

IN THE SUPREME COURT OF NEW ZEALAND

SC 96/2006

BETWEEN **SOUTHBOURNE INVESTMENTS LIMITED**

Appellant

AND **GREENMOUNT MANUFACTURING LIMITED**

Respondent

Coram Chief Justice
Blanchard J
Tipping J

Hearing 16 April 2007

Counsel J G Miles QC and S A Grant for Appellant
P David and T G Herbert for the Respondent

APPLICATION FOR LEAVE TO APPEAL

10.04 am

Miles May it please Your Honours, I appear with Miss Grant.

Elias CJ Thank you Mr Miles, Miss Grant.

David May it please Your Honours Mr David and Mr Herbert for the respondent.

Elias CJ Thank you Mr David, Mr Herbert. Yes Mr Miles?

Miles Your Honours I think at the heart of the proposition is that there are several significant errors we would say in the judgment of the Court of Appeal, but they can probably be divided into those two separate areas. The first relating to the significance of clause 16 in the option and secondly the waiver issue on whether or not the vendors were entitled to insist on payment by personal cheque. Obviously it's the first issue I suppose that will be given greatest emphasis here, largely I think because it's going to depend on the findings on Your Honours' views on the specific findings by the Court of Appeal that clause 16, a special

clause added to the ADLS agreement, was regarded by them as an essential clause in order to complete as it were the transaction as far as the purchaser was concerned. Now that's a major issue, because what it amounts to is a finding that the standard ADLS agreement when used in circumstances where the purchaser is a tenant and hence requires a nominee to be insisted on

Tipping J Why would that be so Mr Miles, why couldn't the tenant just take title?

Miles Because then the tenancy and the ownership as it were becomes one.

Tipping J Or merge.

Miles And there's no longer a supply of a tenant because the tenancy becomes merged in the

Tipping J I follow, yes.

Miles In the ownership Sir.

Tipping J I understand, thank you.

Miles That was really the finding of *Pine*, an earlier judgment in the Court of Appeal and others, and I think that's accepted as being a relatively straightforward position of the law, so where there are circumstances where the tenant is the purchaser it's sound conveyancing practice to nominate a third party. Now what Their Honours

Blanchard J But how did clause 16 add anything on that question?

Miles Well I'd like to deal with that in two ways Your Honour. Could I take you to the judgment itself?

Blanchard J Well I'd rather you took us to the clauses and went through that because frankly at this moment I don't see that it adds anything.

Miles The crucial difference Your Honour, oh well we'll go to the clause, and you'll find them set out in our submissions at pages 2 and 3. We set out clause 12, which is the standard clause in the ADLS agreement, where the agreement provides for the purchaser to pay in addition to the purchase price any GST which might be payable and sets out the circumstances of which it's payable, then clause 13 is the clause dealing with the Going Concern, where if this agreement relates to the sale of a tenanted property

Blanchard J Well it did.

Miles Yes, no question about that Sir, then each party warrants it's a registered person and the parties agree that the supply made pursuant to this agreement is a supply of a Going Concern. Now, there's no

question about, but the key point of that clause is the reference to 'if'. If this agreement relates to the sale of a tenanted property, but it has to be at the time of settlement because the authorities make it clear that

Blanchard J Well that's for GST purposes

Miles Yes Sir.

Blanchard J But for the purposes of the contract it related to the sale of a tenanted property.

Miles But they've changed the terms Your Honour. Clause 16 removes the 'if'.

Blanchard J I don't think it does. I think the 'if' is removed even if you only have clause 13. It is a sale of a tenanted property.

Miles Yes but the test Your Honour is

Blanchard J The test for GST purposes is something quite different.

Miles Yes but that's the crucial, that's what clauses 13 and 16 are all about. They're all about whether GST is going to be paid at the time of settlement, and that

Blanchard J The GST Act doesn't say anything about sales of tenanted properties.

Miles No Sir, that's what clause 13 talks about. What clause 13 says is that if at the time of settlement

Blanchard J It doesn't say that.

Miles No but that's what the authorities have said that the time

Blanchard J But the authorities are about GST. This is a matter of construing whether the contract relates to the sale of a tenanted property, and quite clearly it does.

Miles But what if didn't ten days later? What if it didn't at the time of settlement?

Blanchard J Then the purchaser would be in trouble because it wouldn't have met its obligations.

Miles No, but the vendor has contracted out of taking the point, that's clause 13.

Blanchard J The vendor hasn't contracted out of taking the point. If the transaction is one where GST will be chargeable then the purchaser is obliged to pay the GST.

Miles But not at the date of settlement because clause 16

Blanchard J But that could arise under clause 12 as well.

Miles Quite.

Blanchard J It might happen that the Commissioner doesn't stumble on the obligation to pay the GST under Clause 12 until after the possession date.

Miles Oh that's accepted Your Honour, but that's not the effect that clause 16 has had on clause 13.

Blanchard J Well I just don't see it.

Miles Well let me try and persuade Your Honour to the contrary. Your Honour's with me I take it that it's at the date of settlement that GST is assessed.

Blanchard J Yes. But that doesn't mean it's not a sale of tenanted property at the time the agreement is entered into, which is what clause 13 is concerned with.

Miles I accept that entirely Your Honour, and would Your Honour accept that if only clause 13 was there, if at the date of settlement the tenant was no longer there then GST would be payable?

Blanchard J Yes.

Miles Now clause 16 purports to take that right away.

Blanchard J Take what right away.

Miles The right of a vendor to say 'if the tenant is no longer there GST must be payable'.

Blanchard Clause 13 gives that right.

Miles Yes but 16 takes it away.

Blanchard J I can't see how it takes it away.

Miles Well let me try and

Blanchard J I mean the second sentence of 16 acknowledges the position.

Miles That's a different point with respect Sir.

Elias CJ But is it different? It seems to be wholly consistent with

Tipping J I would like to hear Mr Miles explain how it is different.

Elias CJ That's why I asked is it.

Miles The crucial sentence is the first sentence in 16. 'It is acknowledged that the land is being transferred as a going concern and GST shall be assessed at zero percent'. What the Court of Appeal said, which I think was right, is that that took away the right of the vendor to insist on GST being payable at settlement in the event that the tenant was no longer there.

Blanchard J I don't think for a moment that it would have that effect.

Miles The Court of Appeal thought so Your Honour.

Blanchard J I just don't see how it could.

Miles Well the Court of Appeal thought it did. The Court of Appeal thought clause 16 was an essential add-on to enable the GST

Blanchard J Look, if at settlement it was clear that GST was payable the fact that there's an acknowledgement that GST is thought by the parties to be assessed at zero percent, can't override the GST Act and the rights of the vendor

Miles Of course it can't, well it can override

Blanchard J I mean it's fanciful to suggest that on settlement the vendor could be faced with an argument 'look we know that GST is going to be payable because it isn't actually a transaction as a going concern because we haven't set it up so that it is, or there's been some supervening event which has stopped that happening, but nevertheless we don't have to pay the GST'.

Miles In the circumstances I'm talking about GST will eventually have to be paid. The last sentence in that clause makes that clear, but that is only after it's been assessed by the Inland Revenue, and that would take months or possibly years later and by that stage my client Southbourne is then liable to pay GST. It hasn't got it in because clause 16 said it's not entitled to and it will then have to seek it as best it can from Greenmount.

Tipping J Is your point this, that the first sentence of 16 contractually inter-parties

Miles Exactly Sir, exactly Sir, so of course it's not overriding the Act, it's just saying we are now contracted into not taking the point of settlement.

Blanchard J I don't think that argument works because it's all on an assumption that clause 13 has been complied with and that in fact there is a supply as a going concern. If that's not the case the acknowledgement just falls away.

Miles Well what's the point of 16 Your Honour.

Blanchard J The purchaser couldn't rely on its own default in that respect.

Miles Well 13 says all of that Your Honour.

Blanchard J Yes.

Miles We accept all that so

Blanchard J Exactly. Well 16 has been added because somebody thought that it was necessary to have a belt and braces approach

Miles The Court of Appeal

Blanchard J But it's all there in clause 13.

Miles Well I agree Your Honour.

Blanchard J Well if you agree Mr Miles you've got no case.

Miles No, no. Well on your thesis Your Honour but not on mine, because I say that the first sentence of clause 16 alters the position.

Blanchard J It can't do so. If the position is not that the GST Act can be complied with so that it is a Going Concern. Otherwise the purchaser is just taking advantage of their own default.

Miles Well what's the point of the clause.

Blanchard J It doesn't have much point.

Miles Well don't we then get back into *Reporoa*? It's got to be precise acceptance.

Blanchard J Well it's a precise acceptance if all you've added is something that is in fact legally meaningless.

Miles That's not what the parties thought, that not what

Blanchard J Well it may not be what the parties thought, but contractual interpretation as you know is an objective science.

Miles Let's come back to *Reporoa* Your Honour and the reason

- Elias CJ But before you get on to *Reporoa*, you said that the second sentence was a different matter in clause 16
- Miles Yes Your Honour.
- Elias CJ Why does this condition not deal with a composite idea? Why is it different?
- Miles Because clause 13 is a standard clause and makes perfect sense. It says that 'if at the time of settlement the tenant is in place and there is a supply of a going concern then no GST is payable'. If it turns out that that's not the case and the Inland Revenue subsequently assesses it, so be it. The parties know exactly what their position is. At the date of settlement if a tenancy is in place, no GST, if a tenancy is not in place or if it turns out that one of the parties is not a registered person then GST is payable. And that's exactly what the Court of Appeal said a few years ago in *Fatac* as discussed in a later Court of Appeal in *Starrenburg*. The whole point was to get some certainty as to what the position was. Now what 16 purports to do is to alter that position by saying it is acknowledged that the land is being transferred as a going concern and GST shall be assessed at zero percent. The authorities make it clear that the time for assessment is the date of settlement. The clause is specifically inserted to ensure that as far as the vendor is concerned it has now acknowledged that it is a going concern as its settlement date regardless of whether it actually would be or not.
- Blanchard J What does the word 'assess' mean? Who's making the assessment?
- Miles Well the party making the assessment on the day but always subject to the next clause that if it subsequently turns out that the Inland Revenue has a different view, and of course if at the time of settlement the tenant has gone, the Inland Revenue will have a different view, in which case GST will be claimed, my client won't have got it in and it's only recourse would be to sue the tenant who may or may not have the money.
- Tipping J Mr Miles not having merely the expertise in this field of other members of the Court, I had originally read clause 16 as providing as a matter of contract the purchaser did not have to pay GST on settlement, irrespective of whether GST might ultimately have to be paid by the purchaser. Now that seemed to me at least arguably to be a materially different position than that attaining under clause 13.
- Miles That if I may say so Your Honour is put my argument as exactly as I would have liked it to have been put.
- Tipping J But I'm not at all sure how material the difference is between 16 and 13. That's I think where the other members of the Court are taxing you if you like

Miles Yes.

Tipping J Because that was my first reading of it, perhaps naively thinking that they must have been trying to add something or subtract something otherwise they wouldn't have put it in.

Miles They were and if you go to the judgment, that's what the judgment said.

Elias CJ Can I just ask this? Doesn't 16 simply mean that as between the parties there's not argument that this was the sale of a tenanted property.

Miles Correct.

Elias CJ But since it was the sale of a tenanted property, where does it take you?

Miles The crucial difference is it removes the 'if'. Now I appreciate that just removing

Elias CJ But there wasn't any 'if'.

Miles There is an 'if' in clause 13.

Elias CJ Well there is because that's a standard clause to apply to all transactions, but this transaction was a sale of a tenanted property.

Miles Yes, oh quite, so why is 16 going in there, what's the point of it?

Blanchard J The significance Mr Miles is that it's talking about if this agreement relates to the sale of a tenanted property. It's not.

Miles It's the next phase Your Honour, then GST will be assessed.

Blanchard J Yes, but my point is that it's relating to the agreement.

Miles Well it's relating I think to what takes place at settlement, because that's what the parties are interested in and it's specifically designed to ensure that come what may no GST will be payable.

Elias CJ If

Tipping J On settlement?

Elias CJ If

Miles On settlement, because that's all the parties are interested in.

Tipping J Well I had thought the focus was on settlement, notwithstanding that it might ultimately emerge.

Miles Absolutely, quite Your Honour, that's exactly the point, because settlement is when it all happens. That's all that the parties are concerned about – what the position is at settlement, and there's 28 days to go from the date of exercising option till settlement and as we all know tenants go bust, leases get rescinded, cancelled.

Tipping J What I need help with is in this particular case did it make any difference?

Miles Yes.

Tipping J I can see how theoretically it might make a difference.

Miles Oh well we don't know.

Tipping J If it was as the Chief Justice says, if it was in fact the sale of a tenanted property.

Miles Well it was never completed so we don't know.

Tipping J Well.

Miles We know that at the date the option was exercised or purported to be exercised, on the 27th or 28th or whatever of November, there was a tenant in place but looking at it from the point of view of the conveyancer who gets the acceptance of the option in, an experienced conveyancer knows that anything could happen over the next 28 days. The sorts of things that could happen

Tipping J Does it sort of shift the risk if you like?

Miles That's exactly what it does Sir, that's exactly what it does, because clause 13 recognises that the risk is neutral. If there's been a disaster and the tenant goes then GST is payable and they'll get a cheque for \$435,000 at the date of settlement - they're covered. This purports inserted of course by the purchaser to ensure that at settlement clause 13 on that specific isn't covered.

Blanchard J But if the situation is not on settlement sufficient to comply with the GST Act requirements, how can the purchaser take that point?

Miles Because the vendor has waived that point.

Blanchard J I don't think the vendor has.

Miles There's no question

Blanchard J You can't read the acknowledgement as just giving the purchaser carte blanche to ignore the requirements which have to be fulfilled in order that it is in fact a zero rated transaction.

Miles Well

Blanchard J I mean I think it's mildly ridiculous to suggest that the acknowledgement goes that far.

Miles Well what does it say Your Honour?

Blanchard J It's simply a statement of what they are intending to effect.

Miles Well that's not how it's worded though and if that's all they wanted they didn't need it.

Blanchard J But Mr Miles how could a purchaser on settlement say to the vendor 'oh yes we know we haven't got a nominee which is a registered person, or we know that there is now no tenant there but nevertheless you've agreed it's going to be zero rated'

Miles Well what's the point

Blanchard J It doesn't go that far.

Miles What's the point of the clause then Sir? If it's no further than clause 13 why is it there?

Blanchard J It's just a rather clumsy way of acknowledging the party's intentions.

Miles Can I keep coming back to the Court of Appeal Your Honour if I may, because if the Court of Appeal got it wrong, surely I'm entitled at least the leave to appeal?

Blanchard J Not if the point's going to get you nowhere.

Miles Well I accept that as a correct conceptual point Your Honour, but if you start with a proposition in the Court of Appeal that this is an essential clause then I would have thought I was a long way in, in asking for leave given the *Reporoa* requirement that the options have to be accepted precisely.

Tipping J I would have thought it might be arguable that whether this was a material addition if you like, should be judged at the time of the purported exercise of the option rather than as a result of what might later emerge, because you have to be able to posit at that time that there either is or isn't acceptance in terms of the *Reporoa* principle. The fact that it might ultimately emerge at 28 days or so later that in actual fact it was alright, doesn't give you the certainty of what it is at the time when it's purportedly exercised.

Miles Exactly Your Honour, and that point I suppose was one of the factors that Sir Kenneth Gresson had in mind in *Reporoa* and if I could just

take Your Honours, oh I can read it to you, but you'll find it in my list of authorities at tab 2, and at page 187 the paragraph which I suppose is the key paragraph, has always been cited, starting at about line 34 'a reply constituting the acceptance of an offer must be read with the offer to bring about a binding contract the offer and the reply accepting must be of and in respect of precisely the same terms. The offeree must unreservedly assent to the exact terms proposed by the offeror. If while purporting to accept the offer as a whole he introduces a new term which the offeror has not had the chance of examining, he is in fact making a counter-offer'. What His Honour was I think getting at there is that a busy conveyancing lawyer cannot be expected when faced with a new clause, particularly a new clause in a standard agreement like the ADLS agreement, faced with a new clause which has obviously been inserted to mean something, why when there's only two days to go before the option expires, the whole point is that they're not obliged to then start examining the significance of the clause.

Tipping J Well I would have thought what His Honour was also getting at was that you must be able to posit at the time of purporting exercise

Miles Precisely Your Honour, because that's the time which you look at whether or not it's happened.

Tipping J Well have you gone to a binding contract at that point?

Miles There's certainly been a binding, yes

Tipping J That's the point, it's not so much that later on it might transpire in the event that there was no malice if you like in the additional provision, that's the point that's slightly troubling me.

Miles And I appreciate His Honour Justice Blanchard's view that it doesn't add anything to it, but Your Honours have vast experience in this field. What you have to posit is the experienced conveyancing lawyer looking at this add-on and assessing what it may or may not mean, and the Court of Appeal, and I will come to if I may, come to the judgment now, because the Court of Appeal had no doubt about it and rightly or wrongly they took the view that it was essential term and you get that at para.41 of the judgment where they said 'clause 16 was also essential to satisfying the requirement of s.11(1)(m) of the GST Act'. At 42 they said 'without clause 16, the purchase agreement might not comply with the provision, and they give you an example of *Fatac*

Blanchard J Might not?

Miles Mm, well that is crucial Your Honour because that is why they say it is essential

Blanchard J But if in fact it did comply then it's not an essential provision.

Miles You mean if it was unnecessary?

Blanchard J Yes.

Miles Well then the Judge

Blanchard J That's something to be judged objectively.

Miles Then the judgment is wrong.

Blanchard J Possibly.

Miles Yes.

Tipping J I couldn't quite see why they say it was essential in the light of 13(1)(b).

Miles Quite.

Blanchard J That's my point.

Elias CJ Yes exactly.

Tipping J But I'm troubled on a different point, whether it be essential or not it's purporting to shift the risk.

Miles Exactly Sir and that's what I have been endeavouring to explain to Justice

Tipping J If something goes wrong between exercise and settlement – I know my brother Blanchard says oh well the purchaser couldn't possibly be heard to say that – but ultimately that might be the view of the Supreme Court, but in the busy world of conveyancing the party would just point to 16 and say sorry, you know

Miles It is acknowledged

Tipping J It is acknowledged so how can you possibly, and then you're going to have a

Blanchard J I just don't see how you could take advantage of your own wrong in that way.

Tipping J It's not your own wrong, it's the fact that between exercise and settlement something has happened which at least arguably makes it no longer a tenanted property.

Miles And I'm not sure it's your own wrong either Sir because this is a deal obviously between Greenmount and my client. If Greenmount goes

under in the interim is that really a term 'wrong'? It's not its own wrong in a sort of traditional sense it's

Blanchard J Well if Greenmount goes under your risks are somewhat greater than a non payment of GST.

Miles Yes but if we come back to

Blanchard J It's not a good example is it?

Miles Well it's quite a good example Your Honour because that's exactly what a conveyancing solicitor on the 28th of October has to bear in mind. It gets this extra clause saying that its client, the vendor, has acknowledged that that's going to be the case regardless of what might take place.

Blanchard J But if there isn't how can the acknowledgement stand.

Miles Well Your Honour is saying looking at this objectively with Your Honour's experience and analytical ability, you say that that's an unlikely proposition, but

Blanchard J I'm not saying it's an unlikely proposition, I'm just saying that an acknowledgement that something will be the case can't stand when it isn't the case.

Miles Well I think that's what the Court of Appeal said.

Blanchard J Well maybe they did but I just don't see how that can be so.

Miles Well doesn't that at the very least indicate that to some Judges, and then I think to a busy conveyancer that it's a

Blanchard J Well never mind the busy conveyancer, we're concerned with the objective interpretation.

Miles Well busy conveyancer on an objective

Blanchard J Busy Court of Appeal Judges.

Elias CJ I just don't see how the consequences are changed at all by this clause because it's only a going concern for GST purposes if it is tenanted, so if something happens in the interim and it's not tenanted at settlement then the second clause is operative but it's operative under 13 anyway.

Miles But Your Honour there is a very significant practical difference. The vendor has not got a cheque for \$430,000 in its bank ready to pay the Inland Revenue in the event that the Inland Revenue examines the position and comes to the view that GST is payable.

Blanchard J The vendor could refuse to settle.

Miles Well not

Blanchard J Plainly could.

Miles But this all comes back to Your Honour's assessment that the clause adds nothing, and if I can't convince Your Honour on that point then I appreciate there's a problem, but if I could, and I do keep coming back to the position of the conveyancer because

Blanchard J Well let's assume that the clause was slightly different and it said 'the purchaser will ensure that on settlement the land can be transferred as a going concern etc', and that isn't the situation on settlement, the vendor can say well I'm not settling.

Miles But that wording might be appropriate but that's not what the wording is in clause 16. The whole point

Blanchard J But it can't go further than that.

Miles Well that's what they're purported to do Sir.

Blanchard J Well not on my reading of it.

Miles Well what does acknowledge mean in that context?

Blanchard J It's simply an acknowledgement that that's what the position will be on settlement and if it isn't the purchaser is in default.

Miles But that isn't in the clause Your Honour, otherwise that's what clause 13 says.

Blanchard J This is Alice In Wonderland stuff.

Miles Well the Court of Appeal didn't think so Sir.

Elias CJ Just explain again to me, what do you say the purpose of the second sentence is?

Miles Yes I'm sorry, I was explaining the significance of it to Your Honour. Let me go back to the first point. What the parties want is at least certainty as to the GST regime and that's what those couple of cases that I mentioned earlier say that the effects of clauses 12 and 13 and s.11 set out to do. If it's tenanted at settlement, zero rating. No-one has to get a cheque in. If it's not tenanted, GST is payable and the vendor is protected.

Blanchard J How is the vendor protected?

Miles Because it has got its cheque.

Blanchard J Well how does clause 13.2 operate? Is it surplus

Miles Well that's the let-out that if there was an error somewhere

Blanchard J Well in that case there's no absolute certainty under clause 13 either. It might be a slip up.

Miles Oh yes, but, yes there might be Sir but that doesn't alter the effect that I say the vendor is now in. If I might just come back to just completing the

Elias CJ Are you saying there's more certainty for the vendor under clause 16?

Miles There's more certainty for the purchaser

Elias CJ Yes, for the purchaser under

Miles Under 16, because the purchaser has said come what may it's going to be deemed as being zero rated and I'm not going to have to pay you

Elias CJ But then it's in the event that Inland Revenue takes a different view.

Miles Yes Ma'am but that's a year later. That's when the whole deal is done and nine months, a year, 18 months later

Elias CJ But that's exactly comparable to 13.2.

Miles Yes exactly Ma'am, but my point is that if the tenant had gone under 13.2, the vendor would say 'pay me the GST'.

Blanchard J Regardless of the fact that it's obviously not a transfer as a going concern and that the acknowledgement is wrong.

Miles Well whether the acknowledgement is right or wrong, the acknowledgement as between the parties has been recorded.

Blanchard J It's an acknowledgement on an assumption of future fact. If the future fact doesn't transpire the acknowledgement means nothing.

Miles Well then there's absolutely no point in the clause.

Blanchard J Yes.

Miles Because that is exactly 13.

Blanchard J Yes, yes we agree on that.

Miles Yes, and the Court of Appeal is fundamentally wrong when it says

Elias CJ Where does that take you if the Court of Appeal's fundamentally wrong on this?

Blanchard J It doesn't help your case.

Miles Well it's a start Sir.

Tipping J It's not a bad start.

Miles I mean on a traditional basis it's not a bad start.

Tipping J You opened your argument by saying that it removed the 'if'.

Miles Yes.

Tipping J Now what you're saying I think Mr Miles is that it removes the 'if' because it anticipates what the position will be at settlement, rather than letting it be contingent?

Miles Exactly Sir, so that rather than be able to assess the position at settlement date, and the vendor saying GST is payable or GST isn't payable, they've now contracted out of that right. GST now will not be payable. If it turns out that it was payable then at best they've got a right of action against the tenant months or years later.

Tipping J They're not releasing the purchaser in all circumstances, they're simply saying we won't do you for GST on settlement.

Miles Today, on settlement, exactly Your Honour

Tipping J And that is anticipating an event that may actually be contrary to the fact but they are agreeing if you like to defer their right to reclaim the GST, they having to make a payment in the meantime themselves. That seems to me to be the best way of your clients' putting its case. I'm not necessarily saying I agree with it but that is the essence of the case isn't it? They're anticipating

Miles Exactly Sir, and its material because we've got a tenant who when it entered into the deal 18 months earlier did it on this basis because it couldn't afford to buy it. It's borrowed the full amount, the full \$3.5 million. The only reason it's been able to fund that is that the property has actually rocketed in value and it's now able to borrow the full amount, so we're not talking about the Bank of New Zealand here, we're talking about a relatively small company which may or may not have \$430,000 in nine months or a year's time. So it is material in that sense, a protection which a vendor is entitled to have, namely the GST, sitting in its trust account as it were has gone. The risk as His Honour Justice Tipping has pointed out has passed.

- Elias CJ But under clause 13 why does that risk exist?
- Miles Well under 13 the parties are in a position to make their own assessment on settlement date. If there's no tenant then it's easy, GST is payable. Under clause 16 no tenant, GST not payable because they've contracted out.
- Blanchard J So your argument is that under that clause even if there's no tenant there, and that's quite obvious, the purchaser who's supposed to ensure there is a tenant there is able to say to the vendor you can't take that point?
- Miles Yes Sir.
- Blanchard J That's your argument?
- Miles Now the second point where the Court of Appeal got it wrong, if I can take Your Honours back to the judgment, if you go to clause 54 it says 'we reject Ms Grant's submission on this first point. We hold that clause 16 did not depart from either party's contractual rights and liabilities in any material way'. Now firstly that is not an accurate statement of the obligations under *Reporoa*. The obligation is that the option has to be exercised in precisely the same terms the moment one re-phrases it to talk about in any material way, you immediately get involved with value judgments as to what might or might not be material and hence the certainty with *Reporoa* and the subsequent cases, *Gulf Harbour* and the others have continued to maintain as so significant in the conveyancing world goes. But equally fundamentally that whole sentence gets it wrong in my submission. It says 'clause 16 doesn't depart from either party's rights and liabilities'. It is irrelevant what the parties' contractual rights and liabilities are. All that is required under the option is that it has to be exercised by signing the standard ADLS contract.
- Tipping J I think what they meant was 'we hold that clause 16 did not depart from either parties' contractual rights and liabilities as they would have been without the clause.
- Miles Well it's an odd way of putting it Your Honour because I think what they are getting caught up in is an analysis of what they believe the party's agreement entailed, and when you go back to the previous few paragraphs you will see that fits in with their idea that the clause is essential to ensure that the agreement works. But that's not what *Reporoa* is all about. If the deal that they struck is unable to be exercised properly or successfully by the ADLS agreement, then it can't be accepted in the terms of the option. There is no room under this area of the law to add clauses to effect what they say the agreement was always intended to be. If you couldn't effect the agreement under the standard clauses of the ADLS then you're gone, and rightly so because the party should have contracted at the time to ADLS

agreement and any other clause that might be necessary to effect it successfully, or some other similar clause. But what they've done in 54 is got caught up in the concept of whether or not the contractual rights and obligations of the parties were and all that is required under *Reporoa* is that there has to be a precise acceptance of the terms. Once you add clauses you've gone.

Tipping J But if this clause 16 did not add anything or subtract anything, then surely *Reporoa* would be satisfied? Are you not saying that just semantically because it's there on the page, although it has no legal effect whatever in any substantive sense, are you Mr Miles?

Miles I would be reluctant to make that concession. I mean I understand exactly why Your Honour is putting the question and it has, I can understand why you're putting it. I keep though coming back despite the warning by Justice Blanchard that it's inappropriate, but I keep coming back to the position of the conveyancer faced with the further clause. The conveyancer as Justice Gresson pointed out obviously has to have a look at it, but is he expected to then have to analyse whether that clause has any further meaning, whether it adds or subtracts to the agreement, and if so to allow it or not.

Blanchard J Mr Miles *Reporoa* is only an example of the law relating to offer and acceptance. Your conveyancer or any other sort of lawyer will quite frequently in practice have to determine whether correspondence has formulated a contract. We can't put *Reporoa* up on some sort of pedestal, because it's only an example of a more general phenomenon.

Miles The reason I think it is though of such significance Your Honour is that every day countless conveyances rely on it and why it has worked for 50 years is because there is an elegant simplicity about the proposition.

Tipping J You're certainly looking for trouble if you add something. I mean that's part of what's troubling me in this case. To add something and then turn round and say well it doesn't actually add anything.

Miles But I suppose if I keep boring you by saying the three Judges in the Court of Appeal certainly had a different view.

Tipping J Well they thought it was essential which I find difficult but not for the reasons they gave.

Miles Well we all might find that difficult for varying reasons but what it does through up though surely is that that clause is something that we need to continue to put into perspective, to construe it, and we need further time to do so.

Tipping J I think with respect you're putting your para.54 point. Your para.54 is really no different from your earlier point Mr Miles in my mind. You're either going to get home on your earlier point or you're not

going to get home at all. The way they've put it in 54 doesn't seem to me with respect to add much to your ammunition and I'd be interested to know what you were saying about the deposit if you've effectively exhausted the, what I regard as the first point.

Miles Yes, I'll come to the deposit issue. Now, what Their Honours said about this is they cited *Otago Estates* understandably. After all that was the principal point being put up by my client and at para.56 of the judgment they state that the law on the issue has been authoritatively re-stated by the Supreme Court, the *Otago Estates*. They made the point that of course a personal cheque is not legal tender and there's a key sentence there in the middle of that citation 'a vendor who takes a personal cheque or knowingly allows his or her agent to do so, without objecting specifically to the form of the tender of payment as soon as he or she is aware of it, must expect to be taken to have dispensed with the need for payment'. Now the crucial phrase seems to me Sir who knowingly allows his or her agent to do so, and that was the point that they took up at para.57 where they say that Mr Foley would have seen at a glance that the cheque was drawn by Greenmount and that it wasn't until 4th November that Southbourne objected specifically the mode of payment. That was eight days later. In the interim the time for exercise of the option had expired. Now that is a very simplistic assessment if I may say so. The dates were roughly, not roughly, I think the dates were these Your Honours. The option was exercised and the agreement was sent in to Mr Foley, my client's solicitors on the Thursday morning, the 27th. He acknowledged receipt of the documents by fax that afternoon. He arranged to meet with his client, that's Southbourne, on Friday afternoon. There could be no possible suggestion that there was any unreasonable delay at that stage. Southbourne, Mr Dickey the Managing Director of Southbourne, hadn't seen the documents. He had no idea whether the cheque for the deposit was a personal cheque or a bank cheque. Now on the Friday afternoon he had to cancel the meeting because his father was in hospital with a serious heart attack; died some little while after that and he had to make arrangements to sort out that. That's in all the affidavits that have been filed. The option expired on the Monday. Now on Monday afternoon, the first time after the Friday afternoon that Mr Dickey could meet with his solicitors, he met him that afternoon and the following day Mr Foley faxed the solicitors for the purchaser saying we have some difficulties.

Tipping J Did he say something directly about the cheque?

Miles No he said we met with our client late yesterday. It has raised questions concerning the validity of the exercise of the option and on instructions we are obtaining an urgent opinion from counsel. We hope to receive that within the next one or two days. I've got copies of that correspondence here if Your Honours

Tipping J So effectively we're getting counsel's opinion on the validity of the exercise?

Miles Exactly, and that was on the Monday, sorry that was Tuesday morning. Now on the same day

Elias CJ But is your proposition relying on this sentence in *Otago Estates* that it's necessary for a vendor to have knowledge of the method of payment, because if so it will cut across a lot of agency law I would have thought Mr Miles?

Miles Well I'm just relying on that statement there Your Honour

Elias CJ Well do you have any other authority for that?

Miles Oh I thought the Supreme Court would suffice.

Elias CJ Well but this could knowingly allow the agent to make the determination of what's acceptable.

Miles Well I thought at least at the level of seeking leave that was probably sufficient authority.

Elias CJ Well is there any suggestion on the authorities that there's any doubt this proposition?

Tipping J Well it cuts into the area of ostensible authority, or implied authority as to taking of a personal cheque and it suggests that there is no such.

Miles Well at the very least it's raising some significant issues on the question

Elias CJ Which may be laid if one goes to the authorities pretty smartly which is why I'm asking you if there is any authority you are wanting to direct to us.

Miles Didn't look at it Your Honour.

Elias CJ No.

Miles I thought the statement in *Otago Estates* would suffice.

Elias CJ Well it's ambiguous as to that point.

Miles Well Your Honour it looks utterly specific to me.

Elias CJ What, that the vendor must know it's a personal cheque.

Miles That's what it says there.

Tipping J Or knowingly allows, that's the word 'allows' which is equally important with the word 'knowingly'.

Elias CJ If you leave it to your agent to deal

Miles Well I don't know that the point is so crucial here because my basic point is that both the solicitor involved and the vendor acted properly and with due despatch. In other words they couldn't be criticised for not instantly taking the point. They took the point as soon as the solicitor met the client. As soon as they'd had that meeting the client gave instructions to seek counsel's opinion. And they wrote to the purchaser's solicitors saying exactly that.

Elias CJ I was going to say they didn't need counsel's advice as to whether the tender was acceptable. Every conveyancer knows that a personal cheque is not legal tender unless accepted.

Miles Oh they were seeking an opinion on several issues, including

Blanchard J That meeting on the Monday?

Miles Monday afternoon, yes Sir.

Blanchard J Had the option expired by then?

Miles At presumably 5 o'clock that day.

Blanchard J Yes, so they had a meeting that afternoon, presumably noticed that the cheque was a personal cheque - it would be a bit surprising if they didn't, and said nothing until the next day when the option had expired?

Miles Yes that's right Sir.

Blanchard J Having already had a period over the weekend when I appreciate that your client had other things on his mind.

Tipping J We've got a finding of estoppel here.

Miles Mm.

Tipping J Without any clear examination of the evidence which I find a little surprising.

Miles There's absolutely none at all Your Honour.

Tipping J And when they talk about Southbourne's actions I would have thought if anything it was in their omission but that may sound a little pedantic but I'm not clear in my mind what action/omissions they, it must be

simply saying nothing for that crucial period of whenever the meeting was until 5pm on the day when the option expired. It's a

- Miles They're just saying eight days is enough, regardless of what happened.
- Tipping J Well that's one view of it. Well on the face of it if, but you can't simply say eight days is enough without knowing what's happened in the eight days.
- Miles With some analysis of what took place and what the affidavits said at the time, and I've actually got the four faxes that I can hand up to Your Honours if you would find it useful, but as I've said the purchasers' solicitors kept the, sorry the vendors' solicitors kept the purchasers' solicitors advised on each day as to what the position currently was and they got the opinion on Thursday or Friday and the moment they got the opinion they sent over and said the option hasn't been exercised validly, for a number of reasons including personal cheque and my clause 16 argument. It does seem to me Your Honours that the fact that the option had passed is actually a red herring. Again if I may come back to *Otago Estates*, Your Honours there pointed out that it's not up to the vendor to actually tell the purchasers what their legal position should or shouldn't be, so long as you don't mislead them of course, or in one way or another make it clear your waiving something. There's no obligation on their part to tell them to get it right and it does seem to me that that is particularly relevant where you've had an option that was sitting there for 18 months. If a purchaser chooses to exercise that option three working days prior to its expiry, you can hardly blame a vendor if it doesn't instantly right back and saying you haven't complied for the following reasons, and if it takes more than three working days to get instructions and the vendor has explained why it has taken three working days, then the fact that the option has now expired seems to me to be legally completely irrelevant. That's just the risk that someone takes if they leave it that long.
- Tipping J It seemed to me Mr Miles also that in this area that there must be room for people to get advice as to whether to take the point. There may be all sorts of factors that could come into a decision of that kind. Now if we're going to say that you're estopped after, you know what is it, two working days here, the Friday and the Monday?
- Miles Yes, exactly Sir.
- Tipping J Pretty tough.
- Miles Well it's just tough for those two working days Your Honour, but because the facts of this case happen to throw that issue up into real relief, namely total justification for not turning up at the meeting the following day, then having a meeting the next working day, and then the lawyers and the client being sufficiently responsible I would say, say this is tricky, I want counsel's opinion. Public policy I would have

thought would indicate that that is at least to be encouraged, not of course used as an excuse to delay indefinitely or to take points, in other words to be used as a cover for something that might have some other alternative

Tipping J There's no finding here and it would need to be explored whether they set out deliberately to ambush.

Miles There's not the slightest suggestion of that Your Honour and the Court came to this view bearing in mind a summary judgment, the Court came to this view solely on the basis that it was just eight days fullstop regardless of anything else and if I just add as a sort of postscript to this you will see a reference in the judgment to an affidavit by Mr Doughty, which is at para.57, where Mr Doughty, the purchaser's solicitors claims that he spoke to Mr Foley on the Friday and Mr Foley allegedly said 'I've looked at it; you've done everything; you've exercised the option; you don't need to do anything else; you've done everything you can'. Now quite apart from it being inherently unlikely that a conveyancing lawyer of the age and experience of Mr Foley making those comments, he filed an affidavit flatly denying it and what is more one of the faxes that passed between the parties over the next two or three days he flatly denied it.

Blanchard J Well the Court of Appeal quite correctly has not placed any weight on that.

Miles Oh quite Your Honour, absolutely, but the point I was going to make was the reason that I, and this is just my suggestion as a litigation lawyer, that the reason why the purchasers put that evidence in is they felt further evidence was needed indicating that there had been some real residing from the position initially taken.

Tipping J There's no active waiver here, at best there is an estoppel from silence.

Miles Exactly Sir, and the silence is nonsense because we have these faxes on the 1st November, the 3rd November, and the 4th November, all from Foley and Hughes, keeping the purchasers' solicitors aware of what was happening. On any view it seems to me Sir that the rejection of the right of my client to be able non-waiver on the facts

Blanchard J Non-estoppel.

Tipping J Non-estoppel.

Miles Non-estoppel, exactly.

Tipping J I was wrong, I thought it was a waiver but it's clearly here talking about estoppel as per *Otago Estates* and it's clearly not a waiver.

Miles Ah yes, no you're right Sir, it's estoppel.

Tipping J Sorry, I probably

Miles Yes and I actually went along with it

Blanchard J Well your argument basically is that the facts are not sufficiently clear cut to establish an estoppel and therefore summary judgment shouldn't have been entered on this grant.

Miles And they did Sir by ignoring the evidence that was before them, the faxes from the Solicitors indicating that they were being kept informed all along.

Tipping J I'd like to see those faxes if they are in evidence.

Miles Yes they are.

Tipping J They're not actually in the papers before us.

Miles They weren't in the papers but they were in the affidavits before the

Tipping J I think the faxes could be of some moment.

Miles It seemed to me they would be Sir.

Elias CJ Remind me of the sequence again. The cheque and agreement were delivered what

Miles They're dated the 27th October and they were delivered on the 27th, yes.

Tipping J Hand delivered?

Miles Sent in I think, but they arrived on the 27th.

Elias CJ And the date for exercise of it?

Miles 31st, which was a Monday.

Elias CJ 31st, so if *Otago Estates* is to be taken in its own terms when it says as soon as you're aware, I'm a little exercised by why. I can understand on the questions of whether the option was otherwise validly exercised it may be necessary to get the opinion of counsel, but on this question of whether the tender was legal, there would have been time for the purchaser to have remedied that deficiency and one would have thought that further facts might not really be helpful in the determination whether *Otago Estates* is to be taken to mean as it says immediately. Any comment on that?

Miles Well I think firstly Your Honour the solicitor would have to get instructions. A solicitor cannot make those sorts of decisions on his or her own.

Elias CJ Well that's really where I'm struggling because I would have thought that is exactly what solicitors do.

Miles I didn't mean on that reply they had to get counsel's view.

Elias CJ No I'm talking about the legal tender only.

Miles Oh no, no, they had to get instructions on the point

Tipping J Because they've got a right to reject.

Miles Yes.

Tipping J I don't think the solicitor would have ostensible authority to bind his client to a transaction which was otherwise not binding.

Miles Well no solicitor would dream of doing it anyway. They would be sued immediately.

Blanchard J I assume it was being made clear throughout that the cheque was not being banked?

Miles It wasn't banked exactly Sir.

Blanchard J No, I know it wasn't banked

Miles Oh, sorry.

Blanchard J But whether it was being made clear that it wasn't being banked.

Tipping J No I don't think that was made clear.

Blanchard J Well this may be a factual question that is still up in the air.

Miles I just don't know, I can't help Your Honour on that.

Tipping J It's not in evidence one way or the other.

Miles Would it show up on a trust account or something if it were banked?

Blanchard J Well it might if you happened to look.

Miles I don't know.

Tipping J How quickly the banks – you know you'd have to get a statement and so on. You'd have to make a specific inquiry.

Miles Yes.

Tipping J I just wonder whether it's emerged during the course of this interesting discussion that para.27 of *Otago Estates* might deserve some further attention with great respect to everyone who was involved in that case.

Miles Your Honour, speaking with the confidence of one who wasn't.

Tipping J No I was, I was, oh yes, yes, yes I was, I was just sort of be gentle about it. I was fully involved and you know it just shows you can't cover all bases with a single formula.

Blanchard J It's a question of what construction you put on the word 'takes'. It's not a statute.

Miles We regard the statements in the Supreme Court as coming very close if I may say so.

Tipping J Especially if they come from my brother Blanchard.

Miles Absolutely.

Tipping J That's why I was treading so very carefully Mr Miles.

Miles Well I'm conscious that I've probably gone over my allotted time

Blanchard J Oh only by an hour or so.

Miles Your Honours have been very patient. Is there anything else that I can add that might help my case?

Elias CJ If we think of it we will be sure to ask you Mr Miles, thank you. Mr David I think before hearing you we would like to have a short discussion so we'll take a short adjournment.

David Certainly Your Honours.

11.14am Court Adjourned
11.21am Court Resumed

Elias CJ Mr David we don't need to hear you on the first point, the clause 16 point, but we'd like to hear you on the deposit point.

David My submission focuses of course on the other point and having heard the exchanges this morning on the question on the deposit point I think it is important that the Court's decision is not, while the operative part of the decision is at the end of the judgment, there is at the beginning of

the judgment 13 and 14, a little bit of the background to the way in which the option was exercised, so on 13, and this came from the affidavits and there's obviously not much controversy about the factual position up until the time when Southbourne came back and said we don't accept that there's an acceptance, but it was on Wednesday that Mr Doughty telephoned Mr Douglas, and he's the property manager for Southbourne saying it's going to be exercised, and then Mr Douglas asked Mr Doughty to send the agreement and deposit cheque directly to the Southbourne solicitor, Mr Foley, and it goes to him on Thursday by courier, and that was present in all the affidavits. The courier was in fact arranged for the 26th, which is the Wednesday, but the material arrives on the Thursday and on Thursday evening at 6.49pm Mr Foley, the solicitor, acknowledges. So Mr Doughty then gave evidence that

Blanchard J Sorry, what's the form of acknowledgement?

David It was a letter at 6.49pm on the 27th October. Excuse me Sir I've had to go straight back into this material. But this was all in front of the Court of Appeal and

Tipping J But that acknowledgement was just acknowledgement of receipt of the letter, not acknowledgement of receipt of the cheque.

Blanchard J Where do we find that?

David No, no Your Honour, I beg your pardon Your Honour

Tipping J Para.18.

David Your Honour what happened was that the courier, and I'm reading from the affidavits, the courier to deliver the ADLS agreement and cheque was arranged for the 26th October, so that's the Wednesday. The courier was delayed. The package didn't leave the office until Thursday, so the courier goes on the Thursday and it's in the evening at 6.49pm on the Thursday that Mr Foley – ah, I'm just trying to find the right letter

Tipping J Well the finding of the Court of Appeal, or the reference of the Court of Appeal is para.18, where they say that Mr Foley endorsed a faxed copy of the letter

David Yes, yes. What happened is that he sent back from Foley and Hughes the letter had accompanied the courier and the ADLS agreement.

Tipping J Yes.

David So he faxed back 'received'. The letter read 'further to my telephone discussion with Mr Douglas', who's this landlord's agent, 'Mr Douglas has requested that the enclosed agreement for sale and purchase pursuant to the option be sent directly to you to arrange for the

vendor's signature'. So it went direct to the solicitor on the request from Mr Douglas – 'please acknowledge receipt of the agreement in duplicate and the deposit cheque of \$350,000, and he faxes back at 6.49pm 'received – Mr Foley', so, I'm just trying to get the timing right for the Court.

Blanchard J No that has to be an acknowledgement of receipt of both the agreement and the deposit cheque I would have thought.

David Because that was what was couriered and that's the point and I've had to dive back into the affidavits quickly for that.

Tipping J Clearly he didn't ever send a trust account receipt?

David No, no, nothing other than 'received' is sent on the Thursday. Um, I'm getting my days mixed up. On the Thursday evening the fact comes back 'received' and then the evidence was from Mr Doughty. 'I telephoned Mr Foley during the morning and he said that he had not looked through the agreement in detail but would do so shortly as he was meeting with his client that day, and that's the point we've now heard that the meeting seems to have taken place on Friday afternoon, and of course the option does indeed expire on the Monday at 5pm. So in my submission we are concerned here with as I see it the substantial miscarriage of justice ground Your Honour and I would submit that the Court had before it

Tipping J This substantial miscarriage of justice, I mean that depends on who's right and wrong on the legal point surely, I mean surely you've got more to say than the substantial miscarriage of justice issue – a sort of flagship point?

David Well Your Honour the point I was trying to bring the Court back to

Tipping J Are you saying this is such tough luck for your client that there is a substantial miscarriage of justice?

David Well one is tempted to make a number of points of that nature when you see the arguments that have been run throughout to avoid the exercise of this option, but they're not matters for this Court, but what I say is that it has to be in my submission something from which the Court would recoil and say that really is an affront to justice. In this situation the Court had before it the evidence of inactivity, and it's accepted it's inactivity, for two days with the cheque having been sent on the

Tipping J But if your client leaves it till the last minute, are you saying that the other side have got to sort of leap into violent action?

David No Your Honour I'm saying that the cheque's delivered

Tipping J Surely the only criticism could be that they weren't told on the Monday that the cheque was going to be regarded as invalid tender. I can't see how you could possibly criticise the other side other than on that basis. If you leave it to the last minute and someone's father has a heart attack, well that's for the risks of commerce I can understand the point that on the Monday they might have told you that they were going to give you a chance to get a bank cheque round but that's about the only point that I can see that's in your clients' favour.

David Well obviously Your Honour in the submission I make the point that there are other arguments to support. This is a situation which a deposit cheque could accept the offer because it's the difference between *Otago Estates*, which is payment under the agreement and an acceptance of an offer, but the fundamental point Your Honour that I make here on the leave application is that the estoppel argument is quite proper for the Court to reach the view that in these circumstances there was the time in which to make that statement 'we don't accept the cheque'.

Tipping J But he didn't know what his client's stance was going to be on this whether to take the point until at the very earliest the Monday, and you can hardly criticise them because of the circumstances in which the appointment had to be deferred. I mean surely all you can reasonably say Mr David is that they should have spoken on the Monday in time for you to get the bank cheque around.

David Well Your Honour yes that's the fundamental position is that they should have spoken and in these circumstances given the nature of this type of conveyancing option, it's not unusual for it to be exercised this objectively late in the piece. If you are going to take the point that this is not a valid contract because of the tender of a deposit cheque, then you ought to take it and speak quickly.

Tipping J But can you reasonably argue that they were in default in that regard until the Monday?

David I can reasonably argue Your Honour in my submission that's certainly open on the facts here for the Court to conclude that in these circumstances because objectively this is we have a one-day or two-day period when they have the material. In the circumstances where the law is on *Otago* is strict that there is a similarly strict timeframe for speaking up if you don't accept a circumstance in which, in this case for instance, Greenmount had a regular approach of accepting personal cheques. So if you don't speak in my submission Your Honour it's a counterweight if you like, the strictness of that estoppel argument and in some circumstances you would say well two days or one day is not very long at all but in my submission in the circumstances of this matter that's an appropriate period of time.

Tipping J Well that's not how the Court of Appeal reasoned it. They reasoned it on a very broad, you know, eight days is too long.

David Well it's correct to say that the eight days was taken and it may well be if you put the other interpretation on matters the parties here as Her Honour the Chief Justice said that one would expect the answer to come back quickly on whether you accepted the cheque or not, but it is correct to say that they took eight days to come back and say 'we don't accept' – 'we don't accept there's a binding contract'.

Blanchard J On the uncontested material, and that means putting aside the disputed conversation on the Friday afternoon, is there any more than Mr Foley has acknowledged that he's physically got the agreement and the cheque and is going to take his client's instructions?

David I'll just check Your Honour. Yes Your Honour's right, he gets the physical

Blanchard J So therefore isn't my brother Tipping right that the main point that you might be able to take is that on the Monday when Mr Foley did meet with his client and did get instructions, Southbourne – have I got the parties the right way around – Southbourne ought to have

David Yes Your Honour, that's right.

Blanchard J To have alerted them to the fact that there was an objection to the cheque

David Yes Your Honour, but

Blanchard J And by not doing so effectively it would be argued was making a representation that the cheque was not the problem and that there was a change of position because in reliance on that implied representation they didn't substitute a bank cheque before the option expired.

David Or run around with cash Your Honour or whatever one does.

Blanchard J Yes.

David That is in my submission mis-conveyance in context which we've heard a lot of on the other point. That isn't a wrong outcome in my submission when you apply *Otago Estate* to this situation, and it's certainly not in my submission something that one recoils from as an outcome. That ought to have happened.

Blanchard J But is this so clear cut that we should cut the matter off at this stage and not grant leave?

David In my submission Your Honour when one comes to a consideration of a situation such as this, and I'm not going to go back into substantial

miscarriages of justices and that's obviously something for the Court to consider, but in my submission it is that clear cut and there are no more facts. The only other factor of course is that the method of couriering to the solicitor was at the request of Southbourne. There was a phone call between Doughty and this Mr Douglas who said 'send it direct to our solicitor', so the process of it going through the solicitor, meeting with the client has been invited if you like by Southbourne, but I'm not sure that takes things much further on the timing

Blanchard J I doubt that it does. The solicitor was to be the conduit through whom the material would be placed in front of the client, but it can't have been expected that the solicitor without reference to the client would simply say yippee it's a deal.

David You'll have to accept that or are you going to go and see the client.

Tipping J When did the vendor, that is to say Southbourne, knowingly allow Mr Foley to take the cheque?

David Well it works like this.

Tipping J Well perhaps other members of the Court might prefer to adjourn because I think that's quite important. You've got to show in terms of *Otago Express* that the client, the company, knowingly allowed the solicitor to take – that means to receive with an understanding of what he was doing rather than ministerially receiving.

David Yes.

Tipping J When did that happen?

David Well it must be only on the Monday that there is a meeting. That must be the situation.

Tipping J Yes well I don't think anything happened

David I beg your pardon Your Honour.

Tipping J It can only then be based on some sort of estoppel and we don't know when, and when on Monday afternoon was the meeting? Do we

David I'm not sure, the evidence was simply Monday afternoon because

Tipping J Late on Monday. I mean I just don't think we can be satisfied that there's such a clear for an estoppel here that a miscarriage of justice might go the other way.

David Your Honour I hear what the Court's saying on the factual issues

Elias CJ But it's not really miscarriage of justice we're worried about here, it's whether it was appropriate for summary judgment to be entered when the issue is estoppel, which is usually quite facts specific.

David There's a further legal argument on the submission that Your Honours will have seen. This is an offer and acceptance case of course about what was required to accept the option and the option that's set out simply states that the deposit of \$350,000 shall be paid, and the Court of Appeal's used, when I say the estoppel argument, but the argument that was also put was that there wasn't in this context of acceptance of an offer, a requirement for payment of cash in terms of the *Otago Estate* as if settling a transaction, so that's a further legal point.

Tipping J Will you want to cross-appeal on that point?

David Well if

Blanchard J Or support the judgment

David If leave was granted, because there is a distinction here between

Tipping J But that's not arguing against the leave, it's saying what you're going to do if leave is granted.

David I suppose it could be if the Court accepted that argument on the documents.

Tipping J Oh I don't think it's at all clear-cut in your favour on that point.

David Well I can only say that that would be one of the points that's put forward, because Your Honours don't have the full documentation here of course but the right of first refusal within the lease expressly stipulated for a bank cheque and this option doesn't. This option says the payment of \$350,000 by way of cheque. Well it doesn't say that

Blanchard J Well in that case maybe you had to use cash.

David Well Your Honour I don't doubt the point to be made to cut the other way, but if the Court was satisfied, because this was an interpretation case, well what's the offer and acceptance here, and we've heard the I think the, with respect, the fanciful circum-infusion of the argument that clause 16 adds something. What I say about this point simply that in the context of this case the Court had before it the facts upon which it could properly make the finding in the context of this transaction. That here we had a party which had invited a transaction to take place in a certain way, had before it the material to assess the option, both as to terms and the cheque and on the Monday afternoon as the option is expiring did not do anything, and in my submission it's a clear-cut case. A fax should have been sent saying 'we do not accept this'. The

solicitor could have immediately taken up that point with the client. It is not a point that requires counsel's opinion.

Blanchard J Could have said we're going to get counsel's opinion and one of the things we're going to get counsel's opinion on is whether this cheque is a payment.

David I suppose that would then be an estoppel if it had reserved its position in that sense, it might not be an estoppel situation.

Blanchard J Yes, because that would have alerted the purchaser to the fact that they might have a problem if they wanted to just stick with that cheque and they might then race around to the bank and get a bank cheque.

David Yes. Your Honour in my submission it's a perfectly proper finding in this context, and that is important, and the context is established objectively here in my submission.

Tipping J You've got no finding from the Court of Appeal that the vendor had knowingly allowed the solicitor to do this.

David Well no, the affidavit evidence was that the vendor had said 'send it direct to Mr Foley, send the material to Mr Foley'. This wasn't a Mr Doughty who is Greenmount's solicitor saying I'll just send it to the solicitor, it was Southbourne's manager Douglas saying send it direct to Foley.

Tipping J Yes but there's no way as I see it that there's any finding or any clear evidence that the client allowed the solicitor to take in the proper sense of that word the bank cheque the personal cheque.

David He only mentioned it on Monday, that's what the evidence was, the meeting takes place on Monday, but it's the process by

Tipping J I think the Court of Appeal have disjoined two propositions which the way it's expressed in *Otago Estate* seem to go together.

David What I understand *Otago Estate* to be saying is that there may well be situations where in the context of the sale of property, there may well be situations in which that will be an estoppel if you do not raise the point. In my submission it would be virtually immediately. And that's what hasn't happened here and in my submission that's a proper outcome of this case, and that's what *Otago Estate* is looking at. If you had a strict rule that notwithstanding general practice - and this is the context of buying and selling property - if you have a strict rule that notwithstanding what could be said to be onus or custom that people always will present cheques, if you had that strict rule the countervailing point is if you're going to take the point you'd better do it immediately.

- Tipping J Well another point that might be relevant is that if you're going to tender non-legal tender you might have some obligation to make sure that it's going to be acceptable.
- David Well I think that does come back a bit to the context of exercising the option but that's a separate point and in my submission if a party in this situation receiving that material gets the personal cheque then it ought to be estopped if it doesn't raise it straight away. You have a cheque in front of you – the solicitor's had it for two days and been looking at it, and over the weekend – and on Monday the point doesn't come back. Now it's not my place today to talk about opportunism but I suspect there's an element of opportunism about that.
- Elias CJ There's a point of general importance though there Mr David isn't there? I mean you might be right in terms of ultimate outcome but what we have to be concerned about in looking at leave is whether this is a point which should be considered by the Supreme Court.
- David I appreciate that Your Honour. In my submission I would say that the decision itself is simply limited to what happened here in this case, and I'm not sure that for instance the Court would ever be in a position to say if you leave it one day, two days, you will have an estoppel.
- Blanchard J What about a simplified version where the personal cheque and the agreement arrive on the last day and the solicitor gets instructions from the client either that, well let's not complicate it, gets instructions from the client and the instructions are we'd better object to the cheque and perhaps other things and doesn't do anything until the next day - doesn't communicate that fact until the next day and meantime the option period has expired. The significance of the decision to say nothing until the next day is surely a question of general and public importance.
- David One can say that in all the situations that you could posit general importance on that basis, I'd accept that, but I'd say that the different situations of fact here, it wouldn't necessarily assist generally for the Court
- Blanchard J I thought I'd really boiled it down to what I see as perhaps the essential point that the other factual issues here are perhaps peripheral. The real question is having taken instructions on the Monday afternoon Mr Foley doesn't communicate that there's any doubt about anything until the next day and even then doesn't mention the cheque. Should he, to avoid his client being taken to have accepted at least the cheque have communicated on the Monday that there might be a problem with the cheque. That seems to me to be a point of some significance.
- David Well it's certainly of significance in this case.

Blanchard J I'm not saying that your client would necessarily lose the case on that basis, I'm just looking at whether there is something that is sufficiently arguable and sufficiently of general importance, after all that kind of simplified version must occur an awful lot in practice.

David And one will always have the difficulty of ascertaining for instance what goes on between solicitor and client to bring about that outcome, and that may not be something that comes up

Blanchard J Well if there's silence on the point, if there's no evidence given of what was said between solicitor and client, I would imagine that a Court would take it that no objection had been to the cheque.

David I appreciate what

Blanchard J So I suspect that if it came to trial Southbourne would have to be prepared to say what happened between solicitor and client.

David Yes Your Honour.

Blanchard J And that's a very provisional view.

David I would expect that they might well be Your Honour. If Your Honour puts it simply as an objective point, if whatever happens in that period, that short period when you have the material and you have a solicitor and client, that whatever happens, even if it's one day and you have the opportunity and say nothing, then you are estopped. If it's taken to that level I could see that if the Court said that that was the case it would be a matter for conveyances generally Your Honour.

Blanchard J Yes.

David I'm just thinking through the proposition but I think I'd probably have to accept that.

Tipping J I think it's a very important point of law as to how much weight one gives in these cases to the primary duty of the person tendering the money to tender in legal tender and how much we're going to come to the rescue of people who don't do it arguably properly.

David Well the argument here of whether it was to tender legal tender

Tipping J Yes well that's why I've put it that way.

David Yes.

Elias CJ But that's the point that you say you've indicated that you might raise

David Well the submission on the leave made the point there is an argument there

Tipping J If you get home on that point well then that's the end of any big issue, but I think it's quite important how easily we come to the rescue of people who on one view of it haven't done it right.

David Well the rescue may be

Tipping J I mean there may be a very good reason why your client couldn't get a bank cheque.

David Well no the reason that there was tender was that there was just a longstanding history of accepting a personal cheque, but that's

Tipping J I just think we've got to be very careful in this area and this seems to me to be a very good case in which to explore it a bit further.

Elias CJ It may well be of course that we wouldn't be able to be enormously helpful because the conclusion might be that this is a matter that would have to be addressed following evidence, including tax expert evidence of conveyancing practice.

David Unless there's anything further I can assist with you on the facts because there was more consideration of what actually happened in the affidavit evidence but I think we've got that clear now as to how this happened.

Elias CJ Thank you Mr David. Mr Miles?

Miles The only point Ma'am is that in one of those faxes – the fax of 1st November that I handed up to Your Honours, the fax from Foley and Hughes on the 1st November said 'we met with our client late yesterday'. The clear inference I think from that is that there would have been no time to have actually sent instructions that night. The option expired in all probability while the meeting was taking place.

Blanchard J Oh well we just don't know do we?

Tipping J I mean this is one of the uncertainties in the case which makes it surprising that it was the subject of summary judgment on this point.

Miles Oh absolutely Sir, I was just emphasising that the evidence is late Monday. I have nothing further.

Elias CJ Thank you Mr Miles. Thank you counsel, we'll consider our decision in the matter.

11.52am Court adjourned