because currently they say we have
15 two strings to our bow and we wish to permit both. We're simply seeking to
establish the facts in the case. If we're wrong, or if the trial Judge decides it's
irrelevant, then we can be penalised for the costs order. But for now, and at
this early stage of this proceeding, we wish to pursue it and, secondly, they
say it doesn't give rise to, yes it does naturally make for a wider scope of
20 cases and otherwise but not that much wider because, for example, GXL and
Todd on an application for discovery have said there's nothing extra relevant
to this question now, and I can refer Your Honours, I do refer in here to the
relevant affidavit, you don't have it, you don't have quite a lot of the material
but that's what's been said, there's no extra material. Now that's not – wasn't
25 accepted and there was a judgment requiring that some documents be
provided but it's relatively limited so the appellants are merely seeking the
opportunity to pursue their case in a way which seems to them, appropriate.

TIPPING J:

30 But they, the plea has to be irrelevant to the issue as we see it, doesn't it?

MR O'BRIEN:

Yes Your Honour, it does.

McGRATH J:

Mr O'Brien, can I just ask you, do you accept that the language, the way the clause is expressed contemplates a sequential addressing of the established financial capability establishment first?

5 **MR O'BRIEN:**

That's one reading of it, but in my submission that creates all sorts of problems in practice and it therefore ought not to be read that way.

McGRATH J:

10 Is it not a discrete issue?

MR O'BRIEN:

Financial capability?

McGRATH J:

15 Yes.

MR O'BRIEN:

Well the problem with that, Your Honour, seems to me to be this, that you could end up with a situation, quite easily, where the clause could be gained by the royalty holder, so for example –

20 **YOUNG J:**

It can be gained either way can't it? I mean the royalty holder may take the view that –

MR O'BRIEN:

Not so easily.

25 **YOUNG J:**

– you're gaining it?

MR O'BRIEN:

Oh well, they do allege it – in the submission anyway. Not in the pleadings.

McGRATH J:

5 So what's the problem with the royalty holder?

MR O'BRIEN:

Clause 22 in here covers it really, Your Honour.

ELIAS CJ:

22?

10 **MR O'BRIEN:**

Sorry Ma'am, not clause 22, paragraph 22 in my written note where I've got, what could happen if it were approached that way is a two-stage inquiry, royalty holder could assert financial capability hadn't been established, declined to otherwise consider the application, thereby delay and endanger
15 the proposed permit assignment, potentially put the permit in jeopardy because they're granted for a short period, effectively drag the applicant through a Court process focused solely on financial capability and then and then only, agree to deal with this so-called second stage, i.e. is there any other reason for withholding consent. So one could end up with further delay
20 and that again can't have been what was intended because the permit holder investing millions and millions and millions, potentially, tens of millions of dollars in this permit wants to be able to freely assign and whilst the royalty holder has a natural and perfectly legitimate interest in ensuring that an incoming assignee is suitable, there's got to be a limit on that and the limit,
25 which in my submission, they've chosen, you can't withhold your consent unreasonably.

BLANCHARD J:

But if they focus solely on sufficient financial capability, they won't be able to
30 raise these other matters afterwards, they're only getting one shot at this?

MR O'BRIEN:

That's right, Your Honour, well here that's right, here that's right because they're saying we don't have any other reason but when you're drafting this clause, it's not necessarily right, it could be anything, you don't know.

5

BLANCHARD J:

But they're not going to be allowed to approach this thing before the Court in two stages. They'll have to put up and everything they've got?

MR O'BRIEN:

10 You would hope so, Your Honour.

BLANCHARD J:

Well they will.

15 **TIPPING J:**

Well they've effectively said all we're relying on is the financials.

MR O'BRIEN:

Well in this case, in this case I hasten to add this point's irrelevant in the sense that they've said "no, we don't have any other", but from an interpretive perspective, this scenario I paint is highly relevant because it could happen. And even if a royalty holder –

20

BLANCHARD J:

But if they don't mention anything other than financials, it will be naturally taken that that is their only ground for objection.

25

MR O'BRIEN:

Well, Your Honour, what if –

BLANCHARD J:

They're only getting one opportunity. The Court will either order consent or not.

30

MR O'BRIEN:

Once it gets to the Court stage, but what if in the application stage letters passing between, meetings, whatever, however it's dealt with, the royalty holder says well, you need to establish the financial capability of the assignee and then we'll consider other reasons but you have an established financial capability so my requirement to reason, as my learned friend puts it, is not in play. I'm refusing consent or I'm declining consent because you haven't got over the first hurdle. If you get over the first hurdle, then I'll look at everything else, I'm busy – don't bother me with this until you get over the first hurdle.

BLANCHARD J:

I don't think that the Judge would be very impressed by that approach – it just doesn't seem to me that this is a very practical objection that you're taking.

ELIAS CJ:

And isn't it commercially really quite ridiculous to think that – well isn't it commercially sound that the clause puts the, requires the transferee to – transferor, to find a transferee who is financial capable. Doesn't it make perfect sense?

MR O'BRIEN:

Yes Ma'am, I completely agree. It clearly requires that.

ELIAS CJ:

Yes, so really doesn't everyone have an incentive to resolve matters if the clause is given its natural effect?

MR O'BRIEN:

Well it may depend on the natural effect, but yes in normal circumstances, but what if, as is alleged, the royalty holder doesn't want the permit to be exploited, doesn't want it to be exploited by the proposed – or doesn't want the proposed transferee to take the royalty, sorry to take the permit, because it wants it and it is in negotiations with the transferor.

ELIAS CJ:

But it seems –

MR O'BRIEN:

Which is exactly, with respect, what was happening here if one takes, except
5 with the GXL shareholder Todd, they were in negotiations at an earlier stage
prior to Greymouth purchasing –

ELIAS CJ:

But this collateral argument may loom perhaps a little too large in your client's
mind. I'm not sure why it has been so consuming in this case. But anyway it
10 maybe that we're just going round in circles –

MR O'BRIEN:

It wasn't intended of course, Your Honour – it's just that it was one of the
pleadings –

ELIAS CJ:

15 Yes.

MR O'BRIEN:

– and of course it went to the High Court, the Judge said fine that, you know it
could be relevant, let's leave it in, the Court of Appeal said no.

ELIAS CJ:

20 It's pretty consuming to come here.

MR O'BRIEN:

Yes.

ELIAS CJ:

I think we're going round in circles to some extent. Really the formidable
25 argument raised against you is that, financial capacity is sine qua non and that
is the only basis upon which the respondent in joining issue with you and the
question is whether matters should not proceed simply on that basis –

MR O'BRIEN:

Yes Your Honour.

ELIAS CJ:

5 – and from what you've said, I mean, do add anything you want to, to the argument, but for myself I cannot see how you get past the way in which this clause is expressed. I still don't understand how you get beyond the natural meaning.

MR O'BRIEN:

Well if I might have one more shot at that Your Honour?

10 **ELIAS CJ:**

Yes.

MR O'BRIEN:

15 Even if the unreasonableness requirement or the requirement not to act unreasonably does not permeate the whole clause, there would still be a requirement on GXL to actually consider financial position, why, because it has to be established – to whom, surely to GXL.

YOUNG J:

20 Well have you got any case in which, where an apparently objective condition such as this has been held to be in fact subject to the opinion of what you would call a consent respondent?

MR O'BRIEN:

Not –

YOUNG J:

Because quite often these –

25 **MR O'BRIEN:**

Not directly on point Your Honour.

YOUNG J:

– because normally where that is intended, the clause will say, will not be unreasonably withheld where the consent respondent is satisfied that financial capacity is there.

5

MR O'BRIEN:

With respect Your Honour that's what this effectively says.

YOUNG J:

10 Well I don't think it does, because it would be different. I mean it would be, I mean in some ways that would be a worse clause from the point of view of the, of your client or – because presumably that would, it would imply a sort of give and take, a shades of grey issue where the Court might think capacity had been satisfied but would accept that honest minds could differ.

15

MR O'BRIEN:

Mmm.

YOUNG J:

20 And that might be, going back to use your language, something which a consent applicant wouldn't much like. Would rather there be a backstop of a hard objective test with the right to have the Court address it as it were de novo.

25 **MR O'BRIEN:**

Yes.

YOUNG J:

30 And are there any cases where the Court has said, it looks as though it's objective. It looks as though it's for the Court to decide it but in fact we'll just defer to what the consent respondent said?

MR O'BRIEN:

Well there's simply – the best cases we've identified are those landlord/tenant cases and the related commercial cases where essentially the Court says, at least in respect of the general clause, you take this two-stage approach, subjective, what's the reason, is it actually a reason, and secondly is it a good reason. But Your Honour it is surely accepted, and indeed I think my learned friend accepts in his submission, that if the clause requires consideration of a particular criterion then it so requires it and not considering it would be – or acting for some other purpose would be collateral, and my submission is that even if you don't have the reasonableness requirement you must still have a requirement to at least consider the financial position.

TIPPING J:

You can take the risk but it won't be shown or will be shown that there was objectively sufficient financial capacity. That's where I get stuck.

MR O'BRIEN:

You can do Your Honour, yes, but –

TIPPING J:

But if you've got a contractual right, that right can't be displaced because you've got other thoughts in your mind.

MR O'BRIEN:

I would say to that if the other thoughts in your mind were the only thoughts that you actually had in your mind and you hadn't turned your mind to, properly to the actual contractual question, then yes it could.

TIPPING J:

Well you've either got the ability to say objectively this isn't sufficient financial capacity or you haven't. Now if you don't think about it at all, but you're lucky enough to be right, why does the law take the right away from you?

MR O'BRIEN:

Because you haven't exercised it. Because you haven't – because the right is actually also an obligation. The obligation is to grant consent if there's financial capability. If you haven't considered it you haven't actually performed your contractual duty.

ELIAS CJ:

Well you take the risk that it will be found ultimately that there was financial capacity so why aren't you – that's what happens in contracts, in enforcing contracts every day.

MR O'BRIEN:

Well that of course is the primary, or at least a primary, response to the claim here that the permit shouldn't have been transferred. There is, however, this second one which again the parties seek to put up and to test.

TIPPING J:

It's been held, hasn't it, that if you terminate a lease, for example, for a reason that doesn't stack up, you can actually rely on a reason that you didn't have in your mind that does stack up?

MR O'BRIEN:

Hold on, with respect Your Honour, I think that's not right. I think –

25 TIPPING J:

It used to be the law. Maybe someone's come along and changed it?

MR O'BRIEN:

I think, well the Woodfall cases and *Louis Vuitton New Zealand Limited v Prince's Wharf Property Fund Limited* (2005) 5 New Zealand ConvC 194,073 per Winkelmann J, cover it. If –

TIPPING J:

Well I'm not sure that they do. They're in a different genre.

MR O'BRIEN:

Certainly the case –

TIPPING J:

5 If I have a right to terminate a lease on two grounds and I terminated on ground 1, but unbeknownst to me I was also entitled to terminate it on ground 2, and I find that out later, but before the litigation, I can rely on ground 2, *Bell v Lever Brothers*.

10 **MR O'BRIEN:**

Yes I'm sure that's right actually, Your Honour, but it's different where you are required –

TIPPING J:

15 Oh yes, I agree entirely but the issue is, were you required here?

MR O'BRIEN:

Well required to consent and not to –

20 **TIPPING J:**

Well to consider.

MR O'BRIEN:

Yes.

25

TIPPING J:

It's not required to consent, it's required to consider –

MR O'BRIEN:

30 Yes.

TIPPING J:

– or were you entitled simply to say, I'm taking the risk. I don't care a damn. I'm not going to consent here. I'll take the risk as to whether I'm in or out of the objective test. That seems to me to be the law.

5

MR O'BRIEN:

Well my point, Your Honour, is you are required to consider.

TIPPING J:

10 All right. You are required to consider.

MR O'BRIEN:

You are required to consider. It's not enough simply to say I'll take the risk because this is a very important moment in the life of a contract, very
15 important, and you are required to consider it if you have the benefit of a consent clause in your favour.

Your Honours, I wonder if I might draw your attention to one other thing, which is not on – I can't take that any further. Well not today, not well, anyway.
20 But, factual matters, I've just made a note at the end of my paragraph 7, sorry at the end of my page 7, to the effect that there is factual material covered in my learned friend's submission. Some of it is not accepted and it's not based on the pleadings and it should just be ignored. It's not in the pleadings and if it's not in any – if it's not in one of the related cases it should be ignored.

25

And the point I make there that's apparent from those other cases, that there's now a mining permit, and Your Honour the Chief Justice asked why are other clients so concerned about this? Well Your Honour they've come in, they've actually explored, they've made discoveries, they've got a mining permit, so
30 why is GXL, if I may say, so concerned? Why are we still here?

TIPPING J:

Well we don't really worry about that.

ELIAS CJ:

Well we don't try and resolve that. That's for the High Court to –

MR O'BRIEN:

I know. Well, that's the point, Your Honour, that's the point. The appellants
5 want the opportunity to explore those matters with GXL and that's – I can't
add anything more.

ELIAS CJ:

Thank you Mr O'Brien.

MR O'BRIEN:

10 Thank you Ma'am.

ELIAS CJ:

Mr Kós, you've heard the argument, is there anything that you want to add to
your written submissions?

MR KOS QC:

15 Only to make one submission.

ELIAS CJ:

Yes

MR KOS QC:

Which is to say that the proposition that the reasonableness requirement
20 permeates both steps within the clause cannot, in my submission, be right,
and it resulted in my friend being driven to the proposition that if the Court
objectively would have concluded that sufficient financial capability had been
established, but the consent respondent had honestly reached a different
view, then the hard objective approach, as Justice Young put it, would be
25 displaced by the honest mind disagreeing. Now in my submission that's
simply not right.

What the clause provides for is a simple objective analysis first as to whether sufficient financial capability has been established. That is the most sensible commercial position to take because that is something that works, against which commercial parties can make a determination.

5

That is all I think I need to say. The rest is covered in my submissions. In my submission the correct, natural, reading of the clause is as we have submitted to you. So really, unless I can assist the Court further?

ELIAS CJ:

10 No, I should, however, have asked Mr Joe if he had anything to add and if there's anything that you need to respond to from him you may be heard again. Thank you Mr Kós. I'm sorry Mr Joe, I overlooked it.

MR JOE:

15 No, Your Honours, as my friend mentioned, the second appellant supports the appeal and submissions of my friend and I have nothing further.

ELIAS CJ:

Thank you. All right, was there anything?

MR O'BRIEN:

20 Happily for Your Honours, no, nothing to respond to on that, no. Thank you, Your Honours.

ELIAS CJ:

All right, well we'll consider our decision in this matter. Thank you counsel for your submissions.

COURT ADJOURNS: 10.49 AM

25