IN THE SUPREME COURT OF NEW ZEALAND | SC 43/2014

[2014] NZSC Trans 23

BETWEEN | **WEST CITY CONSTRUCTION LIMITED**
Appellant

AND | **HENRY DAVID LEVEN and DAVID STUART VANCE as liquidators of St George Developments Limited (in liquidation)**
Respondent

Hearing: 17 November 2014

Coram: McGrath J
William Young J
Glazebrook J
Arnold J
Blanchard J

Appearances: P J Davey for the Appellant
D J Goddard QC and K C Francis for the Respondent

CIVIL APPEAL

MR DAVEY:
May it please the Court, counsel's name is Davey and I appear on behalf of the appellant.

McGRATH J:
Mr Davey.

MR GODDARD QC:
May it please the Court, I am here with my learned friend Mr Francis for the respondents.

MR DAVEY:
Yes may it please the Court, it was nine years ago to the month that West City started carrying out its side of the bargain and what was really a simple agreement that St George would assign the bond as payment to West City for the retentions that were due to it and for carrying out the additional pond works in accordance with the quote that had been provided. This all occurred outside the specified period and the appellant's position is the deed of assignment that was signed almost a year later in October 2006, was simply the transfer of bare legal title. The appellant's position is that the Court of Appeal erred in concluding that there was no intention to assign the bond in November 2005 and that there was no agreement to assign at that time. Secondly that in any event West City had completed the works that it had contracted to do by the middle of January 2006 which affected an equitable assignment before the specified period and further that West City did not, in fact, receive a preference because it had already obtained an equitable interest in the bond prior to the execution of the deed of assignment.

And really, finally, it would not be just and equitable to order repayment of the bond monies by West City. I have provided the Court with a summary of the key arguments which is really taken from the submissions that have been prepared and filed with the Court which hopefully will assist during the course of the hearing.

WILLIAM YOUNG J:
Can I just ask a question Mr Davey. Was the money ever paid? Where is the bond now?

MR DAVEY:
Yes it was. I must say I don't know –

WILLIAM YOUNG J:
So your client was paid the money.

MR DAVEY:

Yes I just don't know the timings of it actually.

WILLIAM YOUNG J:

That all right, I just wanted to know that.

MR DAVEY:

Also, annexed to the submissions I have set out a chronology which may assist the Court as well, at the back of the submissions, in terms of the facts of the case I mean. I don't intend to repeat what is already set out in the factual overview except, perhaps, just to highlight that this bond was actually paid by St George in November 2004 and it was actually a condition of the bond that that work had to be completed by the 19th of November 2005 otherwise the Council could effectively undertake the works itself and then take the monies it had paid to any other contractor out of those bond monies. It was then, there seems to be correspondence between the parties about the extent of these extra works that were going to be required for this stormwater pond because what had happened was St George had effectively run a pipeline down from another development that it had been developing, down to this particular development where the storm water pond was and the scope of the stormwater pond wasn't big enough for both developments and so this is why there was this requirement by the Council, effectively and set out in the correspondence to say look the stormwater pond isn't big enough, you are going to have to make it bigger to cope with these extra retentions.

So there was then, finally a pay-in in 2005 was approved by the Council, West City were asked to quote on it and then there were discussions between Mr Ireland and Mr Andersen where Mr Ireland stated that Mr Andersen agreed that he would pay for the additional pond works and the outstanding amounts under the original contract by assigning the Council bond monies to West City. Mr Ireland's words under cross-examination, "He had assigned the bond to me as payment for doing the extra work, the extra work in the ponds." And then there is the letter which has been the subject of some debate that Mr Ireland sent on the 6th of November 2005 saying that, "We are happy to carry out these works but the balance of the retentions need to be paid and we can't proceed with the planting and minor works until this is done." And then he said in his letter, "We understand you intend payment of these amounts from bond monies held by NSCC, the arrangement is acceptable provided it is done with a

formal agreement." And then it is not until some, almost one year later, West City then carry out the work bearing in mind that this work needs to be done by the 19th of November 2005 to comply with the Council requirements, carries out the work, completes it in terms of the quote by at least the middle of January 2006, again prior to the specified period and then subsequently the Council wanted some extra planting that was to be done which was carried out and then finally a final payment certificate is issued by the engineer in July 2006.

And then of course it is after that that Mr Ireland says he met with Mr Andersen, they signed the deed of assignment and Mr Andersen also signed the notice of assignment to the City Council and Mr Ireland said in his evidence, "This was done so that he could take it to the Council to get the bond changed over to West City." And it wasn't until quite some time later on 22nd January 2008 that Inland Revenue actually find proceedings to liquidate the company. It was put into liquidation in May 2008 I think it was and then there was correspondence between the parties and finally the liquidators issued this notice in November 2011.

So turning then to the first ground of appeal page 6 of my submissions. The issue really is whether the assignment of the development bond is an avoidable transaction and the key point here on behalf of the appellant is the wording of section 292 as it then was at the time. It refers to transaction as being, "Conveyance or transfer of property by the company or the incurring of an obligation by the company." And really the appellant's position is that this obligation was incurred prior to the specified period. And in deciding that, really, it comes down to this issue as to whether or not there was an intention to assign, an agreement to assign or otherwise an equitable assignment and the first matter there really is the critical issue really is whether there was an intention to assign the bond to West City back in around about November 2005 or thereabouts and the first point the appellant relies on in submitting that the Court of Appeal erred in considering that issue was that the Court said that clear words are needed to show that there was such an intention and relied on the decision *Tradegro (UK) Ltd v Wigmore Street investments Ltd* [2011] ECA Civ 268, but that case didn't actually deal with equitable assignments it dealt with really whether there was an intention to hold money on trust for another party. Whereas in my submission the established law is the High Court Judge found was that there are really no particular forms necessary for an intention to assign, the language is immaterial –

WILLIAM YOUNG J:
Where's the paragraph, sorry where do they say there has to be a clear, 25, para 23 sorry, I've got the wrong footnote.

MR DAVEY:
Have I put the wrong footnote?

WILLIAM YOUNG J:
No, no I've looked at the wrong one.

MR DAVEY:
Yes, at paragraph 23, so in terms of the language being immaterial there's the leading case of *William Brandt's Sons & Co v Dunlop Rubber Company* [1905] AC 454 where Lord Macnaghten made that point, the language is immaterial if the meaning is plain, all that's necessary, well in that particular case is the debtor should be given to understand the debtor's been made over the creditor, by the creditor of some third person. And then the Court of Appeal have also previously held *Hela Pharma AB v Hela Pharma Australasia Limited* CA 165/03, CA 206/03, February 2005 that an intention to assign maybe established by conduct. In my submission that's just consistent with general principles on which an intention of course can be derived and inferred from conduct or surrounding facts, and is just consistent with the general principle.

But what we have in this case actually is that Mr Andersen actually used the word, "assignment" and Mr Ireland's evidence on this was effectively the only evidence on this point that Mr Andersen agreed to assign the council bond monies to West City.

ARNOLD J:
Well it's not the only evidence is it, because you have got the draft deed which it is accepted when it was drafted in November 2005, if you look the recitals, there are two recitals C is the second one says, "St George has engaged West City." D says, "St George has agreed to assign the bonds to West City." And that can only have been drafted on instructions from Mr Andersen. So it's a clear contemporaneous indication that he saw an agreement to assign. Now whether it's enough is another matter but at least takes you some way down the road.

MR DAVEY:

Yes it was actually a point that I didn't put in my written submissions, but the High Court Judge actually picked up on this point and referred to it that recital D does record that St George has agreed to assign the bond and it's a point that I sort of put in my key summary, paragraph 4. So effectively it's a further acknowledgement at that point that there was an agreement in place in the appellant's submission.

BLANCHARD J:
Is there any explanation of the discrepancy in the figures. The bond was for $104,350, as far as I can see the total amount due to West City was about 98,000.

MR DAVEY:
Yes, no there's no, there's no evidence as to the reason for that discrepancy.

WILLIAM YOUNG J:
Is there a GST component though?

BLANCHARD J:
That's including GST.

WILLIAM YOUNG J:
Is 98 inclusive of GST?

BLANCHARD J:
Yes.

WILLIAM YOUNG J:
Maybe that the bond is just security for payment.

MR DAVEY:
Well –

GLAZEBROOK J:
What I was going to suggest if we're talking about security is an old fashioned mortgage like a full assignment with an agreement to assign back.

MR DAVEY:

Yes, no in my submission it was really the, it was always agreed that whole of the bond monies would be paid. Now I mean there were in fact extra works that ended up being carried out –

BLANCHARD J:
But they didn't know that at that stage.

MR DAVEY:
No, no they didn't. But then, I mean in who knows in terms of commercial arrangement, I mean West City have been out of its money, it was having to do these extra works whether there was – I mean essentially the two figures were relatively close, and so really from, it was really a commercial arrangement in the end that if West City did carry out these additional works, then it would be paid this amount of money, that's the appellant's position. And so what the Court of Appeal seemed to have essentially concluded is that to start off with that there wasn't in fact an assignment that really that it was just simply an arrangement that West City would be paid out of the bond monies rather than being transferred the bond itself so that what the Court of Appeal seemed to be saying was that, "Well it was just simply an arrangement where the council would pay St George money then St George would pay West City rather than the council paying West City directly."

But again that's in my submission, the words that were used by Mr Andersen were that it was words of assignment and this is also where the conduct's relevant in my submission in that West City actually instructed its lawyers obviously to create a deed of assignment, which effectively transferred the bond directly from the council to West City, sorry, St George instructed its solicitors to do that, and the notice to council that was attached to the deed, and this is at page 242 of the bundle of the case on appeal, specifically states, "Take notice that St George Development has assigned its right and interest" and this is the notice to the council, "In the bonds and North Shore City Council has directed to pay to West City Construction."

GLAZEBROOK J:
What page is that?

MR DAVEY:
Page 242 of the third bundle of – and this is what the High Court Judge obviously had the benefit of hearing and seeing Mr Ireland give evidence, and I should just add

really at this point, Mr Ireland's actually in the back of the Court representing the appellant here as well. He actually said well that he thought that Mr Ireland was really a man more versed in the subtleties of construction than in the subtleties of language, but he had no doubt that when he recorded his understand in the letter that he meant more than the bond money was to be the source of the payment, he wanted the right to receive that money. In my submission as I have said, that's the words that were used and that's consistent with the conduct and what Mr Ireland arranged with his solicitors. So that's really the first point is that there was an intention to assign.

The second point is really that the Court of Appeal was also erred in concluding that there was no agreement to assign in November 2005 because Mr Ireland had stated in his letter that subject to a formal agreement and the critical details not being agreed between the parties. And the Court particularly relied on a decision of *Mountain Road (No. 9) Ltd v Michael Edgley Corporation Pty Ltd* [1999] 1 NZLR 335 and the critical details not being agreed between the parties. And the Court particularly relied on a decision of Mountain Road and Michael Edgley Corporation Pty Ltd which involved a written assignment, but in that case the assignment document itself had specifically stated that the effective of the assignment was the date that it was signed by both parties. And the assignment had actually been signed by the assignor in 1990 but wasn't actually sent for some six years to the assignee for execution until 1996, and in fact haven't been signed at the time of the Court hearing, and the Court considered that really well the effective date on which it was supposed to have been signed by the assignee was, sorry the effective date was the date on which it was supposed to have been signed by the assignee because that is what the contract specifically provided for. Whereas Mr Ireland in this case simply stated in his letter of the 6th of November 2005, "The arrangement is acceptable provided it is done with a formal agreement."

WILLIAM YOUNG J:
Well I suppose there are a number of ways of looking at it. One is that the formal agreement that is contemplated is a formal deed of assignment which unduly was provided. The other is that in any event they went on with the contract anyway and perhaps that is a waiver, it is an indication of what the parties meant and it is not like an executor contract because they have actually done the deal, done the job.

MR DAVEY:

And that is one of the key points the appellant is relying on here, really.

WILLIAM YOUNG J:

Is that addressed in the Court of Appeal judgment?

MR DAVEY:

No it is not and it is one of the point that in my submission, relying on the *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] 3 All ER 1 case and also there is the decision also of Court of Appeal in *Fletcher Challenge Energy Ltd v Electricity Corporation Ltd of New Zealand* (CA 132-00) that the conduct of the parties afterwards is actually a highly relevant matter but the Court of appeal.

WILLIAM YOUNG J:

Well clearly there was a contract because work has been done and money has been paid or work has been done and it is really for the Court to decide what the contract is rather than focus on it and put under a microscope, the assignment component.

MR DAVEY:

Yes well the Court of Appeal actually stated that there was just an agreement in principle that point and that it wasn't a binding agreement.

WILLIAM YOUNG J:

But some of the issues that they deal with, for instance, as to when payment was to be made and what quality and what the requirements were, arose anyway. I mean on their interpretation of the contact there would still have been an issue as to when payment was to be made and so on.

MR DAVEY:

Yes, yes. Yes that's correct.

ARNOLD J:

Well on that would the parties have an overall agreement, an underlying contract in terms of which all the earlier work had been done.

WILLIAM YOUNG J:

Yes they did.

MR DAVEY:

Yes.

ARNOLD J:

And would that have governed this work or not?

WILLIAM YOUNG J:

Was it a variation or an additional contract. I had assumed it was an additional contract but I might be wrong.

MR DAVEY:

I mean it was really in effect a separate contract because it wasn't works that were covered under the original contract, in the sense this was extra works on the pond that hadn't been anticipated at all, that it was going to be required under the original contract.

McGRATH J:

But they could be a variation in terms of that original couldn't they?

MR DAVEY:

Yes they could, yes.

WILLIAM YOUNG J:

Have we got that contract, we have somewhere.

MR DAVEY:

We have only got sort of extracts from it, Your Honour, just at the beginning of the third volume of the case on appeal, just some of the main.

GLAZEBROOK J:

Nobody suggested it was an extension of the previous contract.

McGRATH J:

Well Mr Goddard does I think.

WILLIAM YOUNG J:

Mr Goddard does.

GLAZEBROOK J:

I meant the parties when they were actually contracting.

WILLIAM YOUNG J:

Is there a notice by the engineer or the sort of things that normally accompany a variation?

MR DAVEY:

No there was nothing along those lines that – it certainly wasn't part of the evidence and effectively it was really a verbal agreement because West City was actually asked to quote separately on a further plan that was approved.

GLAZEBROOK J:

Did they ask other people to quote on that, I just can't remember immediately.

MR DAVEY:

I don't think there is any evidence on that point but there is certainly no evidence anyone else was prepared to actually do the work.

GLAZEBROOK J:

Actually I do remember that, it wasn't that easy.

GLAZEBROOK J:

It wasn't that easy.

MR DAVEY:

Really the only party that could step in and do this at such short notice was West City to carry it out so that was, they were effectively the only ones that could do this week in the short timeframe that was required by the Council to have it actually completed. So really I mean the point perhaps that I have already made but it is supported by that *RTS Flexible Systems* case that really despite the fact that the parties contemplated this signing of formal agreement that they really intended to be bound immediately and the fact that the work, as I have pointed at paragraph 52 of my submissions, the fact that the work was performed is plainly a very relevant factor.

WILLIAM YOUNG J:

Just looking at the documents, if you look at page 183 of volume 3. They do seem to have added this on to the original contract price.

MR DAVEY:

Yes the works for certified, yes. They are certified for the works completed up to 30 November 2005, I am not sure actually whether there was certifications after that point.

WILLIAM YOUNG J:

Oh I see, so we don’t know whether that includes the new work or not.

MR DAVEY:

I think it does Your Honour because if you look at the amount that certifies $28,178.03 and then if we turn to page 184, it is for the Quail Drive pond works, it is an amount of $25,047 plus GST which equates.

McGRATH J:

Sorry where is that, this is on page 184?

MR DAVEY:

Down the bottom.

McGRATH J:

Yes I see, yes.

MR DAVEY:

Down the bottom there, there is an amount of $25,047.14 plus GST which I think will equate, we will see to the amount in the payment certificate on page 183.

McGRATH J:

And so this is a certificate for payment by the engineer, the works have been completed and this is the sum to be paid.

WILLIAM YOUNG J:

Okay so the engineers administered it as though it is under the original contract.

MR DAVEY:

Yes it appears to.

WILLIAM YOUNG J:
Was there a notice of variation given?

MR DAVEY:
Not that there is any evidence of, no. This was only for part of the works that were completed up to that point, up until the end of November, there is still further work to be completed on the pond which wasn't really finished. We know it was finished by the 16th of January when a further invoice was issued.

GLAZEBROOK J:
But no further certificate that we have got?

McGRATH J:
Well the next page has got something, that is the next step isn't it?

GLAZEBROOK J:
No that seems to be the same price.

MR DAVEY:
Page 186 is headed "Variation" but that was actually a variation to what, this was actually related to the extra planting that the Council required in about, it seems about April 2006 so West City by the middle of January 2006, they had done the works that were part of the quote that are part of the Council approved plan and the Council said, well actually we want some more plants put in and this was, as Mr Ireland said in his evidence, this was treated as a variation where further planting was required over and above the original quote for these pond works.

McGRATH J:
Yes 184 followed is it by 185 and it is a certificate for payment as at 16th of January, is that right?

MR DAVEY:
Yes and that was for the –

McGRATH J:

The previous one was 15 December.

MR DAVEY:
- That's right. So effectively the one on page 185 was for the whole of the pond works that were part of the quote that had been provided back in August 2005.

McGRATH J:
For which? So this in effect the final certificate then is it, well it may be still tentative but the final sum that is to be payable is the $23,995, at the foot of the page because the work has already been completed.

MR DAVEY:
I'm not – it was certainly, it refers to the amount as paid but it certainly doesn't seem to be – it refers at the bottom of the invoice but there's really no evidence that that actual amount was actually paid for that first invoice, and certainly when one looks at page 190 and 191, which was a letter that was subsequently sent by West City's accountant, the final claim referred to amounts that had been certified but not yet actually paid, totalling some $109,000-odd. So that $25,047 had been claimed but not actually paid.

McGRATH J:
Well it had been certified for payment?

MR DAVEY:
Yes.

GLAZEBROOK J:
You're not going to double up with two invoices, I suppose, so you have one invoice, or a number of invoices that add up to the sum?

MR DAVEY:
Yes, yes, yes –

GLAZEBROOK J:
And their computer system might just expect that you've been paid if you've invoiced.

MR DAVEY:

Yes, that could be the case, yes. So I think perhaps – I mean what the Court of Appeal appeared to really say was that Mr Ireland carried out this work in the hope that he was going to be assigned the bond but one matter that they didn't refer to, and one matter that was clear in his evidence, and wasn't challenged at all, was that he said that he had told Mr Andersen that he wasn't going to do any more work unless he was actually assigned the bond and so really that's one of the key pieces of evidence, in my submission, which I've referred to on page 12, line – paragraph 55 of my full submissions. The Court seemed to think that it wasn't surprising that he would just carry out this work without an assignment based on the long working relationships but the Court didn't actually refer to his clear evidence which wasn't challenged. I'm not doing anymore unless you assign me the bond. So – and in my submission that accords with the commercial reality as well, is that Mr Ireland wouldn't have just done this extra work in the hope that this was going to happen. That this was essentially a contract between two parties and that he intended to, for St George to honour it, and the unusual point in this case, in my submission as well, is that it's never been disputed by St George that there was this earlier agreement until the liquidators obviously have taken this point, but actually between the parties themselves, between Mr Ireland and Mr Andersen, while this, while these works were being carried, out, and there's never been any suggestion by St George that there wasn't a binding agreement earlier on in the piece at all and, in fact, as the High Court Judge, Associate Judge, pointed out, that when Mr Ireland came to actually have the bond signed over, it was all signed up without any demure or anything from St George, from Mr Andersen, so the parties, in my submission, have, their conduct is consistent with there being a binding agreement as well, their conduct afterwards. And it needs to be borne in mind as well that there are these time pressures as well involved, that the beginning of November when Mr Ireland sends this letter on the 6th of November 2005, there's time pressures that the parties are under. These works have got to be completed by the 19th of November. It's consistent, in my submission, with the parties just getting on with doing the job and working out the actual – getting on with doing the job and actually intending to be bound at that stage because the work just needed to be done.

Really, in my submission, when one looks at the High Court judgment, at paragraph 44, this is at pages 30 and 31 of the first bundle of the case on appeal, the High Court Judge sets out his reasoning as to why he considers that there was an agreement to assign back in November 2005 and there's some of these matters I've already referred to in my submissions which, in my submission, are consistent with

there being an appeal. The Court of Appeal on the other hand referred to a number of factors which really – which there was no evidence really of, for instance, the suggestion that the agreement had just been put in the bottom drawer. Perhaps that was because Mr Andersen didn't –

McGRATH J:

Whereabouts are you at now in the Court of Appeal judgment? Just remind myself, I have read it but remind myself of the points which, it was a series of points, wasn't it?

MR DAVEY:

Yes, so this is at, I think it's the bottom right-hand corner is page 41G of the first –

McGRATH J:

Yes, thank you.

MR DAVEY:

So the first matter that the Court of Appeal relied on was, "The agreement was drafted by St George's solicitors… was put in the bottom drawer as an indication that the issue of the parties entering into a contract to assign was shelved for the time being." Well, the problem is we didn't have any evidence from Mr Andersen. We don't know why he didn't arrange for it to immediately get signed. I mean it could have been oversight, it could have been just like Mr Ireland that really this wasn't of much concern, the actual formal agreement, and that Mr Ireland said he only really called for it because he needed to actually take it to the, have it formally signed over so he could take it to the Council.

BLANCHARD J:

Was Mr Andersen available to give evidence?

MR DAVEY:

No, he doesn't appear to have been.

WILLIAM YOUNG J:

There was quite a lot of evidence, they couldn't track him down.

MR DAVEY:

Yes, yes.

WILLIAM YOUNG J:
There was a file note.

BLANCHARD J:
So it's not a case where we can draw an adverse inference from the fact that he didn't give evidence?

MR DAVEY:
Yes, I must say I actually haven't thought of that point.

BLANCHARD J:
Well if he wasn't available, it would be a bit tough to draw an adverse inference that his evidence couldn't have been helpful.

MR DAVEY:
No, I agree, I agree Your Honour. But the point really is, is that in the absence of his evidence there was really, it was speculating to actually say the reasons why he might not have got it signed, that the Court of Appeal seemed to rely on. I mean the phrase "put it in the bottom drawer" was a turn of phrase that Mr Ireland used in his affidavit. Now whether it was physically put in a bottom drawer or what was actually done with it or not, who knows, but the point really is more that the Court actually relied on that as an indication that the parties had shelved a contract at that time whereas there could have been many reasons and so my submission was it is speculation.

Further the Court relied on the fact that West City continued to submit invoices for further work but those invoices in my submission as could be seen the engineer would need to actually sign off that the work had actually been completed and done so that in my submission doesn't indicate that there wasn't an agreement back in November 2005. Again the fact that a letter was sent by the company accountant in June 2006 setting out the payments that had been, those matters that hadn't been claimed and those that had. Again in my submission that doesn't take things any further. Mr Ireland says he wasn't actually aware of that letter being sent out and in any event there needed to be the final completion certificate signed off by the engineer in order for the retentions to be released.

The Court also relied on the fact that deed of assignment was executed on 3rd October 2006 with a new entity but the case was being run by both parties in the High Court was that really there was no real issue the fact that there was this change of entity in September 2006, both the new West City construction and the old one were treated as the same and the Court seemed to think well that was why there was this deed executed on 3 October 2006 to take into account the fact that there was this new entity then. But as we know the Deed was actually prepared back in November 2005 when there wasn't any suggestion there was going to be a new entity for West City construction at that time. So my submission again that's not a factor as to why the deed would have been executed at that time.

BLANCHARD J:

Presumably the new entity was simply taking over all the rights of the old entity?

MR DAVEY:

Yes effectively yes. Though there wasn't actually any evidence on that because it was never really an issue in the High Court at all about that but the Court of Appeal seems to have made it an issue here in terms of saying, well that's why there was this new deed entered into at this time but as I have said we know that the deed was created around about November 2005 and there was never any suggestion that there was going to be a new West City entity, some nine, 10 months down the track. So again it is another factor that in my submission it is not particularly relevant or not relevant at all really. So really the one key point that the Court of Appeal didn't, of course, take into account was the fact that West City had actually carried out this work, completed it.

WILLIAM YOUNG J:

Is that actually mentioned or not?

MR DAVEY:

Sorry?

WILLIAM YOUNG J:

There is a difference between an executed and an executory contract mentioned in the Court of Appeal judgment.

MR DAVEY:

No, not as far as I am aware, Your Honour, no. Now the Court also said, well there is only agreement in principle because some important matters haven't been agreed such as whether or not the works need to be completed to the satisfaction.

WILLIAM YOUNG J:

So just pause there. Just one thing, sorry, just on that line of thought. I take it from the material we were shown that work had been carried out before January 2006?

MR DAVEY:

Yes.

WILLIAM YOUNG J:

So to that extent it was executed when the specified period started?

MR DAVEY:

Yes before the specified period started.

WILLIAM YOUNG J:

Not completely executed but in part executed?

MR DAVEY:

Yes well certainly the vast majority. The only extra work that was carried out after that was this planting the Council required for the pond.

BLANCHARD J:

But that was a separate matter wasn't it?

MR DAVEY:

Yes it only arose.

BLANCHARD J:

Well put it this way. It wasn't part of the obligation that was incurred in October by West City.

MR DAVEY:

No, no, it wasn't part of the original quote that they put forward and that is why Mr Ireland says in his evidence that that extra planting was treated as a variation,

and there is the word "Variation" on that invoice that I referred the Court to earlier. But the Court of Appeal seemed to think that there wasn't an agreement because of this fact that that hadn't been, there wasn't an agreement as to whether or not the work seemed to be completed to the satisfaction of the Council or not.

BLANCHARD J:

Was there any issue about the Council being dissatisfied with the work that was done pursuant to the arrangements made in October or did the Council simply require more?

MR DAVEY:

The only evidence on that point really is from Mr Ireland.

BLANCHARD J:

Is there any evidence that the Council required some of the October work to be redone?

MR DAVEY:

No, no he just says that, "It was requested to undertake further planting of the pond to comply with Council requirements. This was treated as a variation to the quote that was given for the additional pond works."

BLANCHARD J:

And you say that all of that October work, if I can call it that, was done before the beginning of the two year period.

MR DAVEY:

Yes.

BLANCHARD J:

Are you going to come back to paragraph 40(f) of the Court of Appeal judgment. In there it talks about it, "Being surprising for West City to have surrendered its rights of recovery in exchange for an assignment when the bond might never be released or if it was at some distance time in the future" Where does this notion that West City was surrendering rights of recovery come from?

MR DAVEY:

I'm not sure Your Honour, it certainly doesn't seem to be from the evidence that it was, it wasn't actually covered off in the evidence at all as far as I recall. I mean Mr Ireland's explanation was that he thought that the bond was actually going to be released shortly after the works were done initially but then he didn't realise that the Council actually then put on a two year maintenance period to require this pond to be looked after before he could lease the pond so he said in his affidavit –

BLANCHARD J:
That's not quite my point.

WILLIAM YOUNG J:
Is the point, the letter Mr Ireland wrote said the money will be paid from the bond and has that been taken as indicating that the dealers will do the work and we get the bond and that's all, as opposed to we'll do the work, we'll probably be paid out of the bond, but our right to sue you remains. Our expectation is the bond will cover it but, if not, then of course we're entitled to be paid.

BLANCHARD J:
Yes, that's the point I was leading up to.

MR DAVEY:
Yes.

BLANCHARD J:
It's not necessarily unfavourable to you. I was just puzzled by what the Court of Appeal had said.

MR DAVEY:
Yes. I mean it's certainly the appellant's position that was the deal was that payment would be made by the Council with the bond monies or those bond monies would be assigned and effectively West City would get paid out of, get paid from those funds.

WILLIAM YOUNG J:
Well the question is what happens if there's many a slip twixt cup and lip and for some reason or other the bond wasn't paid, was West City entitled to recover the money from St George. This was something I asked you earlier, but the simple deal

is that it's simply security for payment, with the clear expectation that it will honour – will, in fact, respond and cover the payment.

GLAZEBROOK J:

And is that necessarily against you if it was security for payment by way of assignment. By way of security it's still an assignment but subject to a, and I'm not sure what the answer to that is.

WILLIAM YOUNG J:

I assumed that it really was security, it was a charge, and I've been looking at it – I thought the case was really a section 293 case, I think, rather than a 292 case.

GLAZEBROOK J:

Yes.

MR DAVEY:

Yes. I mean the, that's true. It's probably not, it's perhaps not necessarily against the appellant but in terms of –

GLAZEBROOK J:

Well whatever, you're outside of the period, aren't you.

WILLIAM YOUNG J:

You're still outside of the two year period.

GLAZEBROOK J:

Whether it is a true, an old fashioned mortgage, ie, an assignment with an agreement to assign back, or to take the funds.

MR DAVEY:

Yes.

GLAZEBROOK J:

Or whether it's an actual assignment and that's the end of it.

MR DAVEY:

Yes.

GLAZEBROOK J:
And that's the end of it might be slightly odd just, although given what Mr Ireland's understanding was, it mightn't have been as odd as the Court of Appeal makes it sound, because his understanding was the money, the bond money was going to be released as soon as the works were done.

WILLIAM YOUNG J:
And he was in control of the work and therefore in control of whether the bond money was going to be paid.

GLAZEBROOK J:
Yes.

MR DAVEY:
Yes.

GLAZEBROOK J:
So it's not very odd. Not as odd as the Court of Appeal seems to make out.

MR DAVEY:
Yes, yes. That's essentially my point. Unless the Court has any further questions those are essentially my submissions on the point as to whether or not the Court of Appeal erred in concluding that there wasn't an agreement to assign at that point in about November 2005.

But the other alternative argument, really, is that there was, in any event, by the time that the work was carried out in accordance with what the parties had agreed by January 2006, that there was an equitable assessment because effectively the consideration had been executed and that was again before the end of the, before the commencement of the specified period, and I've referred that at page 16 of my submissions. Effectively what I'm saying is at that point St George's conscience was bound. Equity would have regarded that they'd done which ought to be done and accordingly there was an equitable assignment and one of the decisions that I rely on, which is the *Maughan v Elders Finance & Investments Co Ltd* (1987) 5 ACLC 20 case which, in my submission, is an important case from the Supreme Court of Queensland. The Supreme Court of Queensland put, Justice McPherson, and this is

behind tab 5 of the appellant's bundle of authorities, at page 30 of the judgment, this was a case where the Court, where Elders had actually entered into a conditional agreement for mining licences to be assigned to it. Where, which were conditional on the Minister of Mines actually approving these registration of the mining licences and the Court said that even though there was a conditional assignment that nevertheless Elders had obtained an equitable interest in the property. And what the Court, Justice McPherson said at page 30 in that second paragraph, he says, "To insist upon the existence of an assignment in terms present and immediate is to reverse the whole emphasis of what Lord Mcnaghten was saying in the *Tailby* case. Because a present assignment of future property is in its nature not capable of taking effect forthwith, equity beneficently construes that a value be given as a contract to assign. This is done to effectuate the intention. And so even though they're talking about, in the *Tailby* case, about assignment of future property which had not been – which had not yet come into existence, in my submission the same principle effectively applies, that once the consideration has been given, then effectively equity will treat it as contract to assign to effectuate that intention. So in my submission that general principle supports the argument that there was an equitable assignment as soon as West City completed the works that it was bound to complete.

Then that really leads on to the next issue, as to really whether or not the deed of assignment actually gave West City a preference.

BLANCHARD J:
Well does it matter? If it's outside the two year period you can be as preferential as you like.

MR DAVEY:
Exactly. Yes it doesn't.

BLANCHARD J:
Your point is that the equitable assignment occurred, at the latest, when the work was done. It may be that the Council didn't approve of the work until later on but nevertheless you performed your part of the bargain at that stage, particularly absent evidence that the Council didn't approve that work.

MR DAVEY:
Yes. So this is really an alternative argument if for some reason it was –

WILLIAM YOUNG J:

But aren't you stuck, I there wasn't an assignment in place by January 2008 then it is – 2006, then what happened in October was a preference.

MR DAVEY:

No because in my submission even at that point in January 2006, even if there hadn't been a full equitable assignment as such, that nevertheless West City had gained and equitable interest in the bond monies at that point. Even if it was still conditional on the Council giving approval –

ARNOLD J:

When you said "at that point" what did you mean? As at October 2006?

MR DAVEY:

Well certainly as at – my submission, by October 2006 West City had the full equitable title to this bond, so everything, but certainly as soon as it started carrying out that work in November 2005, that even at that point it gained an equitable interest in the bond even if it hadn't yet completed all the work that was required.

BLANCHARD J:

I see.

MR DAVEY:

And that is again really based on this *Maughan v Elders Finance & Investments* case. Because what the majority decided in that case was effectively that disposition of property only related to the beneficial interests in that property and so the fact that legal title subsequently passed wasn't – essentially as long as the beneficial title on the property had passed then it wasn't a disposition of company property at a later stage and I think that is the point that I am -

McGRATH J:

So what is the future property?

WILLIAM YOUNG J:

There isn't a future property; it is an actual property isn't it?

McGRATH J:

Yes, the bond is in existence.

MR DAVEY:

Yes, that's right.

McGRATH J:

So why is this case assisting us?

MR DAVEY:

It is assisting us in the sense that the Court recognised that even if it is a conditional agreement, there would still be an equitable interest in that nevertheless there was an equitable interest that Elders had gained.

WILLIAM YOUNG J:

This is a different sort of condition anyway. I mean there are conditions where a contract is subject to approval by a third party. This is essentially a condition that West City has to go in and do the work that is required to get the bond released. It is not so much a condition in terms of conditions present and subsequent, it is just a contractual obligation.

MR DAVEY:

Yes. And the Court drew that distinction in this particular case and actually said well ultimately it was up to Elders to do what was required to get these mining licences approved and in the same way, in my submission it was ultimately up to West City to do the work that was required to get the bond released. I mean it is summarised at page 31 of the judgment of Justice McPherson, the paragraph is on the right-hand side of the page. His Honour concludes, "Fulfilment of the requirements of the approval is therefore not to be regarded as a condition precedent to the passing of an equitable interest or mortgage in favour of Elders and mining leases. And really that case, in my submission, is consistent with what the Court of Appeal decided in *Bevin v Smith* [1994] 3 NZLR 648 that effectively a purchaser of land could obtain an equitable interest under a conditional contract as well even though specific performance wasn't strictly available.

GLAZEBROOK J:

Well here, of course, you might say well you have got the interest in the bond, it is just that it might be worthless because the Council mightn't release it or may release it later. It doesn't mean it is not an assignment. But the bond is still there, it just may not be released.

MR DAVEY:
Yes, yes.

GLAZEBROOK J:
Or you might have to do some more work to get it released.

MR DAVEY:
Yes. Yes, that's right.

GLAZEBROOK J:
And in that way you say it's like Elders having to do some work?

MR DAVEY:
Yes. So perhaps my reasoning, I've tried to summarise at paragraph 21 – sorry, paragraph 92 on page 21 of my submissions. So that's, I don't think I need to repeat what I've set out there. I mean unless there's any questions about this first ground of appeal I was proposing then just to really turn to the second ground?

McGRATH J:
Yes, thank you, please do that.

MR DAVEY:
So the second ground is whether the Court of Appeal correctly exercised a discretion under section 295 of the Companies Act and the Court focused on the pari passu principle but didn't provide any further explanation as to the basis for its conclusion that it, that what happened in this case wouldn't come to the level of unfairness that would warrant and order that derogated from that principle. And the Court didn't actually specify which subsection it was relying on but in my submission, paragraph 96 of the submissions, I've set out the relevant parts of section 295(a) and it seems, in my submission, that it really falls within section 295(c), "An order that a person pay to the company an amount that, in the Court's opinion, fairly represents some of all of

the benefits that the person has received because of the transaction." Subsection (d) is really more of a tracing provision.

I have also set out in my submissions that this section is based on the Australian Corporations Act. In Australia it's actually been, and I don't understand the respondent to actually argue with this point, but in Australia it's been argued that the word "may" in section 295 – well it's been held the word "may" in section 295 actually means that the Court doesn't have any discretion to make an order at all. That "may" should be read "must." The word "may" should be read "must" but the New Zealand approach has not been that. Certainly the Court of Appeal more recently in *Grant v Lotus Gardens Ltd* [2014] 2 NZLR 726 has said that the liquidator can actually end up issuing a statutory demand or take alternative remedies so –

WILLIAM YOUNG J:
What had happened, I can't – had there been a hearing in the High Court or had the transaction been set aside by default in *Lotus Gardens*?

MR DAVEY:
From memory I think it had been set aside by default and, yes, had been set aside by default and when there was an application – or statutory demand and there was an application to set aside at a later stage. But in my submission although that's been the approach taken in Australia, for the reasons that I've set out, really, essentially, that the word "may" should be given its ordinary meaning and not be read "must" make an order under section 295 and I don't whether the respondent's submission says so far, certainly don't take an issue with that proposition. So really the more, in my submission, the more key issue is the principles that should be applied under section 295 and certainly the Australian cases have taken into account whether it's just and equitable to enforce the whole of the compensation against the purchaser and I've referred, page 24, paragraph 104 of my submissions, to *McDonald v Hanselmann* (1998) 28 ACSR 49 where the Court said the word "may" and the word "some" indicates the Court has the discretion as to whether it is just and equitable to enforce the whole of the compensation against the purchaser. And a similar approach was taken in the case of *KDS Construction Services Pty Ltd (in liq) v National Australia Bank Ltd* (1986) 11 ACLR 403 where the bank had received some $100,000-odd into its bank account which had cleared the overdraft and then the remaining money had been used by the director and the Court said well the preference is only the amount that has cleared the overdraft and so are not going to

reorder repayment of the whole amount. And similarly in *Universal Financial Group v Mortgage Elimination Services* [2006] NSWSC 1132, it is dealing with a slightly different situation but made the observation, I have set this out at paragraph 106 on page 25, "if it appears from the evidence that the recipient of the income has used it to incur expenditure which relieves the entity entitled to it from an obligation to meet outgoings, it is likely to be just and appropriate to reduce any statutory payment order by the amount of such expenditure."

The New Zealand position hasn't really, to date there hasn't been much consideration of how section 295 should be applied. The High Court has stated in a couple of cases, Associate Judge Bell has stated that it should be directed at eliminating any preferential benefit a creditor has received, that the creditor shouldn't be punished for receiving such a benefit, and certainly under the previous legislation, the Court could consider whether it was inequitable to order recovery or recovery in full and although it was under differently worded legislation, what was said in *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12 case was, "That the word 'inequitable' carries the connotation of unfair or unjust; and while it would be wrong to attempt to limit circumstances which may be so described it will commonly be because to order repayment will leave the original recipient in a worse position than if he had never received the money at all."

WILLIAM YOUNG J:
How does that apply here?

MR DAVEY:
Well because effectively that West City from its own funds, expended most of the money on doing these pond works on third party contractors so effectively it has used its own funds and then the Court of Appeal orders to pay some $50,000-odd, it appears of third party contractors and then the Court of Appeal is effectively saying and you have got to pay back the full $100,000-odd as well so it has been left in a worse position than if it had received the assignment as well.

WILLIAM YOUNG J:
But doesn't it appear from where you start from. If you start on the hypothesis that there wasn't an equitable assignment, then as at October 2006, your client which was owed $100,000-odd got a preference ahead of other people who were at

$100,000-odd who may or may not have spent money or done work or they may have just wasted time.

MR DAVEY:
Well the key difference here in my submission is that those monies were never going to be available to the company. Those bond monies were never going to be available to the company because in effect it was payment in advance by the company to the Council for these works that needed to be carried out and if West City hadn't done the work, the Council under the bond could do the work and use those monies to actually – so it was never going to be money that was going to be available to unsecured creditors at all.

WILLIAM YOUNG J:
Possibly some – or anything that was done after January 2006 you might say you have been or maybe not. It is just that virtually all creditors will have laid out money or time or effort, in fact they all will have presumably.

GLAZEBROOK J:
Well your point is really the money wouldn't have been available to the other creditors if the work hadn't been done.

MR DAVEY:
Yes.

GLAZEBROOK J:
Because it would have just been given to somebody else to do the work.

MR DAVEY:
Yes.

GLAZEBROOK J:
Or get, by the Council to do the work.

WILLIAM YOUNG J:
Itself.

GLAZEBROOK J:

Itself.

MR DAVEY:

Yes and I have referred to a case in my – I have got copies which I can make available to the Court as well which the Court of Appeal actually referred to in its judgement. The Privy Council in *Lewis v Hyde* [1998] 1 NZLR 12 (PC) and I've just set out a passage on the last page of my summary at paragraph 16. This is what, in my submission, the key differences here, and the Court of Appeal didn't take into account, is whether the transaction actually diminished St George's assets so as to confirm an unfair or improper advantage to the creditor, and then what the Privy Council said in *Lewis v Hyde* was, "There is no reason to set aside a transaction to so as to bring assets into the pool of assets available for distribution amongst creditors in the insolvency unless the transaction so set aside has in fact diminished the pool which would otherwise have been available." And that's really my point. This pool of money wouldn't have otherwise been available to creditors from the Council bond monies.

WILLIAM YOUNG J:

I understand that, it's just that if you look at it from the standpoint of October 2006, the money by this stage was available for other purposes. I mean your client's expenditure was, by this stage, sunk, as was everyone else's who was owed money by St George.

MR DAVEY:

Yes, although that probably comes back to my original argument –

WILLIAM YOUNG J:

Yes.

MR DAVEY:

But the – it was, I mean, then you can also look at the flip side of that, which is what, the point that, the point that I've made is that really, I mean essentially, if we're looking at a transaction to set aside, it's almost like a transaction is rescinded, so then the parties should be put back in the position that they would have been if the transaction had not occurred at all.

WILLIAM YOUNG J:

What's the transaction? If the transaction is the assignment of October 2006 then putting, then stripping that away means that you have received a preference.

MR DAVEY:
Yes, but if you are going to, if that transaction was set aside and you were putting the parties back into the position that they effectively would have been in, I mean, West City has gone and expended all this money on third parties, and so it's actually worse off and it comes back to that inequitable point that I made in –

BLANCHARD J:
But we're assuming here that there's been a preference within the two year period.

MR DAVEY:
Yes.

BLANCHARD J:
If one assumes that, your argument doesn't work.

MR DAVEY:
Well even if there has been a preference, in my submission, it still comes down to this issue about whether it's fair and just, whether –

BLANCHARD J:
All creditors who have been preferred can say it's not fair and just, but the regime is, you've got to put the money back into the pot because you've got it too late in the piece.

MR DAVEY:
Yes but what the, my submission would of course have said is that you need to look and see, for instance, in the *MacMillan Builders* case that I refer to, as to whether it's inequitable to actually make an order, the Court in that case said that, "It will commonly be because to order repayment will leave the original recipient in a worse position than if he had never received the money at all." And that's effectively what, what would happen to West City in this situation if an order was made that it would have to pay back the entire amount.

BLANCHARD J:

But that's always the case where there's a preference. You've got to get yourself into the mindset that for this argument, unlike your previous argument, you're looking at something that's happened during the two year period, which is a preference, and you knew it was a preference at the time.

MR DAVEY:
Yes.

BLANCHARD J:
So why shouldn't you have to disgorge the money? I just don't think this is a, this argument's a starter, let alone a finisher.

MR DAVEY:
Well because –

WILLIAM YOUNG J:
You're, in a way the argument seems to be that a near miss on the assignment argument might get you over the barrier on the discretion.

MR DAVEY:
Well I mean that is part of the argument, certainly yes.

WILLIAM YOUNG J:
Well in the case you cited, the judgment from Queensland, in truth the National Australia Bank hadn't been fully, hadn't been preferred, in fact, other than as to the money which it retained and I can understand the reasoning of the Judge there. Have you got any other cases where it has been withheld in part?

MR DAVEY:
Just from memory, New Zealand High Court cases that I have referred to but I don't know whether the Court wants to refer to those which is the decisions by Associate Judge Bell and these are listed at paragraphs, sorry authorities 38 and 39 at the list of authorities at the end of my submissions. They are not actually in the case bundle but I can –

WILLIAM YOUNG J:
That's the Canavan *Lotus Gardens* et cetera case is it?

MR DAVEY:

– no it's – from memory *Farrell v E&E Aps* (2012) 11 NZCLC 98-004 it involved the transfer of some property to a creditor and what the High Court said in that case is that section 295 should be directed at eliminating any preferential benefit a creditor has received but that creditor should not be punished for receiving such a benefit. So it still comes back to my point also though that really these assets weren't available for the distribution amongst creditors in the insolvency because if we, I mean by the time the deed of assignment was executed, West City effectively had the equitable interest in that money.

WILLIAM YOUNG J:

But this is just the first argument.

BLANCHARD J:

No, no, you are conflating two arguments. You have got to forget about equitable interest, we only get to this point if you have lost on all of that. But I am not saying you are going to lose on it but this is a completely different ballgame, this argument. You are just a credit who has received a preference within the two year period and you are no different from any other creditor if that is what happened. On this argument if you got an equitable interest you got it within the two year period and you have to give it back.

MR DAVEY:

It's really, perhaps I wonder if that case in the High Court might assist. The case that I was referring to is *Reynolds v HSE Holdings Ltd* HC Whangarei CIV-2009-488-000738, 17 September 2010. This is a judgment of Associate Judge Bell and what His Honour said at paragraph 28 is that –

BLANCHARD J:

Have we got this?

MR DAVEY:

No I am afraid I haven't. It is referred to in the authorities but I haven't provided but I can make copies available to the Court.

BLANCHARD J:

What were the facts?

MR DAVEY:

The facts were that it related to the transfer of medical equipment to HSE, the respondent, and medical equipment was transferred for a price of some $16,000 odd or thereabouts and the Court said well, "Well a transaction under section 292 is set aside," this is at paragraph 28, "The relief should be adopted at eliminating any preferential benefit a creditor has received. More sense of relief is not required. While the credit receiving benefit from an insolvent transaction should not be allowed to retain a preferential advantage, nor should he be punished for having received such a benefit, there is nothing in the legislation calls for a punitive approach. The various remedies in section 295 allow for the exercise of a discretion to mould an outcome appropriate for the case." I can certainly make this –

BLANCHARD J:

Well there is nothing very novel in that proposition.

MR DAVEY:

– no but in my submission when one is looking at what is just and equitable in terms of West City. The West City really I mean, it stepped up to the plate really when no one else was prepared to do this work, undertook this work, incurred costs in reliance on that. If it hadn't done that the Council would have used the money to actually pay another contractor or have the works done and so effectively by the time it got to the stage of actually the deed of assignment, it had obtained, effectively, the equitable interest in this money and with the transaction set aside, really one looks at it, it wouldn't be just to require it to pay back all this money, having it paid all these third party contractors as well.

BLANCHARD J:

But that would have been true if there had been no equitable interest outside the two year period.

MR DAVEY:

Yes, yes.

BLANCHARD J:

If your equitable interest wasn't established early enough, you are in the same position as any other creditor which has in good faith expended money, become a creditor and finds itself unsecured. It is tough but this regime is designed to ensure that people don't benefit ahead of other creditors by getting in first during the two year period. If they do they have to give the money back and then share rateably in it. It's a tough regime but not unique to New Zealand.

MR DAVEY:
No, no it's not but in my submission that although that is the general principle behind it, that the Court can have a less tailor judgment that fits the justice and equity of a particular case as well and that is why section 295 is there. The Court, section 295(c) says that the Court can tailor it to the facts of a particular case and that in my submission this falls outside the usual course of simply a credit that's been paid later for work that was carried out earlier when we've got this degree of background that's been put before the Court as to what actually occurred in terms of what West City actually carried out.

McGRATH J:
I think you have really got to tell us though why it falls outside the general policy of the Act which Justice Blanchard has explained to you.

MR DAVEY:
Because in my submission you can't just simply look at what happened in October 2006 in terms of the deed of the assignment without taking into account everything that has gone on before in terms of –

BLANCHARD J:
Look if your man had come along in October 2006 and said to Mr Andersen, "Heck we're unsecured, give us a security," there is no question this would be set aside. On this argument, we're assuming that you didn't get a security over the bond until within the two year period. If you did, you should give it back, simple as that.

GLAZEBROOK J:
Is your argument based on the linkage between getting the bond back and doing the work and while the work was done earlier, it was linked to getting the bond back at all. Is that the real distinction you're looking at and yes, it didn't – it happened earlier than the two year period but you would say it might be odd if it had happened during

the two year period and the discretion would be exercised in your client's favour, but because it happened it's not. Is that the real argument, that plus all of the circumstances but the specific linkage between doing the work and having the money available at all.

MR DAVEY:
Yes, yes. I note the time Your Honour, I wonder whether, I think that has pretty much finished my submissions. I don't know whether –

McGRATH J:
Well you can have a look over the adjournment to see if you want to say anything else but I think you may have finished your submissions.

MR DAVEY:
Yes Your Honour.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.49 AM

MR DAVEY:
Yes Sir the only final point I would make in conclusion really is that even in October 2006, the bond wasn't available to St George at that point because West City still had to carry out the maintenance of those ponds for the Council to impose a further two period so it had to continue to do work to maintain, to keep the pond in order to obtain payment from the Council so that's really just a further factor in terms.

WILLIAM YOUNG J:
But the Court of Appeal thought that the money involved or the outlay involved was quite minor on that.

MR DAVEY:
Yes I think from memory it was only a few thousand dollars. It wasn't large but nevertheless it was further work that West City carried out in reliance on the fact that it was going to be paid these bond monies by the Council.

BLANCHARD J:
But if we get to this argument, it has already lost on its change of position defence.

MR DAVEY:

Yes it has, yes.

BLANCHARD J:

So you can't resurrect that under section 295.

MR DAVEY:

Well only because the actual work actually required it to still keep on doing it beyond October 2006 as well. Not just earlier on in the piece but beyond actually when the deed was signed by the parties, so it is only to that limited extent. I accept it is not a major point but it is just a further factor that I am inviting the Court to take into account. So unless there is any further questions.

ARNOLD J:

Well are you still relying on the liquidator's delay or have you given that away?

MR DAVEY:

No I am still relying on that because in my submission it was an inordinate delay that someone in West City's position –

BLANCHARD J:

Well if we say that you can't delay up to the six year period from the commencement of the liquidation, we are fiddling around with the Limitation Act?

MR DAVEY:

Yes again it comes down to this discretion about what is just and equitable in my submission and the particular circumstance of the case.

BLANCHARD J:

There is nothing just and equitable to do with the Limitation Act in my experience.

MR DAVEY:

No.

BLANCHARD J:

But it allows a six year period.

MR DAVEY:
Yes it does, it does.

BLANCHARD J:
And the new Act is actually specific on that but it is just recognising what the Courts did long ago.

MR DAVEY:
Yes it's – I mean nevertheless the respondents in their submissions seem to argue that they should be taken into account on the issue of interest et cetera and perhaps it is a relevant area that it could be taken into account in terms if the Court got to this stage so certainly – it's really, I mean the purpose of the Act really was for these transactions though to be dealt with promptly and it just seems like an inordinate delay to actually spend three and a half years before a notice is actually to set aside so there must be some sanction in my submission if the Court got to this stage in terms of making an order, whether it is in terms of interest or when interest should accrue or something along those lines.

McGRATH J:
Thank you Mr Davey.

MR DAVEY:
Thank you, Your Honour.

McGRATH J:
Mr Goddard we certainly want to hear you on the first grounds of appeal. On the second ground, you have heard the discussion from the bench and we leave it to you to decide how much further you can assist us in that matter.

MR GODDARD QC:
Thank you Your Honour. I am not proposing to dwell on that, I might touch on one subsidiary issue for about two minutes at the end. I have Sir my customary road map, it's two pages long but the second page is related to the second point and therefore won't detain us long. I also have a case which I thought I ought to draw to the Court's attention because it provides some support in a dictum from Chief Justice Eichelbaum for one of his arguments which he hadn't identified and I thought the

Court should be aware of it and an article which explains why the dictum is wrong, by Professor Sarah Worthington, so I will come to those.

The essential issue in this case, in my submission, is whether a contract to assign the bond was entered into in November 2005. It wasn't and that's decisive. Even if there was such a contract, no equitable interest passed until the specified period had started to run, I'll come to that. But the principal argument for the respondents is that the Court of Appeal was right to find that there was no contract, no binding agreement to assign the bond, until the deed of assignment was executed in October 2006. Just to clear up one point first, which is the relationship between the principal construction contract, and the contract for the pond works, it's consistently been the position of West City that the pond works agreement was a variation to the principal contract.

Let me go right back to the correspondence with the liquidators in relation to the assignment, volume 3 of the case on appeal, page 318, this is a response by the solicitors for West City to a letter from the solicitors for the liquidators saying we're not satisfied by your explanation and so the solicitors, obviously on instructions from their client, set out the background to the additional work, and to the assignment, and if we turn over to page 319, paragraph 3, West City provided a quotation through the project engineer TSE Group Ltd on 31 October 2005, in which a price had been submitted sometime earlier dated 4 August 2005, the works were treated as a variation to the existing contract and that position was again set out in the formal notice given under section 294 by West City. That notice is in volume 3, it begins at page 348. So this is West City's notice and if we turn over to page 350, paragraph 3, we see essentially the same explanation ending with the observation that the works were treated as a variation to the –

WILLIAM YOUNG J:
So, yes, okay.

MR GODDARD QC:
Sorry Sir.

WILLIAM YOUNG J:
So this is effectively a repetition of the letter?

MR GODDARD QC:

Yes. In the form of a formal notice of objection. So although I'm always anxious to achieve something original, the argument which, as Your Honour Justice McGrath pointed out, is made in submissions for the respondents, that the pond works were a variation to the existing contract. In fact it has its basis in this acknowledgement by West City and is right –

WILLIAM YOUNG J:

Well is it a variation, with a big V, meaning a defined word in the principal agreement or is it a variation of the contract as to how supplementing the work to be carried out and making additional provisions for the payment of the final retentions. Was there a contractual notice given?

MR GODDARD QC:

There was – let me take the Court through the way in which this came into existence. The first point I want to note is that it came into existence by the sort of dealing that one would expect to see for a variation under the contract through the engineer to the contract TSE Group, and if we rewind in the exhibits to page 179, what we see is a fax from TSE Group, sent on 31 October 2005, to Mr Andersen of St George saying, "Here's the price from West City to complete the stormwater quality pond works. Please approve and we will get underway." And that attached the quote on the preceding page, page 178 of the bundle, that's a quote dated 4 August 2005.

WILLIAM YOUNG J:

But wouldn't there normally be a notice, I mean it may be a trivial issue because we are putting too much attention on what is a technicality.

MR GODDARD QC:

I will come to that. So then we've got at page 180.

GLAZEBROOK J:

Sorry, what are you taking form 179? Do we need to wind back a bit further than that, in terms of where did the quote, is there a letter setting out, asking for the quote?

MR GODDARD QC:

Not in the bundle that I have seen.

GLAZEBROOK J:

And it is quite possible this was all done orally of course but given the timeframes.

McGRATH J:

Well it wouldn't be the first time.

MR GODDARD QC:

There were some plans sent through, let me just find those.

GLAZEBROOK J:

Well it is the timeframes as well, it was a very short time.

MR GODDARD QC:

Oh here we go, can I take the Court to 173. So what we have is an email, forwarding on an email from the Council from a Mr Crang to Brett Ireland at West City; "Brett here's the approved plan from NSCC, can you please price?" And that attaches a plan and then what have is the quote from West City that is on 178 and the reason that I went to 179 first Your Honour is that it is not otherwise immediately obvious what 178 is.

GLAZEBROOK J:

Oh no.

MR GODDARD QC:

And so I just wanted to say, look this is by its date and its numbers we can see and I think this is common ground, the quote that was provided. It is not clear while it took a little while for it to be forwarded on but on the 31st of October it was forwarded to the principal, Kevin Andersen at St George and then on 3 November 2005, page 180, an instruction goes back to the engineer who is the person responsible for approving variations under the contract in the ordinary way, saying "Hi Vaughan, kindly instruct Len to proceed with the pond as per his quotation" and then on 181 we have the instruction and this is my answer to Your Honour.

WILLIAM YOUNG J:

But this doesn't look to me like a variation of instruction in relation to what is a reasonably major project. It would be numbered, it would refer to the clause of the contract and all of this.

MR GODDARD QC:

There is a measure of informality about how it was done but what we see is it being originated through the engineer to the contract and I am going to take the Court to how it was implemented in fact.

WILLIAM YOUNG J:

The certificate seemed to praecipe although the numbers suggest it is a different contract.

MR GODDARD QC:

The numbers, we will come to that in a second.

WILLIAM YOUNG J:

Oh you will come to it, okay.

GLAZEBROOK J:

Can you just tell me as to why it matters. Because you could have a variation to the contract. Well if a variation to the contract with the payment in accordance with the contract but I actually must say I haven't looked at what that is or it is a variation to the contract which says, well if the variation to the contract with the payment in accordance with the contract but I actually must say I haven't looked at what that is, or it is a variation to the contract which says in relation to these particular things, we pay behind an assignment or we have an assignment by way of a security which is a true assignment, an actual assignment and if you happen to pay us outside of that well we will assign it back to you, if need be.

MR GODDARD QC:

Your Honour is about three moves ahead of me as is so often the case.

BLANCHARD J:

Usually only two moves Mr Goddard.

GLAZEBROOK J:

Yes I am sorry.

MR GODDARD QC:
Yes but there was a third this time Sir, so I need to try and hold all three in my mind while I answer. First I don't think it matters because either this was part of the principal contract with various payment mechanisms established by it, or alternatively it was a separate contract to do a particular block of work for a particular sum, which was entered into before there is any evidence of an agreement to assign and so either way in my submission this was an agreement to do certain work in exchange for payment of $46,000 odd. In my submission, the better view, second, so it's not important. Either way what you've got is a contract to do work for money, not for a bond.

GLAZEBROOK J:
Well that's your important point.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
Whereas if it's an agreement to do work for an assignment, it again doesn't matter whether it's a variation or a new contract, does it?

MR GODDARD QC:
No, so the important point for me, if this is an agreement to do work for money, but in my submission it is at the margin relevant that it's an agreement to do work for money on the terms of the principal contract, because that rather underscores the existence of processes for certification by the engineer for release of money only after they're satisfied, and it actually becomes important when we come to the question of when there was sufficient performance to trigger a right to be paid, and I'll come back to that as well.

McGRATH J:
Is it fair to say that if it was under the original contract there was a breach because retentions have become due but have not been paid and that it was, if you like, in response, informally, the alternative of using the bond to provide protection was insisted on.

MR GODDARD QC:

Well the word "insisted on" is one that I might need to come back to.

McGRATH J:

Yes, sorry, yes, was raised.

MR GODDARD QC:

But what seems to have been understood in late 2004 was that the work had been completed but that retentions would only be able to be paid out of the proceeds of sale of sections.

McGRATH J:

Yes.

MR GODDARD QC:

And clearly what happened at some stage was that in response to the request to do more work when the retentions already were overdue, and yes so Your Honour's right, it was a failure to perform –

McGRATH J:

Yes.

MR GODDARD QC:

– a payment obligation by St George but instead of performing, St George was coming along to West City and saying will you please do more work, and unsurprisingly there was a conversation about how payment was going to take place, and the Court of Appeal was right, in my submission, to find that there was an arrangement in principle that rather than having to wait for sale of sections, what would happen is that there would be payment out of the bond monies and that the way that would be done, when the work was done, is that there would be a formal agreement to assign. Now the third move, the extra step ahead of me that Your Honour was on this occasion, that I want to just flag, but that I'll have to come back to, I knew that was going to –

GLAZEBROOK J:

Perhaps while you're thinking that, when the work was done there would be a formal, why wouldn't you then have an equitable assignment immediately if that was the agreement. I didn't think that was your argument. So maybe you've slightly mis-stated it or maybe you can explain to me why an equitable assignment doesn't arise if the agreement is when the work's done there'll be a formal agreement, because that's sort of a future property thing, isn't it?

MR GODDARD QC:

There are two reasons. One is that if it's not a contractual promise to assign, it's just an indication of how payment is intended –

GLAZEBROOK J:

Oh, okay, no, that's all right.

MR GODDARD QC:

– you don't get there, but the other one is, that even if there is a, and this is what Professor Worthington's article is very helpful on, even if there is a contract to assign property at some future time, if certain conditions are met, then my submission is that no equitable interest arises unless and until the conditions are satisfied. The principle that an equitable interest arises stems from, there are two justifications. One is – but the best one is that equity treats as done that which ought to be done. If you haven't reached the time for assignment then what ought to be done does not include a transfer of ownership and therefore there is no equitable interest. But that's quite a technical issue. It's one which the texts all say is difficult and I'm going to need to spend a little bit of time on it.

GLAZEBROOK J:

Okay, no, no, you've answered the question, thank you.

MR GODDARD QC:

But I just want to come back to the third point which was Your Honour's question, well, maybe it was an assignment by way of security, or something like that. I agree that there – well first I can say that it's never been submitted by the appellant that it's an assignment by way of security. The fact that that's a possible agreement that might have been entered into, and that it might make more sense in some ways than the absolutely assignment idea, really just indicates that there was not sufficient

certainty about this arrangement for it to be a contract. If you can't tell whether you have got an absolute assignment or an assignment by way of security –

WILLIAM YOUNG J:

So you can tell you have got one or the other, and the work has been done. Doesn't the Court just have to decide which it is, isn't that what Lord Macnaghten says in *Tailby v Official Receiver [1886-90]* All ER Rep 486; (1888) 13 App Cas 523

MR GODDARD QC:

No Your Honour because the option that the Court has here is to say that there is a perfectly – and this is why this is different from the RTS. There is a contract.

WILLIAM YOUNG J:

No, no I know. What I am saying, sorry I am saying, say the options are. We know perfectly well that there was to be an assignment, there is scope for doubt whether the assignment was absolute or by way of security only. Those were the two –

GLAZEBROOK J:

But an absolute assignment like a legal, an old fashioned mortgage where you have an absolute assignment, an agreement to re-assign.

WILLIAM YOUNG J:

- Well I was thinking, we'll do the deal if you give us the bond, that that is the deal which seems to be floating around in the papers and the alternative one is, it's an assignment by way of security, however you describe that and so those are the two possibilities and you say there's a third, but leave that aside. And then the work is done, the Court then has to decide which it is. It can't say, well it is uncertain which it is so therefore the plaintiff gets nothing.

MR GODDARD QC:

The Court would only have to choose if the Court was absolutely satisfied that it was one or the other.

WILLIAM YOUNG J:

Why not more likely than not, why this "absolutely satisfied?"

MR GODDARD QC:

If the Court was satisfied, let me put it in that way.

WILLIAM YOUNG J:

Yes, persuaded it is more likely than not.

MR GODDARD QC:

Well in my submission the very fact that we can't choose between those two scenarios is indicative that my third preferred interpretation which is that there was an obligation to pay and that there was a non-contractual arrangement for payment is the more likely.

WILLIAM YOUNG J:

Well it is a fat lot of use for West City though isn't it, because they are already out of their money for about 18 months.

MR GODDARD QC:

West City was, and Mr Ireland in his evidence was very clear, that he wasn't unduly concerned about the delays because of the normal way in which things were done in the construction industry and that he was willing to do the work because of the client relationship, he put that slightly more colourfully, let me find the passage.

GLAZEBROOK J:

Well what about the letter where he says he will only do it.

McGRATH J:

Let Mr Goddard come to it, it is his first letter and then we will come back to it.

MR GODDARD QC:

Can I go first to Mr Ireland's evidence, so volume 2 page 109, the top of the page. Mr Malarae says "I am going to put propositions to you Mr Ireland for you to comment on. Reading the letter it suggests you have enough of the delays.?" "No no it was nothing, we were doing three other jobs for him" and then a firm statement of the importance of client relationships and then "We will work until something had been something had been sorted out and that payment in relation to this further work was going to be from the bond monies." "Well yes that is what he told me he'd do." So basically what you had here was comfort being given that you won't have to wait for

sales of sections that when the bond money has come back you will get paid out of those and there was clearly some sort of understanding at some stage.

WILLIAM YOUNG J:

But not an enforceable promise you say?

MR GODDARD QC:

Not an enforceable promise.

ARNOLD J:

I mean that isn't consistent with that recital in the deed. I mean it may be that that just indicates that there was an agreement to assign that was not particularly detailed but there can't be any doubt about that St George did agree to assign the bond in return for the carrying out of the work.

MR GODDARD QC:

So what we have here I think is an indication of the need to be a little bit careful about the word agree and the Court of Appeal discusses this and emphasises the different forms like legally binding and not binding, that an agreement can take. But if I could just go to that, I wanted to come to this point but I didn't think I was going to come to it quite yet but while we are here, let's do it. So the assignment is in bundle 3, it begins at page 229 and what we've got is the background, with once –

WILLIAM YOUNG J:

Sorry what page, 229?

MR GODDARD QC:

- 230 is the relevant page, that's where the relevant text begins Your Honour. And what Your Honour is referring to is recital (d) St George has agreed to assign the bonds.

ARNOLD J:

In consideration of the works.

MR GODDARD QC:

Yes undertaken by it. So that is a backwards looking phrase which is accurate at the time but a little bit confusing. But the point I wanted to make was a more basic one

which is that I couldn't count the number of times that I have drafted a recital in a settlement agreement which says, "The parties have agreed to settle the dispute on the terms set out in this agreement." Now what that tells you is not that there is always a binding contract, Sir, quite the reverse. The whole point is that you are doing a formal settlement agreement to settle it. What it records is that you have agreed in principle and you are now giving it legal effect. So in my submission it is quite wrong to take from the use of the past tense here anymore than that there is and understanding which is now being embodied.

ARNOLD J:

I wasn't doing that, I was simply meeting the point that you had made which I understood was that there was no more agreement than that they would be paid out of the bond monies.

MR GODDARD QC:

No.

ARNOLD J:

The fact it has gone further than that and I accept there is an issue about whether this is binding or an agreement in principle, that's another issue.

MR GODDARD QC:

So I do accept that.

WILLIAM YOUNG J:

And it is evidential isn't it because you have got on one side of the debate you have got Mr Ireland saying we had an agreement to assign and there is a letter and on the other side we know that Mr Andersen is picking up the meaning of Mr Ireland as a requirement for an assignment.

MR GODDARD QC:

There has plainly been a discussion about assignment so that the money can be obtained direct from the Council but again I think it is important to pause and ask what was the nature of this understanding and when was it reached and in my submission it was an understanding about how payment would be made in the future that was not a legally binding contract and we see that for example in the letter of 6 November 2005. I think it is worth turning that up, it is on page 182 of the bundle.

WILLIAM YOUNG J:
282?

MR GODDARD QC:
182 Your Honour so on any view what we have at this stage, if we rewind to 181 is a contractual obligation to do the pond works for $46,375.05.

WILLIAM YOUNG J:
You don’t think it’s possibly a contract, partly written, partly oral.

MR GODDARD QC:
It is a contract which in my submission is governed by the principal terms of contract and which is here. And it is quite clear that the formal contractual communications were being channelled through the engineer and we have nothing involving the engineer suggesting payment by an assignment.

WILLIAM YOUNG J:
Well either way.

MR GODDARD QC:
Yes but you have got communications through the engineer confirming an agreement to do the work.

BLANCHARD J:
But they are not always through the engineer. In the letter on page 182 you have got Mr Ireland writing directly to Mr Andersen.

MR GODDARD QC:
Yes I am about to come to that Sir. But in terms of the commitment to do the work, what we have is the usual contractual process being followed which is the engineer is asked to obtain a quote, the engineer obtains a quote, the engineer obtains a quote, the engineer forwards it to the principal, the principal tells the engineer that he’s happy with it and then the engineer instructs the contractor to do the work.

GLAZEBROOK J:
And the contractor says, “I’ll only do it on the terms in 182.”

MR GODDARD QC:
Let me come to that Your Honour. So first of all we have got a contract at this point, it is quite in my submission.

GLAZEBROOK J:
Well – but is there a contract. Do you say just because you do a quote you can't add other terms to it?

MR GODDARD QC:
Well a contract is formed by offer and acceptance. There are two possibilities.

BLANCHARD J:
But hang on a minute. Didn't Mr Ireland give evidence that there had already been a conversation about assignment.

MR GODDARD QC:
Yes he did and that's important because what it shows is that it didn't bear fruit in the agreement that was entered into.

WILLIAM YOUNG J:
Well that is to be seen.

BLANCHARD J:
Well TSE Group may have been completely unaware of that. This is very artificial Mr Goddard.

MR GODDARD QC:
In my submission it is not Sir. If we go back to 180, it is quite clear that there was no agreement that the work be done before 3 November because this is when the quote gets approved and Mr Ireland does not suggest that there was a contract to do the work before this date. So at this point, no contract to do the pond work. Then what we get is a response from Mr Andersen who should know what he has discussed with Mr Ireland saying, "Kindly instruct Len to proceed with the pond as per his quotation."

BLANCHARD J:

That's just talking about the money.

MR GODDARD QC:
Yes, yes Sir but if there was going to be a satisfaction of the obligation by an absolute assignment of the bond, this would have made no sense as an instruction because it wouldn't be as per the quotation.

ARNOLD J:
But this was an instruction to the engineer, ah to TSE Group wasn't it?

MR GODDARD QC:
No to tell them, "To tell them" which is Mr Ireland, "to proceed."

ARNOLD J:
But why would Mr Andersen include that sort of detail in that instruction if he had had some other conversation with Mr Ireland?

MR GODDARD QC:
Because he would have said, as per his – well in my submission there would need to be – if there was going to be a mechanism for payment, different from that provided for in the principal contract, he would need to tell the engineer.

WILLIAM YOUNG J:
But there already is because they are $45,000 adrift of what they are meant to have been paid for 18 months and you are saying the alternative is they don't get paid at all, but it just comes out of section sales.

MR GODDARD QC:
That was what was contemplated up to this time.

WILLIAM YOUNG J:
But there has been a huge departure from what was contemplated by the original contract.

MR GODDARD QC:
In terms of timing.

WILLIAM YOUNG J:

Well in terms of process of payment which is absolutely fundamental.

MR GODDARD QC:

Not in terms of the process for engineers reviewing the work and certifying.

WILLIAM YOUNG J:

And certifying.

MR GODDARD QC:

Reviewing the work, approving it, confirming it is due and certifying.

WILLIAM YOUNG J:

But there is just a problem over actually getting paid.

MR GODDARD QC:

Yes a problem over getting paid and so then we have this –

GLAZEBROOK J:

Well can I just say? Are you suggesting there has been a conversation with Mr Andersen where Mr Ireland had said, "I'm giving this quotation on the basis that I get paid by an assignment" that because it went through the engineer in some way with a quote that that can't be a conditional offer on being paid out of the assignment, accepted by the other side.

MR GODDARD QC:

No that would be an artificial argument Your Honour, it is not the one I am making. What I am asking, we don't have any evidence of exactly what was said in the conversation between Mr Ireland and Mr Andersen. He nowhere in his evidence tells us what was discussed, he just says it was discussed.

BLANCHARD J:

But it is all consistent with giving the instruction.

GLAZEBROOK J:

Well at paragraph 22, page 52 –

McGRATH J:

Justice Blanchard, yes.

BLANCHARD J:

It is all consistent with what Mr Andersen then does. He goes to his lawyers and gives them instructions to prepare a document and the document clearly says, there is an agreement to assign the bonds.

MR GODDARD QC:

And then what he does, Your Honour, is not execute it and not give it to Mr Ireland so conduct is actually consistent with preparing to assign but not yet assigning.

BLANCHARD J:

Well why did he get it prepared at that time if the agreement hadn't been that there would be an assignment.

MR GODDARD QC:

Let me –

BLANCHARD J:

I think that point is pretty fatal to you.

MR GODDARD QC:

- and that's why I am going to deal with it. So let's go to the 6 November 2005 letter. So here we have a letter sent by one party to these earlier discussions, to the other and if there was an agreement to assign, one would expect to see it set out here. But what do we have? We have 6 November Quail Drive subdivision, "See that final pond planting plan, happy to carry out but the balance of retentions were due on 31 January 2004", it is common ground that should be 2005. "We cannot proceed with the planting and minor works until this is paid. The quote for planting the pond and minor earthworks is, we understand you intend payment of these amounts from bond monies held by NSCC." So he is not saying here, you have agreed to assign the bond. We are saying you intend payment. And then what he says, "This arrangement, your intention is acceptable provided it is done with a formal agreement." So what that refers to is not a settled agreement, it is saying, "Well you have told us you intend to pay out of the bond monies. We will accept that …..

…accept that provided that there's a formal agreement which sets out the basis on which the assignment will take place." And that's not surprising because what we see in the draft prepared by Mr Andersen's solicitors is a contract that actually imposes a range of obligations on West City.

WILLIAM YOUNG J:

But I don't think you can reason that from that to create uncertainties. What you can say, what West City can say is, "We've got oral evidence, assignment was discussed and agreed. We've got a letter that while loosely expresses, at least consistent with that, and then we have got on the other side of the debate, an action which suggests that Mr Andersen knows what Mr Ireland is talking about, because an assignment is prepared."

MR GODDARD QC:

But, as Mr Ireland confirmed in his evidence, he didn't know it had been prepared and it was never communicated to him. So in terms of orthodox contractual analysis, certainly the fact of preparation of that draft agreement, which might or might not have undergone changes when it was discussed by the parties, cannot itself be a step in the formation.

GLAZEBROOK J:

Are you suggesting –

McGRATH J:

Can I just ask you this Mr Goddard. That looks to me as though Mr Andersen is proceeding in terms of this being a variation. He is telling the engineer to give a direction.

MR GODDARD QC:

Yes, Sir.

McGRATH J:

Which is the way customarily, variations are ordered if you like.

MR GODDARD QC:

Yes Sir.

McGRATH J:

Paper work is the proper way but this is the sort of way it happens. The next letter is that the – sorry the next page is a letter saying the 46,000 price has been accepted. Now that is, it seems to me, it seems to be keeping the matter within the concept of a variation.

MR GODDARD QC:

Yes, Sir.

McGRATH J:

Now is your argument premised on those two propositions and then on the third, a proposition that Mr Ireland is not willing to deal with this matter in terms of the contract because he is not satisfied he is going to get paid and what he is wanting to do is to have a separate agreement and he is signalling what the terms of that agreement might be.

MR GODDARD QC:

Precisely Your Honour. So the point is that there is by 3 November a contract to do the pond works for payment of an identifiable sum, the quoted sum. That is in my submission part of the principal contract, it is a variation under it, that is the most natural reading of the correspondence Your Honour has just taken me to but it is not essential to my argument but it is the most natural reading and what is being flagged here is that there have been conversations about payment being affected, not by writing a cheque when it is due under the construction contract but by assigning the bond.

WILLIAM YOUNG J:

So are these, do you say these affect the contractual obligations under the contract because under the contract, if this is a straight variation, (a) St George is in default under the retentions and (b) in the ordinary course of events, West City would be entitled to payment promptly after the issue of certificates in relation to the additional work. But that can't be the contract because no one says that is the contract.

MR GODDARD QC:

But that is how the parties then proceeded. If Your Honour looks then –

GLAZEBROOK J:

Can I just –

McGRATH J:

Sorry, I think we have got to get Goddard a chance to answer each question before we pile the next one into him. So what is the response to Justice Young?

MR GODDARD QC:

The response is that that is exactly what the parties then did.

WILLIAM YOUNG J:

No but just up until this point, they know perfectly well that there won't be a payment in response to the certificate. That there will not be, the existing money will not be paid and it would be stupid wouldn't it to suggest that they were contracting on the basis that this was a variation, he had to perform the extra work for the extra $46,000 and he was going to get paid, contractually entitled to be paid but he just wouldn't be paid.

MR GODDARD QC:

And that is why the parties reached an informal, a non contractual understanding that in the absence of any ready cash, the way that payment would be affected once all the work had been done would be by entry into a formal arrangement to assign the bond. So what this was, was an agreement in principle to take the necessary formal steps to enter into an agreement to assign the bond. It is like, it is very much a subject to contract type arrangement.

BLANCHARD J:

Where do the words "agreement in principle" come from; that's you isn't it, not what the parties were saying.

MR GODDARD QC:

It's the – well it's me echoing the Court of Appeal who were, in my submission right to take that from the correspondence and the evidence because it is also not the case that as at November 2005, there is any record of anything that's described as an existing agreement. 182 is very much to the contrary in my submission. It says, it talks about what was intended.

BLANCHARD J:

Well what about 230?

MR GODDARD QC:

And it talks about the arrangement.

BLANCHARD J:

Never mind 182.

McGRATH J:

Just finish 182 Mr Goddard, then apparently we are coming to page 230.

BLANCHARD J:

Well he is merely repeating what he said before, which I don't find very convincing.

McGRATH J:

Well maybe, but I am just trying to follow it. So you are referring probably to the second last line are you?

MR GODDARD QC:

I am; that the arrangement is acceptable so it's an arrangement not an agreement or a contract provided it is done with a formal agreement so it looks forward to that. So it's like a settlement discussion where you say, yeah that sounds acceptable but we will need to enter into a formal settlement agreements.

WILLIAM YOUNG J:

But then when someone pays the money later it rather suggests there has been a formal settlement.

MR GODDARD QC:

So, and what they then get is their formal agreement.

GLAZEBROOK J:

What about on the 7th November, having sent that letter on the 7th November, Mr Ireland says, "Right unless I have a formal agreement, I'm not touching the work." On your argument he would be obliged to do the work because there's been no agreement to have an assignment and so he would have to do the work and whistle

for the assignment because you say the agreement has already been perfected by the, “Len your quote has been accepted” on 181?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
So on the 7th November if he’d said, “Right I want my formal agreement before I do the work,” it would have been too bad.

MR GODDARD QC:
He would have been relying on the relationship and the good faith of Mr Andersen and he would probably, if he had insisted –

GLAZEBROOK J:
Well if he had gone to Court, the Court would have said, “You have got to do the work anyway and you don’t have to have an assignment.”?

MR GODDARD QC:
Unless the principal contract confers on him a right to refuse to do work in circumstances where he’s unpaid and we don’t have the terms in front of us, I would have to look at that, I don’t know. There may well be a right to stop work if you haven’t been paid.

McGRATH J:
Well there be a breach of contract and maybe the contract will presumably deal with that or otherwise the different remedies can be taken.

GLAZEBROOK J:
Although it is odd that you enter into it, knowing that you don’t have to do their work then isn’t it. So you have a formal agreement to do it and yet you don’t have to do the work because you’ve already not been paid?

MR GODDARD QC:
It is by no means unheard of for, and indeed I would say perfectly ordinary commercially, for someone to say, “Well look I can’t pay you unless you do some work for example, because I need to sell this building before I’ve got money so will

you do some work and if and when I manage to sell the property then you'll get paid." And that's basically what is happening here.

WILLIAM YOUNG J:

You would be likely to take security over the building though wouldn't you, I think I would.

MR GODDARD QC:

And sometimes you have the commercial clout to do that and sometimes you don't but it's perfectly common in many, many industries, certainly construction but also legal work, to agree to do just a bit more work in the hope that that will produce the outcome for your debtor, that will give them the funds that will enable them to pay you. It's like having a successful outcome at first instance for someone who is owed money, the other side appeals, your client can't pay you unless they recover in the proceedings and you say, okay I'll do the appeal.

WILLIAM YOUNG J:

And you have got a lien over the proceeds?

MR GODDARD QC:

I am not sure that works for counsel.

WILLIAM YOUNG J:

You will have a solicitor's lien.

MR GODDARD QC:

Perfectly common. And then I wanted to point out that that is the way that this was administered as we move forward. So if I go then to the Court – the Court has already been to certificate 19 which is on page 183. Again this is $28,000 worth of the pond work and that's included in the value of works for the contract. So this continues on from the previous 18 certificates.

WILLIAM YOUNG J:

Well there's obviously at this stage, quite a variation between the formal administration and the contractual reality because everyone knew that that money wasn't going to be paid in accordance with the certificate, presumably the engineer as well.

MR GODDARD QC:

That doesn't mean that it is not appropriate in terms of the contract for the engineer to inspect the works to confirm that what's required has been done and to issue the certificate which triggers the obligation to pay.

BLANCHARD J:

Isn't this just a mechanism to establish that the contractor has earned the money. It's got nothing to do with how it is going to be paid.

MR GODDARD QC:

It has a lot to do with whether it is going to be paid and when it is going to be paid but not, Your Honour is right, not how it is going to be paid. But the point that this mechanism was treated as applicable confirms that it was part of the –

BLANCHARD J:

But it would be natural, it would be absolutely natural to continue to have certification by the engineer. I don't really see this as anything more than a very neutral factor.

MR GODDARD QC:

Let me – in my submission it does go further than that and let me just for the sake of completeness go to the final certificate on this which is certificate 20 on page 217 of the bundle and what we see here again.

GLAZEBROOK J:

Sorry what was the page number, I didn't get it.

MR GODDARD QC:

217 Your Honour. Certificate number 20 where what we have is – the second bottom box, "For work completed under the contract as at 18 July 2006" so that identifies the current value of work, the residual amount some 61,000 and that's confirmed as payable. Sitting behind that, what we have is the claim made by West City to St George that gives rise to that certificate and that includes various works on the main subdivision and then over at page 228, pond planting and landscape in the last couple of lines and that's aggregated into the total amount due, GST is added, the amount paid to date is set out and we see a balance outstanding. So that again confirms that it was treated by West City as part of the principal contract. It was

invoiced as part of it and it was certified by the engineer as part of it. So that's the whether, that's the when. The other communication that's helpful on this is the letter enclosing that certificate from TSE Group dated 19 July, that's on page 216 and that sent to Mr Andersen of St George, "Re: Quail Drive, the works have now been completed by West City and have passed a final inspection with the Council. The Council have started their two year maintenance period for the planting and the pond and we will hold back part of the bond for this period. Enclosed is the final payment certificate for the monies owed to West City construction, certifies the remaining money that was agreed with you to complete the pond and the retentions that have been held. Please make payment in accordance with the conditions of contract." So again an indication –

WILLIAM YOUNG J:
Well it is just a form letter isn't it because everyone knows that payment is not going to be made in accordance with the conditions of the contract?

MR GODDARD QC:
But what it shows is that the parties were treating the contract as governing their relationship and that was certainly the engineer's understanding and again rewinding, that letter is preceded by the letter from West City to the engineer at page 190, so this is West City speaking now and West City is saying, and this is at a time when, what the appellant says that they were the owner of the bond, so they say they owned the bond, they had received something in the region of 100,000 but here they are sending a final claim referring to claim 17, 18, 19, certified but not paid, the two claims for the pond work, additional pond planting.

McGRATH J:
They are establishing their entitlement to money Mr Goddard and that, it seems to me that's how the contract is proceeding. That to get your entitlement you need a certificate from the engineer and that is being established here but I am not actually sure that this throws a lot of light, from the terms of the contract, in terms of what was agreed as to manage of payment and, if you like the status of that agreement.

MR GODDARD QC:
Let me explain, I will just take Your Honour over to the next page 191 where again the amounts are set out. Now why is this relevant. It is relevant because in my submission, if there was an existing contract to assign the bond and if West City was

already entitled to that bond, then there would need to be credit given for the value of the bond in this claim. It is in my submission implausible that a plain vanilla claim for money would be sent, if there was an agreement that in exchange for doing the work and for giving the debts that are owed, the bond was to be received.

BLANCHARD J:
Where is this notion of forgiving the debts that were owed, coming from?

MR GODDARD QC:
From the appellant's case which is not that this was an assignment by way of security but that it was an absolute assignment and Your Honour heard Mr Davey say that he was not suggesting this was an assignment by way of security; that the deal was, you do the work and in exchange for the retentions and the work, we'll give you the bond and that's why he said it didn't matter that the numbers didn't match up. Your Honour asked that very important question earlier and the reason he said is not, oh because it was just by way of security but because it was near enough and the swings and roundabouts were commercially acceptable to the parties. Now that is, in my submission implausible but that's the case that is being made. It is perhaps commercially more plausible that there be an assignment by way of security but that's not what Mr Ireland ever said in his evidence. It's not what has ever been argued by the appellant and it is not in my submission open to the appellant at this stage in the proceedings, to say, oh actually we can satisfy the Court with the necessary degree of confidence that there is a completely different contract from the one that we have suggested below.

WILLIAM YOUNG J:
I mean it is not completely different. I mean whether an assignment is by way of charge or absolute may turn on matters that are intrinsic to the words used. For instance whether it is in substance is the secure payment of a debt.

MR GODDARD QC:
Yes and so then we say, well can we – is there any evidence that sheds light on whether this was an informal arrangement about how payment would be achieved, out of the bond rather than out of section sales and we will assign it to you once all the work is done and we know what's owing or was this an absolute agreement to assign a bond worth 104,000 for work that was supposed to be worth 90 something, so an overpayment or was this an assignment by way of security with the result that if

it was insufficient, more would be payable and if it was too much, that's tough for St George as well, they've just waved goodbye to it. Now the fact that we can't tell which of the second or third of those we have got here is strong evidence that we've actually got the third. We've got something that was on the way to being an agreement but that had not reached the point of being agreed with the necessary certainty to form a contract and if something that fundamental, is this West City's to keep or is it just a payment on account. Can West City still sue or are they forced to take the bond by way of satisfaction. I mean that is a fundamental issue Sir.

WILLIAM YOUNG J:

I suppose I see that as really resolved by the way Lord Macnaghten dealt with it in *Tailby*, that that would be a very good argument if it arose before the contract was carried out but once, as it were, the pond is redone or work gets underway then really you have just got to make the best fist of deciding what the contract was rather than getting too tied up with the possible variations.

MR GODDARD QC:

That's not really what *Tailby* said Your Honour, because there was no doubt about the existence of a contract in *Tailby* it was a very detailed agreement.

WILLIAM YOUNG J:

Yes but that what he said was that the arguments over vagueness were of no particular moment given that the deal had been carried out.

MR GODDARD QC:

And – but the point was, yes it was an executed contract so whatever it provided for should be treated as done.

WILLIAM YOUNG J:

And this is an executed contract.

MR GODDARD QC:

Only if it is a contract and that's the step that was not necessary to decide.

WILLIAM YOUNG J:

I am sorry I didn't catch that.

MR GODDARD QC:

It is only an executed contract if it's a contract to assign.

WILLIAM YOUNG J:

No sorry, but it is executed and the work has been done. That is what I mean by an executed contract.

MR GODDARD QC:

But that in my submission is precisely is an illegitimate elision of performance of the construction contract which entitles you to payment of money and performance of a contract under which the bond will be assigned if you do certain work and you can only get the second of those, if, I mean it is obvious, but it is important, there is a contract to assign. And you can't do some sort of bootstraps argument in which you say, "Because the work has been done there must have been a contract to do it for an assignment."

WILLIAM YOUNG J:

No obviously can't but it is just that, well I won't say it again because I have said it already.

MR GODDARD QC:

So it is absolutely accepted that there was an agreement to do certain work, that it had substantially been done but this brings me to the next point which is that it wasn't enough for it to be done to Mr Ireland's satisfaction obviously, it had to be done to the engineer's satisfaction and the engineer did not confirm satisfaction with the work triggering an entitlement to be paid or receive whatever other benefit was to be provided until, was it, July 2006. So this then becomes very important in terms of when there was a transfer.

ARNOLD J:

Can we just be clear about the sequence of work. The work that formed the basis of the original quotation was completed prior to January 2006.

MR GODDARD QC:

Not completed to the satisfaction of the Council and the engineer.

ARNOLD J:

Well that's just what I am testing. There was an additional requirement that the Council made in April 2006. Now it's not clear whether that requirement – may be you can – is it clear, should I say – how that requirement came about. Was it the Council looking at what had been done deciding well actually we think more needs to be done here so it was really an addition to the scope of works that had formed the basis for the quote or was it reflecting a dissatisfaction with the way the quoted work had been carried out. I thought it was the former, not the latter.

MR GODDARD QC:
There is no evidence to suggest that it's the former and that the Council moved its stance on what was required. Rather what you had was the Council saying look this is what is required, that being translated into a request to West City to do some work, a quote. There is absolutely no evidence about where the gap came to pass between what the Council for its part was looking for and what was done. So again in terms of establishing that all the work had been done, that was required under the "provided for back in November 2005."

GLAZEBROOK J:
But the extra planting was agreed to pay an extra amount of money so obviously the parties didn't think that they were required to do the extra planting for free. I mean there is planting stuff, if you look at the Council stuff on 174, I don't really understand this stuff but there's a whole lot of planting schedule there. Now presumably the Council didn't think it was moving the goal posts but the parties agreed there would be an extra price paid for that extra planting, so the parties must have thought that it wasn't included in the earlier price, mutually thought it wasn't included in the earlier price.

MR GODDARD QC:
So Your Honour is right. We have got certain planting requirements from the Council on 174, the quote in August 2005 says and it is about the fourth item from bottom – "Planting" but without any more detail than that so it presumably means planting by reference to the schedule that has been set across.

GLAZEBROOK J:
And they thought they had done it, the Council says no and they agree, having both mutually thought it had been done but the extra stuff was going to be paid extra for. Because otherwise if that wasn't the case they would be saying, "Well you haven't

completed the contract because you haven't done the planting required by the Council" but neither party appears to have thought that given there was an additional sum agreed.

MR GODDARD QC:

Certainly St George and West City agreed that West City should be paid an additional amount for doing this which suggests that the commercial deal that was eventually done, was if they were going to do this work they would be paid something extra for it. That is more likely to happen if it was outside what the parties expected but not inconceivable if what you had was, West City saying well look there is already no profit in this for me, this is what I assumed and unless you pay me more I am just not willing to do it. And that is also a perfectly common commercial outcome particularly for someone in St George's position desperate to get the Council's tick sooner rather than later. But this again comes back to my point about -

GLAZEBROOK J:

Well why haven't they completed the work no matter what if it is completed and they are getting paid more for the extra. It doesn't matter why they decided that, St George must have agreed to accept, by agreeing to pay the extra amount, that the previous work had been done.

MR GODDARD QC:

And that comes back to my submission that among the things that would need to be agreed, in order for there to be a contract to assign the bond, would be the trigger for the assignment. Now what we see in what was agreed on in October 2006 is that the trigger would be completion of work to the satisfaction of the Council.

GLAZEBROOK J:

Well they are not going to get the money until the Council is satisfied, so there is not much point, I mean the trigger might be early but it doesn't really matter what St George and West City agree because until the Council releases the money no one gets it, isn't it? I mean just as a matter of practicality. They could agree till the cows come home that you get the money as soon as you have completed the work but if the Council isn't going to cough it up, then you might as well not bother.

MR GODDARD QC:

You could also agree that you got it immediately but leave it to them to cross whatever bridges the Council required; that's not what was done and there is no suggestion of that. In order for there to be a contract to assign you need to know at what point West City would be entitled to call for an assignment. That is an essential term of an agreement to assign. It is not something which goes without saying because there are a number of different points that could have been selected by the parties as the point in time, at which there would be an entitlement to an assignment.

ARNOLD J:

But isn't that where Justice Glazebrook's point cuts in because both of these parties were in the construction business. They know that when Councils take bonds they will release them when they are satisfied that whatever the bond was being taken for, has been met so I mean both parties are going to approach it on the basis that that's the point of time that you need the assignment.

MR GODDARD QC:

What Justice Glazebrook put to me was a different proposition which was the entitlement to the assignment could precede the satisfaction of the Council and that is what I was responding to, suggesting that we don't know that.

ARNOLD J:

Well it doesn't really matter from a practical sense. If the money is only going to be released when the Council is satisfied, why is it material as long as the assignment takes place by that point, whether it might take place earlier?

MR GODDARD QC:

It is material if for example, if insolvency supervenes for example. Whose is it at a given point in time. With property an essential agreement, essential element, an agreement to assign is to know when the assignment happens and the fact that it is assigned but that your ability to get the benefit of it, is subject to further conditions under the instrument that is assigned, is neither here nor there. There is a separate question about when the assignment happens and it matters because it matters when someone owns property. Now the evidence that was given by West City never crosses that bridge until we get to October 2006.

WILLIAM YOUNG J:

Well if you look at page 185 of volume 3 which is an invoice of 16 January 2006, that strongly suggests that everything in the original quote had been dealt with by then because it is an invoice for the full amount.

GLAZEBROOK J:
Sorry, page?

WILLIAM YOUNG J:
Page 185.

MR GODDARD QC:
What actually it suggests is, I mean Your Honour is right that it suggests that West City believed it had done everything.

WILLIAM YOUNG J:
Yes and there is no challenge to that is there?

MR GODDARD QC:
No but what there is, is a process that is then followed for the engineer to review it and certify it and what we see is that happening only in July 2006. So if the question is, has the work been done to the point where West City is entitled to payment and therefore entitled to payment by whatever means a payment was agreed, that point is only reached when the engineer certifies that that work has been done in accordance with the contract to the engineer's contract.

WILLIAM YOUNG J:
What if we are looking at it in a less technical way and looking at it in terms of whether West City has done what it has promised to do and done that before the specified period starts. You say too loose and airy fairy?

MR GODDARD QC:
Yes and certainly not what was agreed. The parties didn't agree that there would be an entitlement to an assignment based on something short of delivery in accordance with the contract.

WILLIAM YOUNG J:

But why couldn't there be an agreement to an assignment which in practical terms would be of no value to West City until everything was done which enabled the bond to be paid out.

MR GODDARD QC:

There could be, that was what I was suggesting to Justice Arnold earlier but again I come back to the point that we need to know and if you don't know whether what was agreed was assignment in – I mean it would have been perfectly sensible for the agreement that was entered into in October 2006 to be signed on the 7th of November 2005. I am sure the Court has read it but it is actually drafted in a forward looking way. If we go to page 230, we've got various definitions including completion date, project, works, means the work as set out in the schedule to the bond. And then (2) "Obligations by West City, completion of the works. West City shall undertake and complete the works on or before the completion date in a proper workmanlike manner and to the full satisfaction of St George and the Council." 2.4 Council's final arbiter as satisfactory completion; 2.5 an indemnity back from St George and then in (3) obligations of St George. "St George hereby assigns all its right title and interest in the bonds to West City absolutely upon the satisfactory completion by West City of the works."

ARNOLD J:

Look at the definition of the works. "The works are defined at the bottom 230 and are defined in a way that cannot possibly exclude the additional work." Well the works as set out –

MR GODDARD QC:

In the schedule to the bond.

ARNOLD J:

That's right which was prepared in November 2005.

MR GODDARD QC:

2004 the bond.

ARNOLD J:

Oh sorry the bond.

MR GODDARD QC:

The bond, the bond Sir.

ARNOLD J:

Got confused, my apologies.

MR GODDARD QC:

No, no it's rare that it runs that way round; it is nice for a change. So what we have got is an agreement which could perfectly, sensibly have been signed on the 7th of November 2005. And it would have imposed forward looking obligations on West City to do the works and it would have imposed indemnity obligations if the work wasn't done properly. It would have provided for an assignment upon the satisfactory completion by West City of the works bearing in mind that satisfactory completion means you get a tick from both St George and the Council and then there are various termination rights that could have resulted in the assignment not happening but for example if we look at (5) Termination and certain things that would trigger termination and 5.3 Compensation, "If St George terminates the deed in accordance with 5.1, pay to West City from the bonds reasonable compensation for any works carried on the property by West City prior to termination of the deed." So you have got a whole coherent mechanism for West City to do some work, if it finishes it and the Council is happy then, but only then it gets an assignment. If it does some work but it doesn't get all the way and the agreement is terminated, then it gets paid out of the bond money but it doesn't get the assignment. Now my point is that if the agreement that was ultimately entered into by the parties, only contemplates an assignment upon satisfactory completion and an ability to pull the plug on the assignment, at any point short of the Council being happy, what is the evidential basis for suggesting that a different agreement was reached early?

GLAZEBROOK J:

Well I am just looking at the engineer point. You say you have to have a sign off by the engineer. What say at the time that the works were completed and everybody had agreed they had been completed and the engineer just decides he is not going to certify. If you went to Court and the Court said, "Well the engineer should have certified because it was quite clearly, practically complete at that stage and the Council should have been satisfied but it was just being difficult". I mean you don't have to wait around do you for people who are being difficult and not fulfilling their contractual obligations. Because if you say you have to wait until the engineer signs

off, well the engineer decided to sign off in July, presumably because they were lumping the extra work as well in.

MR GODDARD QC:

Because they were waiting to get the Council's approval which was very clearly a requirement to trigger the assignment here.

GLAZEBROOK J:

No sorry, I'd understood you said you have to wait for the engineer to sign off. If the engineer should have signed off earlier, then surely you don't say, well you have to wait for him to actually sign off.

MR GODDARD QC:

There is no suggestion.

GLAZEBROOK J:

So it's the Council is the real issue?

MR GODDARD QC:

The Council is the real crunch but again I don't understand there to be any complaint about undue delays on the part of the engineer.

GLAZEBROOK J:

No, no, nobody is suggesting that. It was a hypothetical because you were saying you have to wait.

MR GODDARD QC:

Well what I was saying was that the promise –

GLAZEBROOK J:

So you're saying that if there was an agreement, it was only an agreement to sign off once the Council was satisfied. Well where do you get that from? From the formal deed of assignment.

MR GODDARD QC:

– my argument is not that that is what the agreement was, my argument is

that we don't know what was agreed because there is no evidence of an agreement with sufficient precision until we get to here but – and this is a subsidiary point, an important one and I am conscious of the time so I should probably make this and then stop and come back. It is that when we do see an agreement between the parties, that agreement is very clearly an agreement to assign only once satisfactory completion accepted by the Council as final arbiter has been achieved and there is certainly; my primary submission Your Honour is that there is no basis that there was any agreement at all because there was insufficient certainty about essential elements but if there was an agreement and this is what I need to deal with after lunch, then it cannot – there is no basis for suggesting that it was an agreement to assign earlier than the point in time that was eventually agreed by the parties in writing in October 2006, which is when the Council was happy which was July 2006.

WILLIAM YOUNG J:

So did you say that if this assignment had been entered into in November 2005, West City would still lose because the assignment contemplated, didn't occur until within the specified period had kicked in.

MR GODDARD QC:

Yes.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.15 PM

MR GODDARD QC:

Your Honour I want to go to the 3 October 2006 agreement and consider in a bit more detail what it tells us about what the parties had and had not agreed prior to that date. So that is in volume 3, it begins at page 230. And just recapitulating quickly without covering territory twice in detail. It is an agreement that defines completion date as 19 November 2005; it defines works as the work described in the schedule to the bond including the minor works bond and an additional works bond. It imposes a positive obligation on West City to undertake the works, so that is the work required by the bonds which may or may not be the same as the work quoted on, on or before the completion date, in other words by 19 November to the full satisfaction of St George and the Council. It provides for time to be the essence, it contains a reasonably strict regime for extension of time for completion in 2.3. It appoints the Council as the final arbiter of satisfactory completion in 2.4 It provides

for indemnities from West City back to St George if the work is not done properly or if it is not done on time including costs and legal expenses. It then provides in (3) "For an obligation on St George to assign its interest in the bonds to West City absolutely upon the satisfactory completion by West City of the works," that's the point I touched on before lunch and provides that at that time, 3.2 "Notice to the Council will be executed so that West City can become the legal owner of the bond."

And there's a detailed dispute resolution provision and then there's a very important termination provision designed to protect St George's position if the work required under the bonds is not completed and it provides for termination if West City becomes insolvent. 5.1(a) or 5.1(b) "If there is a breach which is not rectified," 5.2 "Provides for St George to do the work." 5.3 I mentioned earlier but it is important, "If St George terminates the deed in accordance with 5.1 or 5.2, so if the work is not done to the satisfaction of the Council and St George terminates, then there is never an assignment of the bonds but what St George will do is pay from the bonds, reasonable compensation for works carried out which won't exceed the lesser of the amount which West City has done on the work or the amount of the bond. So West City is never going to get paid more than the amount of the bonds less certain amounts. GST, costs incurred by urban, I think that should be St George, two different companies there but it doesn't really matter, "In completing the works including internal costs and other costs incurred in exercising remedies under the deed." Then there is some boiler plate provisions before the signature a few pages on.

As His Honour Justice Arnold noted in questions to my learned friend, this appears to have been drafted in November 2005 on instructions from Mr Andersen. We don't know that because no one could find Mr Andersen. Ms Ali gives evidence of the steps she took to try to find him and that is why picking up Your Honour Justice Blanchard's question and my submission the failure to call him, can't justify any adverse inferences in this case. An attempt was made to find him and he couldn't be located. Also suggests that it is probably not appropriate for the other creditors to effectively be disadvantaged for not being able to find the company principal, there is not an indentify of interests there but this is after all an application by the liquidators but the key thing is that attempts were made to find him, he couldn't be found so he didn't give evidence but the Associate Judge drew the inference which seems reasonable from the prospect of references to 19 November 2005 that this was prepared on instructions from Mr Andersen sometime in November 2005 and what

does this tell us. The first and most important things this tells us is that Mr Andersen was willing to enter into an assignment provided it was done in a formal agreement prepared with the benefit of legal advice that protected St George's position, including its ongoing obligations under its resource consents to do work.

GLAZEBROOK J:

Well where do you get that from – that was on the actual agreement which was before this point because if you look at the affidavit paragraph 52, there had already been an agreement to enter into an assignment according to Mr Ireland.

MR GODDARD QC:

Sorry is Your Honour on Mr Ireland's?

GLAZEBROOK J:

Paragraph 52 of Mr Ireland's, oh yes at page 52, I knew I had 52 somewhere.

MR GODDARD QC:

I will just catch up.

GLAZEBROOK J:

Or I should ask first in paragraph 22, was that challenged at all in cross-examination and was there a change to what was said there?

MR GODDARD QC:

This was explored in cross-examination and what he said was that these discussions took place back before he even provided a quote which was August 2005.

GLAZEBROOK J:

But that was my understanding.

MR GODDARD QC:

And he came up with a number of characterisations of what was agreed, it was as the Court of Appeal said a shifting characterisation, at times it looked more like, much more like just an intention to pay out of the bond monies and I can go later to the various references on that but this was explored and a range of different forms were given.

GLAZEBROOK J:

Well even in this affidavit he actually, I can't remember but there is a bit where he says he was paying it out by assigning it.

ARNOLD J:

Paragraph 22.

GLAZEBROOK J:

22 was it, no it was a bit further down.

MR GODDARD QC:

He goes on to say, "I sent a letter dated 6 November confirming West City would be happy to carry it out. Advised him that could not proceed" It really just paraphrases the letter, "Advise the arrangement was acceptable provided it was done with a formal agreement." So what we are trying to work out Your Honour is whether there was a concluded agreement back in August of some kind which seems a bit odd because there wasn't even a formal quote for the planting at that stage. He doesn't suggest there was any agreement in November, he positively rejects that suggestion.

GLAZEBROOK J:

Well he agreed to pay them by assigning and on that basis, "I put in that offer which was conditional on there being an assignment."

MR GODDARD QC:

And the question is –

GLAZEBROOK J:

Which had already been agreed according to him.

MR GODDARD QC:

- and the question then is what was meant by saying it was agreed; was there a contract because the parties intended to enter into immediate legal relations.

GLAZEBROOK J:

There was an offer which said, "I will offer as long as you give me an assignment. You have agreed to give me an assignment and by your acceptance of my offer, you

are accepting that you are going to give me an assignment." There begs the question as to when that assignment takes place but does that matter.

MR GODDARD QC:

Yes it does Your Honour. First of all what Your Honour has described is one possible sequence of events. Another possible sequence of events is that the parties said, "Well will you pay me by assignment." "Yes but on the shared understanding –

GLAZEBROOK J:

I quite like –

McGRATH J:

Please let him answer the last question.

MR GODDARD QC:

"On the shared understanding that this was the sort of agreement that had legal wrinkles and in accordance with normal commercial practice in New Zealand as cases like *Concorde Enterprise v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385. This is something that would have to be written up in a formal agreement.

GLAZEBROOK J:

Sorry my question wasn't that. The question was if that was the position, what is your answer to that. So if there is an offer that is subject to an agreement already indicated that there would be an assignment, what is the answer to that. I understand your first answer.

MR GODDARD QC:

Which is that there is evidence that that is not the position. Understood. Second, if that was the deal then it is too uncertain to be a binding contract because key issues are not resolved.

WILLIAM YOUNG J:

Even when it is performed?

MR GODDARD QC:

Yes and third such evidence as we have of the content of the parties' shared understanding is the agreement that was eventually entered into without demur and

that provided for an assignment to be effective only upon the Council's satisfaction and that means, I am going to take the law on this that there was no equitable ownership until all of those requirements were met.

BLANCHARD J:

Does that matter?

MR GODDARD QC:

Yes Your Honour.

BLANCHARD J:

Under section 292, why should it matter?

MR GODDARD QC:

Because the effective disposition was the vesting of equitable ownership in July 2006.

BLANCHARD J:

But if it is pursuant to a contract which is made outside the two years, it seems to me that it is quite contrary to the policy of 292 that it should be struck down.

MR GODDARD QC:

No more so than if the contract to do work and be paid for it is made outside that period but payment only comes within it. It is the same and I will come to the cases but basically as a matter of policy Your Honour, it makes no difference whether there is a contract to do work where they promised to make monetary payment or a contract to do work where the promise of payment by delivery of chattels or of a chose in action. In either case if the work is done the right to payment accrues and then within the specified period the value is transferred, that's the preference, it's the basic policy of the provision. It can't matter whether you pay with cash or with chattels or with a chose in action. The policy is the same. It would be very odd if the form of payment made a difference.

GLAZEBROOK J:

So your only answer, if we are not with you on the first and third, is that it is too uncertain or is there another answer. I am sorry I don't –

MR GODDARD QC:
I just need to get my list straight in my head again.

GLAZEBROOK J:
Oh yes the first is that it wasn't an offer on that basis. The third as they understand is, it wasn't an offer that was capable of acceptance because it was subject to a formal agreement with a whole pile of stuff in it and then the middle one was it was too uncertain.

MR GODDARD QC:
Too uncertain and the fourth one on that list is, even if there was such an agreement, there would not have been a passing of equitable ownership until the agreed pre-requisites for that passing were met and that was within the specified period so it's a preference.

GLAZEBROOK J:
And the agreed pre-requisites were the Council approval, is that right. Sorry I am just trying to get the argument straight.

MR GODDARD QC:
That is not my first argument, my first argument is there were none of course because there was no agreement but what I then say is if there was an agreement the best evidence we have of the agreed pre-requisites, the hoops that West City would have to jump through to get an assignment is what Mr Andersen instructed his solicitor to draw up and that's Council approval.

GLAZEBROOK J:
So the answer is yes, Council approval?

MR GODDARD QC:
Yes, for those reasons. In my submission the fact that Mr Andersen went away and instructed his solicitors to draw this up, is consistent with two possibilities. One is that there was only a rather inchoate understanding that the way this would be done was by some sort of arrangement for assignment with the details to be worked out. The other was that there was a more developed understanding but that it was common ground that it would need to be done by a formal agreement to use Mr Ireland's own words which would be one drawn up by lawyers to deal with all the

complexities that this might raise. So it is impossible in my submission to attribute to St George as opposed to Mr Ireland, a willingness to contract immediately. Rather Mr Andersen's conduct points the other way. Second, this is evidence that in November 2005, Mr Andersen for his part was only willing to agree to an assignment that would be effective from the date that the Council was satisfied with the works. There's good commercial reason for that, because any point short of that he had the obligation to do that under the resource consents, and he wouldn't get his necessary Resource Management Act certificates and things so he could sign sections until he'd done the work, he didn't want to be in a position where he'd parted with the bond but some of the costs covered by the bond fell on him. So, perfectly sensible commercial arrangement, he was only willing to agree to an assignment once the Council was satisfied with the works. There's no evidence he communicated anything different to Mr Ireland, there's no suggestion from Mr Ireland that what he found in this agreement was a departure from any prior understanding, so again either there was no contract to assign, because this was a key issue, the preconditions for assignment, that hadn't been agreed at all, or, in my submission, if there was a contract to assign the best evidence is that the deal must have been, "Yes, but only once the Council was fully happy," so that there'd be no recourse to St George to do more work.

Third point we can take from this is that, and it's a related one, Mr Andersen wasn't will to agree to an assignment without an ability, a right, to pull the plug in certain circumstances, in particular if the work wasn't done, and to do the work itself and get the bond itself. Again, no evidence he communicated anything different to Mr Ireland, so either there was no agreement because this critical issue, when could the assignment be undone, or rather not proceed, wasn't agreed, or that was the deal, that there was to be a right to pull the plug at any stage, prior to the Council giving approval.

Fourth point, and this is another important one, is that what this tells us is that Mr Andersen was willing to agree to an assignment provided that West City agreed to assume certain obligations over and above the existing obligations it had assumed in the exchange of correspondence to date. In particular, the obligation to do the work by 19 November and the indemnity in clause 2.5. So what we have here is evidence that Mr Andersen, yes, was willing to give an assignment, but only if he got certain things for it, these promises, the promise to do it by a particular date, the promise to do it in exchange for an indemnity. So the evidence of what Mr Andersen either was

willing to agree to, if there was no agreement, or thought they'd agreed if there was, included these additional obligations, but we don't –

GLAZEBROOK J:

Well, do you think the date was an additional obligation? Because I thought it was always on the basis that the work would be completed within the timeframe asked by the Council, which is why there was such a rush over it.

MR GODDARD QC:

There's no reference to dates in the correspondence.

GLAZEBROOK J:

Well, what about the thing from the Council itself, does that actually say what date it was?

WILLIAM YOUNG J:

That the bond was the 19th of November 2005, that was the date, which is the date in the draft agreement. But that was never started by the time the agreement was entered into because –

MR GODDARD QC:

It was looking a bit unlikely. Mr Ireland suggested in cross-examination that it might have been achieved – I could ask my learned junior to find the reference. He was asked about that, because I think it seemed to counsel for the liquidators that that was a bit implausible, Your Honours reaction as well, and the answer, "Well, well," I think it's a bit more complicated than that, and I'll ask, you know, Mr Francis to just find that reference, because I vaguely remember it, but I can't be more precise than that.

But, coming back to it, the critical additional obligation that Mr Andersen was seeking in exchange for his agreement to assign was this indemnity which – and there's no reason to think that Mr Ireland, if he'd been asked to sign up to this in advance before the work was done, back in November 2005, would have agreed, we don't know, because it wasn't put to him, and this is the key point that the Court, the best evidence the Court has of what Mr Andersen was willing to agree to is something which we don't know anything about Mr Ireland's willingness to agree at the time, because it wasn't put to him because at that time the discussion didn't happen.

GLAZEBROOK J:

Well we don't know that Mr Andersen was only willing to sign up on that basis anyway because it was his lawyer's agreement wasn't it.

MR GODDARD QC:

On his instructions and we don't know where that came from yes. But the point is that what he wanted was a proper legal document, that's quite clear because he asked his lawyers to draw something up. This went in, we don't know whether it was his idea or his lawyer's idea and we just don't know whether this would have been agreed or not. And again what that underscores in my submission is that this is too complex an agreement to be done orally, that it is much more likely that the parties contemplated the process that Mr Andersen immediately initiated which is the drawing up of a proper written agreement with legal input and that there should be no agreement till then.

The fifth and final thing we can take from this is that what Mr Andersen understood was happening in November 2005 was not an assignment by way of security because this isn't one. So Your Honours were putting to me, fairly forcefully at times this morning, well surely that must have been what was contemplated but what is quite clear is that in November 2005 that is not what Mr Andersen was saying to his solicitors because this is not an assignment by way of security. It is an absolute assignment of the bond to be effective once the Council has given its blessing.

So again what can we take from that. What we can take from that is either that there was no agreement on that critical aspect of the arrangement at this stage or that it wasn't an assignment by way of security but rather the absolute assignment and satisfaction of obligations owed by St George, that the Court of Appeal rightly found it was implausible, West City would have agreed to back at that stage.

My learned junior has found the reference for me in volume 2 at page 124. In the course of cross-examination Mr Ireland says, line 20. It was put to him "It was never going to be possible to complete the work by 19 Nov. 14". He says, "I disagree with you, could have done it by the 19th, there was a bit of to and fro going on at this stage of the game." So what we have is evidence which points strongly against St George having agreed to some much simpler arrangement without the protections that it saw as essential for its position, protections which as a matter of commercial logic were

important for its position because it remained on the hook in terms of the resource consent obligations to do the work and it didn't want, understandably, to be in a position where the Council wasn't happy, it had to do some work at its own expense, but someone else was going to get the bond money. And so it caused its solicitor to draw up this deal.

But would this deal, which was what St George was willing to do, have been accepted by West City in November 2005, well who knows because they weren't asked. What that tells us is that there was not yet an intention to create legal relations that the issues that needed to be resolved were too complex to be dealt with in the informal way that the appellant's now contends for. And my fallback argument if the Court says no –

GLAZEBROOK J:

Well why didn't they just get on with it then. If they really did want, because it had been said by Mr Ireland that he wanted a formal agreement. You say St George was only willing to do it with a formal agreement, why didn't they get on with it. What is your theory of that?

MR GODDARD QC:

That basically the day-to-day doing the job took priority and people didn't do the documentation.

GLAZEBROOK J:

So not that they thought they had deal, so it didn't matter –

MR GODDARD QC:

No.

GLAZEBROOK J:

– when you documented it? Well, why would that not be the inference they had of a deal, so they don't need to worry about documenting it until they need to –

MR GODDARD QC:

It's –

GLAZEBROOK J:

– ie when they're ready to get the money from the Council?

MR GODDARD QC:

Those are the two possible explanations. Which is correct is essentially a matter of evidence. It was very much for West City to prove the existence of this contract on which it relied, to establish the earlier transfer, and it simply hasn't got across the threshold of showing that there was a sufficiently certain understanding. And, fall-back argument, if there was a deal, then there's no reason to think that it was more favourable to West City than what finally got documented, which has all these limits, all these conditions, all this timing, which, as I'll come on to, means that the same result follows.

I do also want to – and whatever we might think in the rarefied atmosphere of this beautiful courtroom about the prudence of getting everything properly recorded and contracts before doing any work, experience and the reported cases suggest that the real world is just messier than that, and that people frequently fail to do so and that that produces a lot of very interesting litigation. And in fact there's a, in that *RTS* case my learned friend relies on, the first paragraph I think has, talks about how the parties there got on with an extremely substantial and complicated contract without ever actually signing their agreement and what is said by Lord Clarke, giving the judgment of the Court, in paragraph 1 has the different decisions in the Courts below, "And the arguments in this Court demonstrate the perils of beginning work without agreeing the precise basis on which it is to be done, the moral of the story is to agree first and to start work later," and that's the moral, but it's not what always happens.

McGRATH J:

Did anyone question Mr Ireland as to why he didn't do something promptly with the agreement, he didn't send it for execution properly?

MR GODDARD QC:

Was Mr Andersen –

McGRATH J:

Mr Andersen, sorry.

MR GODDARD QC:

– who had it prepared, and he wasn't there, Sir.

McGRATH J:
Mr Andersen…

MR GODDARD QC:
That was the problem, he couldn't be found.

McGRATH J:
Yes.

MR GODDARD QC:
My assumption is that he’s probably in Queensland –

McGRATH J:
No, that's fine, yes.

MR GODDARD QC:
– which is where insolvent builders seem to end up, but that's not a known quantity.

Mr Ireland does on a number of occasions, not only the passage I took the Court to but a few pages earlier, emphasise that this was a long-standing client relationship and that he’d done a lot of work for Mr Andersen and that he was, you know, willing to basically cut him some slack, is the way the evidence plays out in terms of getting on and doing stuff for him, helping him out, maintaining the relationship. So I think it’s important to bear in mind that this was a client relationship with history, and it will no doubt have been hoped to be an ongoing one, not a completely or even substantially highly formalised set of dealings, but that the parties did also, knew that there was some stuff you did need to reduce to contract and, where that was important, they did.

I touch in my 2.3 of my road map on the fact that Mr Ireland’s contemplation of a formal agreement and Mr Andersen’s instruction to his lawyers to draw one up are perfectly consistent with normal commercial practice, that's dealt with in paragraphs 4.11 and 4.12 of my submissions, and perhaps in the interest of efficiency it’s better to go to those than to the cases. So, 4.11, which is on page 12, I refer to the decision of Mr Justice Cooke, as he then was, for the Court of Appeal in *Concorde Enterprises*, after talking about the normal understanding in New Zealand, the

contracts of sale and purchase, the property reduced to writing, His Honour said, "This case in the different field of commercial contracts where there's not by law the same need for signed writing as evidence, but in our opinion the natural inference is same in the absence of factors to the contrary. Unless that inference is displaced, the result is that even though all the terms to be included in the document have been agreed there's no contract, and each party has a locus poenitentiae until at least execution on both sides," and the same point was made by the Court of Appeal in *Verissimo v Walker* [2006] 1 NZLR 760 (CA), which again I won't go to, but it's a decision of the Court of Appeal given in 2005 in a commercial contract case which cites *Concorde,* refers to the various – in fact, I am going to go that that, because it's quite helpful.

So, if I could take the Court to my bundle of authorities, tab 9, *Verissimo v Walker*, and the decision of the Court delivered by Justice Baragwanath, and probably the logical place to start in terms of the analysis of this issue is paragraph 26 on page 768 of the report, setting out the submissions, after setting out Mr Henry's, the Court turns at 26 to Mr Stewart's, placed at the forefront of his argument, in the front of his argument, the statement of Justice Mahoney in *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 (CA), the only question considered by the trial Judge was whether there was a binding contract between the parties, "In considering this question it's of assistance to distinguish between three questions: did the parties arrive at a consensus?; second, if they did, was it such a consensus as was capable of forming a binding contract?; and, third, if it was, did the parties intend that the consensus at which they arrived should constitute a binding contract?" and, just applying that test to this case, can I pause to say that in my submission the answer is there's no evidence of a consensus beyond you'd be paid by assignment out of the bond and that two and three are not met.

We get then the Court's discussion, beginning at 29, "Undoubtedly, as Mr Walker repeatedly recorded and as he accepted in oral evidence, the parties had reached agreement," and that's what my friend keeps emphasising and that's what the Court keeps putting to me. "But with respect to Mr Henry's careful argument, we do not agree that on the objective test of what that would have meant to an ordinary informed New Zealand observer is that the parties would have assumed an immediate legal commitment. It is true –

WILLIAM YOUNG J:

You know, Mr Goddard, this is executory. I just don't see the relevance of this in a context where the work's been done.

MR GODDARD QC:

Well, the fact that the work –

WILLIAM YOUNG J:

I mean, there are hundreds of cases like this.

MR GODDARD QC:

Yes. And the fact that the work's been done is of particular importance in a case like *RTS* where, in the absence of a contract formed effectively by conduct, you've got no contractual relationship between the parties at all and it's inherently unlikely that they intended to proceed without a contract. But here we have a contract, Your Honour. The parties' mutual rights and obligations are established by the construction contract. So the only question is whether the fact that work was done under that contract, triggering the rights to payment –

WILLIAM YOUNG J:

Well, you say that, but no one has given us a copy of the variation clause in the contract. We've got a copy of the amendments to it. The word "variation" is used in the documents in a way that's ambiguous, it is clear that the engineer dealt with payment certification as though it were within the contract. But to say that this is, that this was a variation that was, as it were, entirely within the four corners of the primary contract, seems to me to be pretty implausible, given that money hadn't by paid.

MR GODDARD QC:

Your Honour, that was the position that West City took from the beginning of this dispute, and I have proceeded on the basis that that was correct. In my submission –

WILLIAM YOUNG J:

Well, yes –

MR GODDARD QC:

– it's a bit late for West City to take a different position now.

WILLIAM YOUNG J:

Well they've used the "variation" with a little 'v'. I don't read in what the two documents you took me to, an unequivocal assertion that what happened here was by way of variation within the meaning of clause 9 point whatever it is of the principal contract which no one has bothered to produce.

MR GODDARD QC:

The conduct of the parties in terms of the involvement of the engineer in the certification process, as Your Honour said shows that either this was a variation within the four corners of that contract or that the parties agreement to this work brought into play significant parts of that contract including its administration regime, its certification regime.

WILLIAM YOUNG J:

But not its payment regime.

MR GODDARD QC:

All the conduct in relation to payment was consistent with that in terms of making a claim, getting a certificate and then by letter, calling on St George to pay. So everything that was actually done was absolutely consistent.

WILLIAM YOUNG J:

But they knew they wouldn't get paid, I mean it is common ground on all sides that there is no free cash.

Unless, of course sections were sold which could happen or a new project was undertaken which produced some cash flow but otherwise what was understood as a fallback was that there would be, in the future, a formal agreement which would get them paid by means of an assignment. And that is what was agreed so I don't need to spend too much more time on these cases because as Your Honour says, there are plenty of them, I just thought this was a particularly helpful summary and particularly paragraph 31 where it says, "It is convenient when discussing formation of a contract to speak of intention but it is tripe that the subjective state of mind of the respective parties is immaterial. What matters is the message that was objectively conveyed by each to the other" and as they say at the foot of the page "Both the words used and the factual matters are important to the determination of what intention the Court will infer here, whether they reached agreement to be immediately

bound." And what we have is Mr Ireland's letter looking forward to a future agreement and what we have is Mr Andersen instructing his solicitor to prepare a formal agreement but then not proceeding to execute it. So the indicia the parties' conduct point to a formal agreement being needed and not being entered into until 3 October 2006 and then Mr Ireland called on Mr Andersen to sign it. And they didn't just sign the notice to the Council assigning the bond, if there was a previous deal, why not just sign page 242. But that's not what the parties did. They entered into a more elaborate agreement which conferred various rights of indemnity and certain other mutual obligations, some of them now satisfied, others looking forward and that scheduled the notice and then they executed the notice.

So again what we have when an agreement finally was entered into was not just implementation of an existing agreement but documentation of a more complex commercial agreement. A problem with the suggestion that there was an agreement is the timing 12.4 – when was there a contract. In my submission it is impossible to identify a time at which a contract to assign came into existence before 3 October 2006 because it certainly is the case that in November 2005 a formal agreement was contemplated that sometime in 2005 one was being prepared but there is no evidence of any discussions between the parties about assignment after that until 3 October.

2.5 essential matters necessary for a contract to come into existence were not discussed and agreed including whether the assignment was absolute or conditional, that would be very odd in my submission to impute to the parties an informal arrangement to assign by way of security when what we see them do when they finally come to do a deal is an absolute assignment but we just don't know what they had agreed until we see the 3 October 2006 agreement and see what they in fact agreed. We don't know whether it was going to be in full or partial satisfaction of the claims; was West City agreeing to take this in full satisfaction of its claims or if it was owed more, as it ultimately was, was this partial satisfaction. And critically we don't know what was agreed about conditions to be met before the assignment would be operative unless we look at the agreement and then we know that it was conditional on the Council being completely happy. And then I refer in my 2.6 to the subsequent conduct in terms of making claims seeking certification to trigger a financial entitlement under the parent construction contract in respect of the plant, the pond construction work, expansion work and planting work and that in my submission also cannot be reconciled particularly the letter of 13 June 2006 when an argument that

West City was already the beneficial owner of a bond worth $104,000 because then you wouldn't be calling for payment of $109,000. You would either be saying this was what we were owed and it has been satisfied by receipt of the bond but we need your formal notice to the Council please. I will leave it at that.

So (3) in my outline, "If there was no contract there'd be no equitable interest." I don't think this is especially controversial and the argument in my friend's written submissions that if he fell short of a contract he could still somehow get to an assignment, it wasn't really developed so I have dealt with that in writing, I won't spend more time on it now.

What I do think needs a bit more attention is the issue dealt with in my paragraph 4. So what happens if the Court is against me and finds that there was an agreement to assign at some earlier stage and it was sufficiently certain to have contractual force and I am not quite sure what terms the Court will pick as the sufficiently certain agreement given the options on offer but the Court will, if it has reached this point, have formed a view on what was agreed and the Court will have concluded that there was an intention to create legal relations. If those requirements are all met, then in my submission no equitable interest would pass until the work was completed and I should add at the end of my (4), "To the satisfaction of the Council" because that was implicit but I should spell it out. "It was completed to the satisfaction of the Council." Why do I say that? I say that because this follows from the apparently conditional nature of any agreement to assign as evidenced by the 3 October document that was eventually entered into. So there is no suggestion from Mr Ireland that there was some different deal at which he got an assignment earlier than that by discussion at some stage. I do, at the risk of harping on, note in brackets in 4.1 "That the difficulty of identifying the relevant conditions casts doubt on the existence of a contract but I am at risk of falling into the trap of relitigating issues that by definition I have lost on, if we are in this paragraph so I won't dwell too much on that.

If there is an agreement it must have been conditional on completion by West City of all work required to the full satisfaction of the Council and if that is the case then when one asks whether ownership of the bond would have passed in equity, one asks – the cases differ a little bit on this, I will go to them shortly, one or other of two questions, or possibly both.

ARNOLD J:

Just on this, “Finish the work to the full satisfaction of the Council.” Say before the work was started in November 2005, there was a carefully prepared schedule of what was required and we have got the plan with all the planting on it and all the rest of it.

MR GODDARD QC:
Down to the last shrub.

ARNOLD J:
Sorry?

MR GODDARD QC:
Down to the last shrub.

ARNOLD J:
Yes down to the last weed in my case but however. But everything else stays the same that we have got and let’s assume we have got an assignment, an agreement to assign in that time but it is clearly related to that work. The fact that at some subsequent point the Council came along and said, “Well, actually, we want some more done before we are prepared to sign off,” could that really affect the way the assignment was approached, the meaning that you gave to it in November 2005?

MR GODDARD QC:
I need to take a step back from that question and say there’s strong evidence that St George was not willing to agree to an assignment triggered by that, as opposed –

ARNOLD J:
Triggered by…

MR GODDARD QC:
Triggered by a completion of anything other than what the Council required. And there’s good commercial reason for that, important part of a context, the factual matrix, which is that if matters fell short of Council satisfaction, then St George was going to have to do the work if it wanted to get its Resource Management Act certificates.

GLAZEBROOK J:
But it did that anyway, didn’t it? It paid for the extra planting, or agreed to.

MR GODDARD QC:

No, that was West City, Your Honour. I mean to say, would St George –

GLAZEBROOK J:

So, wouldn't St George have thought that finishing the work that they'd asked them to do and the Council's satisfaction went together? When it found out it was wrong it agreed to pay extra for the extra plants.

MR GODDARD QC:

No, in my – but it didn't –

GLAZEBROOK J:

Well, it did.

MR GODDARD QC:

But it didn't assign at that stage, and that's the –

GLAZEBROOK J:

Well, no, that's what you say. But you're saying it wouldn't have – if that's right, then it wouldn't have agreed to pay the extra, it would have said, "You haven't actually finished the works."

MR GODDARD QC:

That was a reasonably small amount. We don't know what the position would have been if the requirements had been more extensive, and we do know that no more was paid for the ongoing maintenance work that was also required by the Council. So there are some factors pointing both ways.

So, coming back to Your Honour's question –

ARNOLD J:

Well, I mean, if you're –

MR GODDARD QC:

– because I haven't really answered it yet.

ARNOLD J:

No, well, that's right. Finish the answer and then I'll…

MR GODDARD QC:

Yes, and then you can tell me why I still haven't answered it properly. But let me have a go at least.

So, the evidence of what St George was willing to agree to was an assignment once everything had been done to the Council's satisfaction but not before. Second, that makes perfect commercial sense because you wouldn't expect St George to be willing to put itself in a position where the money could be paid out to West City, and yet it would have to write additional cheques of an unknown amount to satisfy the Council across the whole range of issues contemplated by these various bonds. So it's unlikely, in my submission, and West City could not have reasonably expected, that St George would be agreeing to an assignment at a point short of full Council satisfaction. So I'm, I guess, first questioning –

WILLIAM YOUNG J:

But why would it matter? Because the assignments, the money's not going to be paid out until the Council is satisfied. Isn't that, isn't the risk here all with West City?

MR GODDARD QC:

The risk is also with St George, because it needed this work to be done in order to get the certificates under the Resource Management Act –

WILLIAM YOUNG J:

Well, hadn't it got the certificates?

MR GODDARD QC:

– that would let it sell sections.

WILLIAM YOUNG J:

Hadn't it got the certificates? Weren't these bonds given to enable the certificates to be granted, the section 224 certificates? Why else would you give a bond? Otherwise, if the hadn't been given the Council would just withhold the certificates until the bond had been given – until the work had been done.

MR GODDARD QC:

Let me just check that. Because there's some, you know – to the extent that one can attribute logic to the requirements of territorial authorities, there's some force in what Your Honour says, but I just want to check that is in fact the way it works. In fact what I'll do is I'll get my learned junior to do that while I finish answering Justice Arnold's question.

But if there had been an agreement which was tied to completion of well-specified work and there was no debate about whether that had been done. So if you agree, if you say, "I agree that I will do this list of things, and when I've done this list of things then you agree that you will assign to me some shows in action," then the Council's happiness would be irrelevant, I accept that.

ARNOLD J:

So you're effectively saying then – I mean, if you look at it from the position of the parties in November 2005, when it's argued this agreement to assign was entered into, the Council's satisfaction as they were approaching it revolved around the planting schedule that had been developed to that point in time.

MR GODDARD QC:

It revolved around the whole of the stormwater works. But the only thing they were indicating they had an ongoing issue about – no, actually, in November 2005 it was the whole stormwater works. So it wasn't just some planting at that stage, it was quite a lot more, the pond had to be made bigger. So if we –

ARNOLD J:

Oh, yes, yes, sorry, I'm –

MR GODDARD QC:

So if we're winding back to –

ARNOLD J:

The landscaping, let me use the word "landscaping" and "planting".

MR GODDARD QC:

Well, it's more than just landscaping, because the pond was too small. This was the problem, that a pipe had been built from a neighbouring subdivision –

ARNOLD J:
Yes.

MR GODDARD QC:
– into the Quail Drive one, so the runoff pond was too small, so the whole thing had to be substantially expanded and then, once it had been expanded, had to be landscaped. This was not just about landscaping, this was a substantial job involving – well, you know, it's $50,000 worth of work, so it's…

ARNOLD J:
Okay, well, accepting that description, standing corrected as to that description. But if that's what the parties had in their mind, and that's what their contemplation was that the Council had to be satisfied about, if the Council comes along five months later, once all that work has been done and there's no issues about the standard of it, and says, "Well, actually, we want some additional things done," now, in one sense it comes within the idea of, to the Council's satisfaction, but in another sense it doesn't, because it's now a new requirement, which was not fully articulated as necessary at the time the agreement was entered into.

MR GODDARD QC:
And that gets back to the very important point that in order to have an agreement to assign, which it seems clear was condition on certain things happening, you need to know what the certain things are. And what is I think very important is that when the parties eventually signed an agreement to identify those certain things, they didn't do it by reference to the quote, they did it by reference –

ARNOLD J:
They did it by reference to the works.

MR GODDARD QC:
As defined in the bonds. So it wasn't the Council's facts which was what was quoted against, it wasn't the quote, it was whatever the Council required in order to satisfy it under the bonds, which will have been in general terms and will have left plenty of room, I imagine, for a council to exercise judgment about satisfaction. So –

GLAZEBROOK J:

We've got the bond somewhere?

WILLIAM YOUNG J:
It's attached to the assignment.

MR GODDARD QC:
We've got the bond but, frustratingly, we don't have all the conditions. The bond begins at 239 – well, actually, we do have, at a very general level, what seems to be required. So at 240 – actually, this does seem to be "the" schedule. So –

GLAZEBROOK J:
Yes, that's what I thought.

MR GODDARD QC:
Yes, no, Your Honour's right. So at 240, the schedule, there are various things. There's a wetland planting maintenance bond, there's a reserves planting bond, stormwater pond-based works, and so on. So, these are in very general terms, and I don't think as a matter of resource management law or as a matter of contract in terms of the bonds that it was open to the Council to make up new requirements as it went along. Rather, the point is that what was required by these general descriptions was somewhat open-textured and there was room for debate about it, and that's why St George very sensibly said, "Well, whatever the Council properly, obviously, requires under here you must do." So, really important that it was all of this stuff that had to be completed before, under the parties' agreement, there would be an assignment. And if what West City had been asked to quote against and had quoted against was not co-extensive of what the Council expected under that very general schedule, then what St George wanted to achieve was that that would be West City's problem before there could be an assignment, and there's no reason to think they agreed to something different before that.

GLAZEBROOK J:
What was the consideration then if this assignment was totally outside of the actual contract to do the works. Because if you say there is a contract to do the works, what was the consideration for the assignment or it just was going to be done by deed and therefore it didn't matter was it?

MR GODDARD QC:

I mean I think that is a perfectly sensible answer but it also sends to me –

GLAZEBROOK J:
But that is not what Mr Andersen, not Mr Ireland's evidence was. He said he wasn't doing the work without this and that that had been agreed to.

MR GODDARD QC:
And that is what Mr Andersen appears to have contemplated in his instructions to his solicitor.

GLAZEBROOK J:
Yes but it was actually related to the works which was it already, so there is not some different work is there?

MR GODDARD QC:
Yes there is because what Mr Andersen contemplated was that he would agree to this provided that West City agreed to do whatever it took the works, as defined in the assignment, being defined by reference to the bond.

GLAZEBROOK J:
So he was going to vary the contract that had already been entered into.

MR GODDARD QC:
Well again, need to bear in mind Your Honour that Mr Ireland's evidence was that these discussions took place back in August about assignment, or around then. There was a bit of a moving feast.

GLAZEBROOK J:
Was it August? I didn't think a date had been given.

WILLIAM YOUNG J:
The quotation was in August.

MR GODDARD QC:
He said it was before he came them a price and the price was given on the 4 August, it actually could well have been before that.

ARNOLD J:

He did also say November at page 102 when he was under cross-examination, line 25. “What is the arrangement you’re speaking of?” “Well he told me he would assign the bond to me as payment for doing the work, extra work on the pond.” “So is this in October 2004” Answer, no November I think it was, November 2005.”

MR GODDARD QC:

This passage was the start of some confusion that took about two pages to sort out because the arrangement that was referred to in his paragraph 14 was actually the earlier arrangement about getting paid out of sales of sections so there was this passing reference. But then if we come on to – let me find it page 123 of the case on appeal. Beginning oat line 9, “You refer to this arrangement being acceptable provided it is done with a formal agreement.” He is being asked here about that 6 November letter. “Yes.” “So you’d accept you agreed to receiving payment from St George under this arrangement, provided it was done by formal agreement?” “Yes.” And then the first sentence on page 92 which is his affidavit on page – in fact that doesn’t make much sense, that cross-reference. “This sentence is based on discussion you have had with Mr Andersen, it is discussion we have had several times with Mr Andersen and Mr Vaughan Crane, that’s the engineer, the discussion didn’t take place between 3 November when the quote was accepted and 6 November.” “Actually it was carried out before then.” “When?” “Pass, it was carried out before we even gave him a price.” So there he is saying that the discussion about the assignment happened before there was even a price. And actually while the Court has that here. “You have summarised the discussion essentially on page 25 so this is the 6 November letter which as you understand St George intends to make payment out of the amounts of bond monies?” “Yes, yes I wouldn’t have done the work if we hadn’t agreed to it.” “The formal agreement you speak of can be found on the next page, page 26, is that correct?” he says, “That’s the deed of assignment that’s yeah, I suppose you could call it the agreement. Wasn’t, no that’s just the assignment, that’s not necessarily what was agreed. What he agreed to do was pay us using the Council bond money, this is just the assignment of it.” And then there is some more toing and froing about a formal agreement and he confirms it is the only thing we have got in writing but it’s not that, yeah that’s the assignment, oh yea, carry on.” So and then again over on 58, sorry 125 of the case on appeal, talking about the deed itself, line 12, the first date, he thinks it was Mr Andersen that put it in, signed at the offices of St George, how did that come about? Did you physically take the copy to Mr Andersen? “No his lawyer wrote this, the agreement, I was happy

what I had written to him. I was happy what we agreed, we agreed we would get paid out of the Council bonds." So again that is a pretty general agreement, not an immediate assignment unnecessarily, it could be a whole range of things. "This was a formal agreement so that I could actually take it to the Council and physically get the bond changed over to our name, but that could not happen until the works were complete." So he also seems there in his oral evidence that the assignment couldn't happen until the works were complete. "Before the deed was signed had to you seen it?" "No." "Quite sure about that?" "Yep." "So the first time you saw it was at Mr Andersen's office?" "Mmm, because I was into him about it, 'Give it to me, come on, I've got to get this bond actually physically to us,' because a bit of a legal issue," and he goes on to explain why he was chasing it.

There is, as the Court of Appeal said, fairly in my submission, a lot of vagueness, a lot of different accounts of just what was agreed and just when it was agreed, that from early on the idea was that if they did this extra work they'd get paid out of the bond monies rather than having to wait for section sales, the November – October 2004 theory seems clear. But it was also, certainly in November 2005, Mr Ireland's expectation there'd be a formal agreement, Mr Andersen's expectation there'd be a formal agreement, and that didn't come to pass until October 2006. It was also clearly Mr Andersen's understanding – well, clearly, the best inference –

WILLIAM YOUNG J:
This is pretty repetitive.

MR GODDARD QC:
Yes, I'm sorry, Sir, I'm just –

WILLIAM YOUNG J:
I mean, we must have had it about –

MR GODDARD QC:
– realised that I –

WILLIAM YOUNG J:
– half a dozen times that Mr Andersen's understanding is recorded in terms –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:
– of the deed of assignment.

MR GODDARD QC:
So, again the point is that we have now the oral evidence of Mr Ireland also suggesting he didn't expect there'd be an assignment until the works were complete –

GLAZEBROOK J:
Well, but he makes a distinction between a formal assignment he can take to the Council, and otherwise he thinks he makes that point, you read it to us –

MR GODDARD QC:
Yes, I did.

GLAZEBROOK J:
– and he makes it clear at page 107 for instance, "I'm not doing any more unless you assign me the bond," which is when he's talking about his discussion. So, I mean, I'm not sure you can pick something out of there and say, "See –

MR GODDARD QC:
No, and that's not what I'm trying to do. What I'm trying to suggest is that there were a – exactly what the Court of Appeal said, that he gave a range of accounts at different times about exactly what had been agreed and when, which, but that there's nothing to cast doubt on the agreement being condition on the Council being fully happy. And if that's right –

GLAZEBROOK J:
And then sometimes it's an answer to a question, say at 42, he was told, "You were going to be paid from the bond monies," and he agrees, for instance, "That's what he'd told me he'd do." So I'm not sure that, the difficulties in terminology happened both from the lawyer and from him.

MR GODDARD QC:
Yes. But there were those difficulties, and –

GLAZEBROOK J:

But he's a lay person and the lawyer's not.

MR GODDARD QC:

And then you look at what was actually done. But the reason this is repetitive – and I do apologise for that – is that I keep looping back to the no contract argument and I shouldn't, I should be focusing on what I'm now on, which is my four, which is that if there was agreement it was conditional on satisfaction of the Council, and if that's right then –

WILLIAM YOUNG J:

Was that put to Mr Ireland?

MR GODDARD QC:

Not apart from the passage that I've just gone to, I think, Sir, no. It was for him to make out the existence of a contract and the terms of that contract.

BLANCHARD J:

Once the work was done, whose job was it to sort the Council out and get the Council effectively to accept that everything was satisfactory? It would be St George, wouldn't it? Because presumably it was St George who were dealing with the Council, having made the bond arrangements?

MR GODDARD QC:

Yes, St George or its agents, Sir.

BLANCHARD J:

Right, thank you.

GLAZEBROOK J:

And I think that point is actually made at the end of, as I understand it, of Mr Ireland's evidence, where he was saying he needed to deal with the Council directly and sort it out, isn't it? "The only way we were ever going to get this sorted was deal with the Council direct, hence…"

MR GODDARD QC:

I understood His Honour to be putting the opposite to me in fact, which was –

BLANCHARD J:

I was.

GLAZEBROOK J:

Well, no, no, but that – no, no, it was opposite, but he was saying, "Well, it was St George's job, but because it wasn't being done properly we thought we had to take it over at the end."

BLANCHARD J:

Where did he say that?

GLAZEBROOK J:

Right at the end. But it actually backs up the point that it was St George's job, I would have thought.

MR GODDARD QC:

Sorry Your Honours, can I just - the reference, not quite what I remember him saying, I am just wondering where that was.

GLAZEBROOK J:

Right at the end, page 127.

WILLIAM YOUNG J:

Yes it is a reference to what is happening in October 2006.

MR GODDARD QC:

Yes, that it was getting beyond a joke because the Council kept asking for different things. So what he is complaining about if we look at the whole of the answer, it wasn't the money, it was the actual work. " Write 13/13/12 2005, we had completed the works in the pond, that's in 2005, they get another variation on 30 April 2006, it was getting like it was beyond a joke, the only way we are ever going to get this sorted was deal with the Council direct." So he appeared to be saying that he wanted an opportunity to engage with the Council about what they required and to satisfy them.

And in my submission that is no different from any other promise to someone about how you intend to pay them and then getting on to them and saying, come on you told me you would pay me in this way, I want you to stump up with it now and if it's by assigning an obligation owned by a third party, saying I want you to assign that to me so that I can deal with him direct. And then we come to the legal point which is 4.2 which is that if there was a contract to assign conditional on the Council being satisfied and that is certainly what was signed, then the equitable interest in the bond would only pass when that condition was met.

WILLIAM YOUNG J:
It all depends on what's agreed. So if the agreement is that there is no assignment effective until the Council signs off on it, then you are right. If the agreement is that there is a general assignment query by way of security only to cover what we are owed, then you're wrong.

MR GODDARD QC:
Or if there was no agreement because you can't tell.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
No but that is looping back to the earlier argument. So just on the hypothesis that there was an agreement under which there was to be an assignment of the bond, it depends on what that agreement was.

MR GODDARD QC:
Yes and that is what their Lordships say in *Tailby v Official Receiver* and it is picked up in many other cases, that once you are talking about whether a contract effects an assignment or not, it is all down to interpretation of the contract.

WILLIAM YOUNG J:

And on your approach the deal struck would provide not much more than illusory security for payment because it would be so dependent on events that West City couldn't control.

MR GODDARD QC:

No I wouldn't –

WILLIAM YOUNG J:

Okay well far less substantial security than the alternative hypothesis, I put to you.

MR GODDARD QC:

I think in practical terms because – and this is the point that Her Honour Justice Glazebrook was putting to me a moment ago, in practical terms because you would have to get the Council happy before any cheque was written by the Council.

WILLIAM YOUNG J:

And there is also a problem over preference.

MR GODDARD QC:

Yes exactly, so subject to the risk of supervening insolvency.

WILLIAM YOUNG J:

Yes that is what I meant by events that West City can't, doesn't have any control over.

MR GODDARD QC:

Sorry I thought Your Honour was referring to the Council.

WILLIAM YOUNG J:

Well to some extent, yes.

BLANCHARD J:

Mr Goddard, once the work was done and we know that it was satisfactorily done because there's never been any evidence to the contrary, why didn't an equitable interest arise at that point?

MR GODDARD QC:

That’s I think my 4.2. So if there is a contract.

BLANCHARD J:

It is in your 4.25.

MR GODDARD QC:

Oh sorry I am in my road map Sir. Rather than the –

BLANCHARD J:

Oh sorry I am looking –

MR GODDARD QC:

You are in the big one, right.

BLANCHARD J:

Because what you say is an agreement to assign an existing chose in action in the future does not give rise to an immediate equitable interest in property before the consideration is provided or the agreement becomes specifically enforceable.” Now what I’m suggesting to you is that once the work was done and then it was for St George to get the Councils sorted out, the consideration had been provided.

MR GODDARD QC:

In my submission that's not the position, Your Honour, because what St George was contracting for, as a pre-condition for the assignment, was that the Council be fully satisfied, and it couldn't –

BLANCHARD J:

Yes, but the full satisfaction of the Council couldn't come from West City. It could do the work, it did do the work, there’s nothing to suggest that the work wasn’t perfectly done. It wasn’t its job to get the Council approval.

MR GODDARD QC:

Once – so it couldn't be known that there was nothing more for West City to do until confirmation had been received from the Council that its requirements were in fact met, because there was no sufficiently well identified objective standard, and that's why the agreement was crafted in the way it was, in my submission. What I think Your Honour might be putting to me – Your Honour will tell me if I’m wrong – is that

once the Council says, “We’re happy with the work,” then we know with the benefit of hindsight that at some earlier time West City had got there and that all that was left to be done was the administrative stuff, and so the question is whether at that earlier time when we now know West City had done everything necessary to satisfy the Council, the equitable interest didn’t pass, is that the question?

BLANCHARD J:
Mmm.

MR GODDARD QC:
Then I see the force of the argument that when there was nothing more for West City to do –

BLANCHARD J:
As far as it was concerned it was an executed contract.

MR GODDARD QC:
No, I think there are still – well, there are two points. The first is that that occurred within the specified period, because –

BLANCHARD J:
No, it didn’t.

WILLIAM YOUNG J:
No, it didn’t.

GLAZEBROOK J:
No.

WILLIAM YOUNG J:
No, it didn’t. It occurred before the 16th of January. I took you to the document earlier. Everything required under the quotation, which of course as a specification of work is something that's St George’s, had been done by the 16th of January, as I read the document.

MR GODDARD QC:
But everything that the Council required had not, which is the –

BLANCHARD J:

No, that's not so. The council later came along and wanted some additional work done, but that doesn't seem to have been work within the October/November contractual arrangements.

MR GODDARD QC:

But what Your Honour was putting to me was, as I understood it, was if the agreement is to do work to the satisfaction of the Council, but all that has to be done is certain administrative steps to show the Council's satisfied, and answering that –

BLANCHARD J:

And there the obligation, the obligation to sort that out, is on the other party to the contract.

MR GODDARD QC:

Absolutely. But the Council wasn't satisfied with the work done up to January 2006. It said –

BLANCHARD J:

But we don't know that.

MR GODDARD QC:

Well, we know that they were not agreeing to release the bonds until more was done.

BLANCHARD J:

Yes, but they were asking for more things, but it wasn't because of a unsatisfactory state of affairs of the work that West City had done, it was that the Council was deciding it wanted more planting.

MR GODDARD QC:

In order to satisfy –

BLANCHARD J:

And that more planting was paid for or agreed to be paid for by St George, which wasn't apparently suggesting that this was because of some shortfall on the part of West City.

MR GODDARD QC:

Yes. I was answering Your Honour's question on the basis of the condition that I had suggested was discernible from what was eventually agreed, which was that the work to be done was the work required to satisfy the schedule in the bonds. If I'm wrong on that, then if the condition for assignment that was agreed – so we're on the hypothesis there's a contract – and then we've got to say, "So what was –

BLANCHARD J:

Well, why was the extra planting to be paid for by St George, if it was something that came within the scope of the works in the October/November contract?

MR GODDARD QC:

I think this comes back to His Honour Justice Young's point that it all depends on what the agreement was. If the agreement was to assign once the work in the October/November contract had been done, then that's all that had to be done to get the assignment.

BLANCHARD J:

Well, they didn't know there was going to be any new contract beyond that.

MR GODDARD QC:

But they knew that the Council had various requirements, specified at a level of some generality that had to be met and when they sat down to write a written agreement they defined the criterion for assignment by reference to the Council's requirements, not by reference back to previous contracts entered into. They still didn't say, "The October/November plus that specific variation." They said, "It's whatever the Council needs and so my answer was predicated on the assumption that that was the condition and if that was the condition then it couldn't be met until the third party consent was obtained. And there is quite a lot of case law on equitable interests not passing under a conditional contract until the condition is met and those are referred to in Professor Worthington's article.

GLAZEBROOK J:

Is it a conditional contract because all it says is, the Council has to be satisfied so I suppose you say it is conditional on doing the work until the Council is satisfied.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
But there was no obligation to do the work until the Council is satisfied under our contract so we now have a separate contract. We have a contract to do $47,000 worth of work which is agreed was done. Now we seem to have a separate contract that you get the assignment if you do whatever extra work, unreasonable or otherwise the Council might want. So we have two contracts according to you, rather than one.

MR GODDARD QC:
No we have one and we need to decide which it is.

GLAZEBROOK J:
Well what is the one. Because you say there's a separate contract, we're with you on that. We suddenly have this other contract outside of that in terms of the assignment that says, "No matter what you have already agreed and done under that first contract, in order to have the assignment you have got to do a whole lot more."

MR GODDARD QC:
Well that's what the parties actually signed of course, in October 2006.

GLAZEBROOK J:
Well that's assuming it's not just one contract.

BLANCHARD J:
Yes but by that time it was all over, Rover anyway.

MR GODDARD QC:
Which is probably why at that stage, Mr Ireland was pretty relaxed about signing up to something that general. And that comes back to my point -

BLANCHARD J:
Yes. I mean one wouldn't assume that on a strict construction of what was agreed a year or earlier, all those extra terms were part of the deal. Later on it didn't matter, probably sign anything because he was just going to get the assignment of the bond.

MR GODDARD QC:

That loops back to my submission earlier and I don't want to repeat myself.

BLANCHARD J:

No and I wouldn't if I were you, I can see where you are going.

MR GODDARD QC:

A year earlier Mr Andersen thought all those extras were required before he would agree to an assignment.

WILLIAM YOUNG J:

Well he may or may not have, they wound up in the agreement. I mean we are going round and round in a circle on this.

MR GODDARD QC:

And we have no reason to think, as Your Honour said, that Mr Ireland would have agreed to that prospectively because –

WILLIAM YOUNG J:

You are going round, you have just gone round another loop I think actually.

MR GODDARD QC:

That's why I did it hesitantly.

BLANCHARD J:

But you agree, I think as a matter of law that if the consideration is provided, an equitable interest in property can arise.

MR GODDARD QC:

If the consideration has been provided in full and if all conditions to which the promise to assign are satisfied, then an equitable interest arises. And the reasons for that are explained in Professor Worthington's article. I did want, for the sake of completeness, to draw the Court's attention to a dictum which is more favourable to my friend of the Chief Justice in that case that I have just lost – it is all right I will just see if I can find it. *Re Martin ex parte Avery Motors Ltd* [1991] 3 NZLR 630. Now this was a case in which the Chief Justice was concerned with a conditional sale

agreement in relation to goods and His Honour held that under such an agreement, no equitable interest passes until payment has been made in full but if I take the Court to, and that's based on the English Court of Appeal in *Re Wait* [1927] 1 Ch 606 (CA) and the positive comments made about that in some subsequent cases. But on page 632 at the foot of the page, what His Honour said is, "As regards equitable ownership had the property in question been land or a chose in action an equitable interest would pass to the purchaser immediately upon conclusion of the agreement to transfer." Ever since *Re Wait* (1927) 1 CH 606 (CA) this consensus as principle has no application to the sale of goods." Now, it's a case of "goods", the statement about sale of land is in fact in my submission, it needs to be approached with some caution, it's a bit of an over-simplification, as the Court of Appeal explored a few years later in *Bevin v Smith*, but so far as if shows in action is concerned, the reason why that can't be right, which is essentially that any interest must be, is defeasible, the contract might not be performed, it might be set aside, that there are other authorities suggesting that the interest passes only as an when performance occurs, are all, point much more strongly to the idea that either there is no equitable interest immediately on contracting, or it's a very thin equitable interest, far short of equitable ownership, and you only get full equitable ownership once you have performed in full, and Professor Worthington explains from first principles and by reference to the cases why that should be so, in my submission it makes good sense. Again, if you pause and think, why is there equitable ownership? There's equitable ownership because equity treats as done that which ought to be done. You don't get full equitable ownership until what ought to be done is that full legal ownership's passed. And so at the level of principle that makes good sense, and that's why I say in 4.3 that if there was a contract conditional on completion of the work to the satisfaction of the Council, then the earliest possible equitable assignment is July 2006, which is within the specified period, and I provide the references to my submissions on that.

On the second issue, all I was going to say was for all the reasons the Court explored with my learned friend, if we get to this point there's nothing to distinguish West City from other creditors who receive a preference, and his final point, referring to my submissions, which suggested that if there was unacceptable delay the appropriate response lay in reducing the period for which interest was awarded. That's not of course a positive suggestion that that is appropriate –

WILLIAM YOUNG J:

Did the Court of Appeal make an order as to interest?

MR GODDARD QC:

No.

WILLIAM YOUNG J:

So maybe the point doesn't arise.

MR GODDARD QC:

That's with High Court I think, Sir. But, in my submission, this is not a case where there's been delay of the kind that would disentitle the liquidators, which is to say the body of creditors generally from receiving interest. If it's a preference, if interest has accrued to West City when it ought to have accrued to the body of creditors generally, then that correct position should be restored.

GLAZEBROOK J:

But we're not doing that. Were you seeking an order for interest?

MR GODDARD QC:

No, I'm not seeking –

GLAZEBROOK J:

I understood it was with the High Court …

MR GODDARD QC:

– I'm not seeking any order. But to the extent that my learned friend is saying –

GLAZEBROOK J:

No, no, that's all right.

MR GODDARD QC:

– "You should do something to us."

GLAZEBROOK J:

No, I suddenly – you said you wanted interest, and I suddenly just worried that we were supposed to be looking at that, I'm not…

WILLIAM YOUNG J:

I don't think it is with the High Court, is it? Para 60 of the Court of Appeal judgment, "West City Construction is to pay the amount of $104,350 to the appellants." I don't think there's any reservation of a question as to interest, is there?

MR GODDARD QC:
My learned friend, who was involved, says there is, and he may be able to help you in reply better than I can.

Unless there's anything I can assist the Court with, those are my submissions.

MR DAVEY:
Just in terms of that last point, Your Honours, the liquidators are claiming interest and that matters' still to be resolved by the High Court, but essentially it's been put on hold while this appeal is being determined, so that's where things are at there.

WILLIAM YOUNG J:
Thought they might have to seek it by way of recalling the Court of Appeal decision anyway, never mind.

MR DAVEY:
Yes, so those matters are really outstanding in the High Court pending this appeal really.

WILLIAM YOUNG J:
Sorry, why?

MR DAVEY:
Because well depending on what the outcome of the appeal.

WILLIAM YOUNG J:
No, no but assume the appeal is dismissed, what issue is there as to interest?

MR DAVEY:
There won't be. Oh sorry, if the appeal is dismissed, if the dismissed well the liquidators are claiming interest from the date of liquidation and really the appellant's submission is that –

WILLIAM YOUNG J:

Well wouldn't they have to go to the Court of Appeal for that, to ask them to recall their judgment unless there is a reservation of legal -

MR GODDARD QC:

There is reservation of 63 Your Honour.

WILLIAM YOUNG J:

Sorry, it's a reservation of leave.

MR GODDARD QC:

Yes there is a reservation, page 63 of the Court of Appeal.

MR DAVEY:

It says, "Any outstanding costs or interests are to be, interest issues are to be determined in the High Court."

WILLIAM YOUNG J:

Oh sorry, okay thank you.

MR DAVEY:

Just in terms of factual. There is three or four just factual matters I would like to clarify with the Court and then a couple of legal issues as well. The first factual matter was that my learned friend suggested to the Court that these monies were put up to the Council prior to St George getting the 224C certificates. Now Mr Ireland – it hasn't been covered completely satisfactorily in the evidence but he stated, in volume 2 page 115 under cross-examination, line 12, page 115 line 12 of the second volume. He says, "While this pond is happening in the meantime Kevin Andersen puts up a bond to the Council so he can get his 224 and the engineers are still mucking around getting a design and they won't pay me my money." So there's also a letter from Rider Hunt, 27 October 2004 which is in the evidence as well which is on volume 3 page 166 which basically says that the project is now complete, the customer has applied for S224 certificates, this is expected by the end of the month subject to payment of all contributions to Council." So it is really the point that Your Honour Justice Young was making that this bond was put up so that St George could obtain the 224 certificates and that really the effect of the bond which is at page 239 of case on appeal is that if the work wasn't actually done then the Council could obviously

use that bond to carry out the works. So it wasn't a situation where St George is at risk of not having titles being issued for the properties so that it could on-sell them. That was the whole purpose of the bond essentially.

The other matter that in my submission needs to be borne in mind is that these works were certified as being practically complete back in July 2004 and there is a letter in the evidence, in the third volume at page 154 from the engineer stating that, "As at 31st July 2004 that a practical completion certificate was issued" and that really the only matter that was then outstanding was the defects liability obligation. So at that point that West City agreed to actually carry out these additional works in the pond, it wasn't any contractual obligation under the original contract for it to do it. It had completed its work, they had been certified by the Council, the only matter that was really was this defects liability period and whether it is a variation to the original contract or not, I mean Mr Ireland in his evidence also stated that he thought that this was a separate contract to do these pond works, and he said that at page 110 of the case on appeal, in volume 2, he says, "That's because the pond works is a separate contract." At the end of the day, in my submission, it doesn't make a great deal of difference, because he was clear that these, he wasn't going to carry out these additional works unless he had been assigned the bond.

The other point was, in terms of factual clarification, was that Mr Ireland in his affidavit at paragraph 27 – and this is at page 53, volume 2 of the case on appeal – said, "On or about 16 January 2006 West City issued a second payment claim for the balance of the Quail Drive pond works that were then complete in accordance with the quote." So he's given that evidence that they were done by that date in accordance with the quote, he wasn't challenged under cross-examination on –

WILLIAM YOUNG J:
Sorry, what page is this? I'm sorry.

MR DAVEY:
Page 53, paragraph 27.

WILLIAM YOUNG J:
Yes. Well, that's the document, I referred to it in the course of argument.

MR DAVEY:

Yes. So, he wasn't challenged on that at all in cross-examination, that those works in any way weren't completed at all at that point in time.

Also just in relation to the issue that was raised about the certification by the Council – by the engineer. It appears that the engineer certified that first payment for the first part of the bond works in December 2004, but then on after it wasn't, there wasn't any real further certification by the engineer until July about any of these extra works, which in my submission is consistent with this being a separate contract that had effectively been entered into by West City.

One point that was sort of raised was in terms of the remedies that would be available, whether or not West City had really sort of, had precluded itself from trying to seek payment. But essentially, in my submission, if St George had refused to actually transfer the bond to West City once it had completed the works, then West City would either have two choices: either it could seek specific performance of the agreement, or otherwise cancel and presumably seek damages. So it didn't necessarily mean it was precluded from pursuing other alternative remedies.

The other point that my learned friend made, concentrated heavily on, was the agreement and what it contained in it. Now while attempts were made to locate Mr Andersen, in my submission there was no reason why the liquidators could not have called the solicitors for the company, because they were then, because the liquidators would then have the ability for, to waive privilege, that type of thing, to actually give evidence about the circumstances in which that agreement was made or drawn up, but that evidence wasn't called by the liquidators and so, in my submission, it's otherwise just guesswork or speculation my learned friend's asking the Court to rely on there.

Really, in terms of the agreement, perhaps if just by way of, on that point, just in terms of a simple analogy, I mean, if I had instructed a painter to paint my house and he had completed painting the house but I hadn't quite paid him the full amount and then I said, "Well, can you paint the garage as well?" and I said, "Well, I don't have the money to pay you but I'll give you my car, I'll transfer my car to you if you do that," and the painter duly paints the garage as well and then says, "Well, now, transfer the car to me," in my submission it would not accord with common sense for then me to turn around and say, "Well, actually we didn't have an agreement that the car would be transferred, that was just so you just did that work, painted the garage,

in the hope that you might get paid that way," and that's effectively, in my submission, what the respondents are trying to argue in this case, but that the common sense circumstances and that there is sufficient evidence by Mr Ireland that he wasn't going to carry out this extra work unless he was paid, unless the bond was assigned to him, and he then carried out the work and that was sufficient either as being an agreement to assign the bond or otherwise, alternatively, once the work was completed, then that effected an equitable assignment.

The other – just briefly in terms of a couple of legal points, and these really relate to the argument that my learned friend's put in terms of when an equitable interest arises under his, the last matter is, he was addressing with the Court, was that he's referred the Court to the article by, it's Worthington I think, but of course she hasn't referred to the New Zealand Court of Appeal decision in *Bevin v Smith*, and I think she's based in London, a professor in London, and the Court of Appeal in that case recognised that an equitable interest can arise under a conditional contract before the contract is actually specifically enforceable. And the Court said that one of the most compelling reasons – and this is at page 665 of the judgment – is that, as a matter of practicality, parties to a contract which is defeasible upon failure of a condition of the kind complained of here are essentially in the same position as parties who are under conditional contract pending completion. And the Court then went on to say that it's difficult to distinguish the position of a purchaser having that conditional equitable interest from that of a purchaser in a contract where the vendor has the further specifically enforceable obligation to take all necessary steps to secure a consent. And the Court then went on to say that there might be some conditional contracts that are regarded as truly condition precedents, but that – and this was a the distinction that was actually drawn in the *Maughan v Elders* case that I've referred to, which is actually also cited as *Re Androma Pty Limited* in the article by Ms Worthington. But essentially where you have approval that is more in the nature of a condition subsequent, that an equitable interest can nevertheless arise, and that this matter relating to the Council was a relatively minor, in terms of the extra planting that was required, and that effectively in my submission, based on the reasoning in the *Re Androma* or the *Maughan v Elders* case, that an equitable interest will nevertheless arise when a condition of that is required, because after all it was really just, it was up to West City to carry out those further works and if that was going to be required by the Council. So really, unless the Court has any further questions, really those are my submissions in reply.

McGRATH J:

Thank you, and thank you, counsel. We will reserve our decision in this matter.

COURT ADJOURNS:3.54 PM