IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2008
[2009] NZSC 43

	BETWEEN	RODERICK WILLIAM NIELSEN Appellant
	AND	DYSART TIMBERS LIMITED Respondent

Hearing: 10 March 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: S P Bryers for Appellant
F Godinet for Respondent

Judgment: 15 May 2009

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs in the sum of $15,000.00 plus usual disbursements to be fixed by the Registrar if necessary.

REASONS

Para No

Elias CJ and Blanchard J	[1]
Tipping and Wilson JJ	[12]
McGrath J	[43]

ELIAS CJ AND BLANCHARD J

(Given by Blanchard J)

[1] We have had the advantage of reading in draft the reasons of Tipping J and McGrath J. We respectfully prefer the legal analysis of Tipping J.

[2] It is open to someone who makes an offer to stipulate the circumstances in which it will lapse. If the offeror does not do so expressly, it may nonetheless be apparent to an objective observer that the offer was made on the basis of the existence of certain circumstances.

[3] It is not, of course, every change in circumstances which will cause the offer to lapse, i.e. make it no longer open for acceptance. A rule as wide as that would be productive of great uncertainty for offerees and, indeed, for offerors. Case law, as Tipping J demonstrates, has always required a change which an objective observer will see as very considerable in its consequences for the offeror.

[4] We are of the view that, in the absence of an express term in the offer, the level of change of circumstance which is required for it to lapse is that of a fundamental change, which may occur all at once or by gradual development. An offeree cannot reasonably expect to accept an offer if the basis on which it was made has fundamentally changed. Furthermore, because it was possible for the offeror to specify the events in which the offer would lapse and, normally, to revoke the offer at any time without having to give a reason, in determining what must be taken to be, or amount to, a fundamental change the Court should give less weight to the occurrence of any event which an offeror must have had in contemplation when making the offer, and about which the offeror chose to be silent. That silence when the offer was made, or when it could have been revoked, may indicate that the offeror did not regard such a matter as fundamental to the continuance of the offer.

[5] We do not adopt the contractual construction approach which McGrath J suggests. We consider that the analogy with a bilateral relationship is likely to

distract attention from the real task of the Court, which is to examine the unilateral action of the making of the offer against the circumstances in which it was made. It is the objective intention of the unilateral actor which is the proper focus. The intention of the offeree in purporting to make an acceptance is irrelevant. To introduce the notion of a condition precedent to acceptance would also add an unhelpful complication. Nor do we consider that the suggested test of whether the "acceptance" produced a common contractual intention can, as McGrath J believes, be deduced by applying rules of construction concerning implied contractual terms. It is surely more straight forward simply to ask whether, objectively, there has been a fundamental change in the circumstances pertaining when the offer was put forward and therefore in the consequences of an acceptance for the offeror.

[6] As it happens, however, although applying Tipping J's test, we reach a different conclusion from him on the facts of this case. We do not consider that the granting of leave for the proposed appeal to this Court amounted in context to a fundamental change. It was obviously of some significance but it was not fundamental.

[7] When the offer was made, the offerors, the Nielsens, must have been aware that the Supreme Court might decide to grant or dismiss the leave application before the offer was accepted. Yet they chose not to refer to this possibility, notwithstanding that they actually stipulated that payment must be made by a particular day, and therefore that the prior event of acceptance must have occurred on or before that day.

[8] It was perhaps understandable that the Nielsens were, as it appears, more concerned with a speedy final resolution of their dispute with Dysart, than with a procedural step which, though improving their chances, did not guarantee the success of their appeal and would not bring about such a final resolution. If they had been concerned about the decision on the leave application and did not want the offer accepted if leave were granted, they would surely have addressed that contingency expressly.

[9] The reference in the offer to the discontinuance of the leave application was, in our view, merely a recognition that the proceeding had to be formally brought to an end in the event the settlement offer was accepted. The like action would have been needed, in the form of a discontinuance of the appeal, after a grant of leave. The reference was to the leave application because that was the stage the proceeding had reached. It had no greater importance. Indeed, the existence of the reference, without more, is even more telling against the view that the Nielsons regarded the determination of the leave application as fundamental.

[10] Nor do we see anything influential in the fact that there was only a short interval between the notification by the Registrar of the grant of leave and the notification of acceptance. The offer had been made only that morning and had been accompanied by a request that the offeree's instructions be taken urgently. Although we give it no great emphasis, it is equally to be observed that the offeror's solicitor did not see fit to revoke the offer immediately advice was received about the grant of leave.

[11] For these reasons we agree with the conclusions unanimously reached by the Courts below and would dismiss the appeal with costs of $15,000 to the respondent plus usual disbursements to be fixed by the Registrar if necessary.

TIPPING AND WILSON JJ

(Given by Tipping J)

Introduction

[12] The issue in this appeal is whether an offer made by the appellant, Mr Nielsen, had lapsed before the respondent, Dysart Timbers Ltd, purported to accept it. Both the High Court[1] and the Court of Appeal[2] held that the offer had not

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1 *Dysart Timbers Ltd v Nielsen* [2008] 3 NZLR 78.

2 *Dysart Timbers Ltd v Nielsen* [2009] 2 NZLR 9 (William Young P, Arnold and Baragwanath JJ).

lapsed; hence Dysart's acceptance created a valid contract between the parties. We take a different view. It is first necessary to put the issue in its factual context.

[13] Mr Nielsen and his brother had entered into a guarantee of the indebtedness of a company called Castlerock Group Ltd to Dysart. Dysart sued the Nielsen brothers on the guarantee for $213,169.39 plus interest and costs. The issue in that litigation was whether a deed of settlement between the parties covered the debt which the Nielsen brothers had guaranteed. The High Court found in favour of the Nielsens. The Court of Appeal reversed that conclusion and entered judgment for Dysart for a total of $314,867.02.

[14] On 14 June 2007 Mr Nielsen applied for leave to appeal to this Court. That application was opposed by Dysart. Mr Nielsen's submissions in support of the application were filed on 18 July 2007. Dysart's submissions in opposition were filed on Monday 6 August 2007. Included in Dysart's opposition was the proposition that the application had not been served, albeit Dysart became aware of the application through advice from the Registrar within the time for bringing the appeal. Hence the non-service, which led to a submission that Mr Nielsen would need to seek leave to file another appeal out of time was, at best, of technical force only. The application for leave was based solely on the proposition that a miscarriage of justice might occur if leave to appeal was not given. It was not suggested that a point of general or public importance or commercial significance was involved.

[15] On the morning of Thursday 9 August 2007, three days after the filing of Dysart's submissions in opposition to the application for leave, Mr Nielsen made an offer to settle the proceedings. The offer was conveyed at 9:23 am by email from counsel for Mr Nielsen to Dysart's solicitor under the heading "Dysarts v Rod & Greg Nielsen". It read:

> John,
>
> "Without prejudice"
>
> I have been instructed to put forward an offer of $250,000 in full and final settlement of the above matter. The sum can be paid on Monday at which time the leave application to the Supreme Court will be discontinued.
>
> Can you please take urgent instructions.
>
> Regards,
>
> Andrew Swan

[16] At 12:30 pm that same day, the Registrar of this Court advised the parties that the Court had extended time and granted Mr Nielsen leave to appeal. Forty-two minutes later, at 1:12 pm, Dysart's solicitor responded to the offer as follows:

> Andrew
>
> My client advises that it would be prepared to accept the payment of $250,000.00 in full and final settlement of this matter.
>
> Payment to be made on Monday 13 August 2007.
>
> John Ropati.

[17] To this email counsel for Mr Nielsen replied at 2:38 pm in the following terms:

> John,
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> I have your email of 1.13pm today. As you know, leave to appeal was granted by the Supreme Court by Judgment delivered at 12.30pm today. As a result, the condition on which the offer was made, namely that my clients would withdraw the leave application, is no longer possible. Further, the offer was, of course subject to an implied term that the leave application would be withdrawn before the Supreme Court made any decision in respect of the application. As the implied term has been broken prior to your client's purported acceptance, the offer is not now capable of acceptance and there is no settlement.
>
> Andrew Swan

[18] The exchange concluded with an email from Dysart's solicitor to Mr Nielsen's counsel, sent at 2:47 pm, reading:

> Andrew
>
> I refer to the above matter.
>
> A settlement offer in the sum of $250,000.00 was made by your client on today's date, and was subsequently accepted by my client.
>
> Please ensure that settlement takes place as agreed on Monday 13 August 2007.
>
> John Ropati.

Settlement did not take place and Dysart commenced proceedings seeking a ruling that a binding settlement had been effected.

Decisions below

[19] In the High Court Priestley J held that the offer made by Mr Nielsen was neither expressly nor impliedly conditional on the application for leave to appeal remaining unresolved. The offer did not therefore lapse when the decision of this Court was received, earlier than expected, during the period between the making of the offer and the time when it was accepted.[3] Hence Dysart's acceptance was valid and a binding contract of settlement had come into existence.

[20] The Court of Appeal broadly speaking agreed with Priestley J's analysis and upheld his conclusion. The Court held, as had Priestley J, that the reference in the offer to discontinuance of the leave application was simply a reference to the consequences of the offer being accepted rather than being a part of the offer. The reference to discontinuance could not be construed as containing a terminating condition, to the effect that the offer would lapse if leave to appeal were granted prior to acceptance.[4]

[21] The Court of Appeal also held that an offer would usually be subject to an implied condition that it lapse if there were a change in circumstances of such significance that it could not fairly be regarded as still open for acceptance.[5] While

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3 At paras [37] – [40].
4 At para [29].
5 At para [26].

the approach we would take is broadly to the same effect, we consider the concept of the offer no longer being regarded as "fairly" still open for acceptance is too subjective. The required change of circumstances should be defined in a more objective way. The Court's conclusion was that the change in circumstances brought about by the grant of leave was insufficiently material to justify the conclusion that the offer thereupon lapsed, given that the underlying dispute remained fully alive. The Court's concept of insufficient materiality does not, in our view, pitch the test at a high enough level, quite apart from the difficulty of also being too subjective.

Legal background

[22] It was common ground that an offer may lapse upon the occurrence of a change of circumstances prior to acceptance. The question is how great the change in circumstances must be before it can be held that an offer has impliedly lapsed on account of the change. No clear consistency of approach emerges from the various cases surveyed in the Courts below and referred to again in this Court. None of these cases bears any close factual similarity to the present case.

[23] In *Macrae v Edinburgh Street Tramways Co*[6] Lord President Inglis spoke of "an important change in circumstances" and later of an alteration in circumstances making it "utterly unjustifiable and absurd" to regard the offer as continuing. In several insurance cases[7] the Court spoke of a change in matters materially affecting the risk. That, of course, is a concept familiar in the insurance field. In *Krupp Handel GmbH v Intermare Transport GmbH (The "Elbe Ore")*[8] Bingham J spoke of circumstances rendering the making of the intended contract impossible. That, however, like the similar reference by the Lord President in *Macrae*, was a reference more to his conclusion in that case than a general test. In a further Scottish case the necessary change of circumstances was also described as "important"[9] and, in

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6 (1885) 13 R 265 (Ct of Sess). The plaintiff accepted a settlement offer only after he became aware that he had been awarded less.

7 *Canning v Farquhar* (1886) 16 QB 727 (CA); *Looker v Law Union and Rock Insurance Co Ltd* [1928] 1 KB 554 and *Sommerville v The National Coal Board* [1963] SC 666.

8 [1986] 1 Lloyd's Rep 176 (QB).

9 *Bright v Low* [1940] SC 280.

another English case, the Court spoke of the subject matter of the offer having to remain in "substantially the same condition".[10]

[24] The textbooks are of no particular assistance, save that they all accept, as was common ground, that conditions as to termination of offers may be implied as well as express.[11] In order to determine what the Court's approach should be to the implication of a terminating condition, it is desirable to go back to first principles.

Discussion

[25] An offer is a statement of the terms upon which the offeror is prepared to be bound if acceptance is communicated while the offer remains alive. It is a unilateral statement and, in that respect, is to be distinguished from the bilateral nature of the contract which comes into existence upon the acceptance of the offer. The distinction is relevant to the basis upon which terms may be implied into the offer. When there is a suggestion a term should be implied in the case of a bilateral transaction, the question is what a reasonable person would consider both parties must have meant to happen in circumstances not expressly addressed by the contract. The conventional concepts (officious bystander and business efficacy) are built on that underlying premise.[12] In the case of a unilateral transaction, such as an offer to contract, the focus should be on what the then sole party to the transaction, the offeror, meant to happen. This approach to offers is consistent with principle and is supported by leading American textbooks on the law of contract.[13]

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10 *Financings Ltd v Stimson* [1962] 1 WLR 1184 (CA).

11 See Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007), para [3.5.5]; Beale (ed), *Chitty on Contracts*, Vol 1 (13th ed, 2008), para [2–098]; Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed, 2007), p 79; Beatson, *Anson's Law of Contract* (28th ed, 2002), p 59; Peel, *Treitel: The Law of Contract* (12th ed, 2007), para [2–066]; and Carter, *Carter on Contract* (looseleaf, service 24, 2009), para [03–130].

12 For an illuminating recent discussion of the general subject of implication of terms into contracts see the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11, at paras [16] – [27] per Lord Hoffmann. Their Lordships indicated that an implied term is not a term which the Court adds to the contract; it is already in the contract as a matter of construction. The Court is simply recognising it. There is no difference in this respect between a contract and an offer.

13 See Lord, *Williston on Contracts*, Vol 1 (4th ed, 2007), p 953, discussing implication of a term that acceptance must occur within a reasonable time; and Perillo, *Corbin on Contracts*, Vol 1 (Revised ed, 1993), p 211.

[26] What the offeror meant to happen must be objectively assessed. Whether it is appropriate to infer that the offer was meant to lapse in the events which have occurred will depend on the terms of the offer itself and all the relevant circumstances in which it was made. If an offer is made on a particular factual basis or assumption[14] the Court may be justified in finding an implied condition that the offer will lapse should that basis or assumption cease to apply. But that finding should be made only if the continued existence of the factual basis or assumption was fundamental[15] to the making of the offer or to its terms; otherwise it cannot be said to be inherent in the terms of the offer. Put more generally, a condition that an offer lapse upon the occurrence of a particular change of circumstances should be implied into the offer only if it is objectively apparent that the willingness of the offeror to be bound by the offer has been fundamentally undermined by the change of circumstances.

[27] In the result the condition which is implied is that the offer will lapse upon the occurrence of a fundamental change of circumstances. Recognising that a change of circumstances of this fundamental kind is necessary before an offer lapses will ensure that lapse on this basis will be a relatively rare occurrence. This is an appropriate way to reconcile the interests of offerors and offerees and to avoid the considerable uncertainty that would result from the test being at a lower level.

[28] An offeree cannot reasonably expect to be able to accept an offer if the basis on which it was made has fundamentally changed. Conversely an offeror must ordinarily be expected to provide expressly for the circumstances in which the offer will lapse. The need for there to be a fundamental change in circumstances before an offer will lapse gives appropriate weight to the interests of both offerors and offerees. The reasonable expectations of both parties are thereby accommodated.

[29] In the present case Dysart was aware of the facts constituting the change before it purported to accept the offer. We are not therefore called on to decide whether an offeree's ignorance of the change should affect the issue.

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14 See the discussion of Bingham J (as he then was) in *Krupp* at p 180.

15 The Court of Appeal used the word fundamental in places in its judgment, but did not incorporate the concept in its test: see paras [15], [19] and [28].

[30] There is some similarity between the approach just outlined and that taken at common law to the question of frustration of contracts.[16] The point is addressed in chapter 1 of Treitel's *Frustration and Force Majeure*.[17] The author speaks of the tension which exists between the principle of sanctity of contract and what he then describes as a counter-principle:[18]

> On the other hand, the principle of sanctity of contract, like many legal principles, is not considered to express an absolute value. It is qualified by a counter-principle that parties who enter into contracts often do so on the basis of certain shared, but unexpressed assumptions. … [The] effect [of the counter-principle] is that contractual obligations may be discharged by supervening events where these have brought about a change of circumstances so significant as to destroy a basic assumption which the parties had made when they entered into the contract.

[31] This passage sums up the essence of a key aspect of the common law concept of frustration. Provided the unilateral nature of an offer is recognised, the frustration analogy provides useful guidance for the kind of basis upon which a condition providing for lapse upon a change of circumstances may be implied into an offer.

[32] The present significance of an offer being a unilateral transaction is that whereas concluded contracts generally allocate risks between the parties, an offer does not do so. Liability for breach of contract does not usually depend on fault. Performance is not excused by changes in circumstances. Hence traditionally a very high threshold was required for frustration, going as it does to discharge rather than to formation of the contract. Although there is conceptual similarity between frustration and implied lapse of an offer, the differences between the two are such that it is not appropriate to apply the full rigour of frustration principles to the lapsing of offers, albeit the test must still be at a high level.

[33] The approach we have adopted is also supported by the way *Carter on Contract* puts the matter in his statement of the general principle for determining when an offer lapses upon the failure of a contingency. The author states[19] that

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16 Now governed in New Zealand by the Frustrated Contracts Act 1944.
17 Treitel, *Frustration and Force Majeure* (2nd ed, 2004).
18 Paragraph [1–001].
19 Paragraph [03–130].

where an offer is expressly or impliedly made on terms that it is to remain open for acceptance for so long as a certain state of affairs continues to exist, it lapses once the state of affairs has ceased to exist. Although the author does not directly address what level of importance the change in the state of affairs must have before a lapsing condition may be implied, it is, as we have said, appropriate to require a high level of importance so that offers do not automatically lapse upon too fragile a basis, to the detriment of the reasonable expectations of offerees. If the lapsing condition is express, it will, of course, take effect according to its terms. Nothing we have said affects the ability of the offeror to withdraw the offer at will before acceptance, unless the offeror has bound itself not to do so.

The present case

[34] The starting point for examining the present case lies in the terms of the offer itself. The crucial words are "at which time the leave application to the Supreme Court will be discontinued". These words make it clear that the offer was being made on the assumption that the application for leave would not have been resolved before performance of any resulting contract took place. Hence Mr Nielsen, as offeror, must have envisaged that any acceptance of the offer would occur before the decision of this Court on the leave application was delivered to the parties. The request that Dysart's solicitor take urgent instructions is consistent with that proposition, but is plainly inconsistent with the proposition that the offer was to remain open for acceptance after the leave decision was delivered.

[35] The Courts below considered the reference to discontinuance of the application was of consequential or procedural significance only. We do not share that view. The reference demonstrates how the offeror's mind was working. The offer was made on a factual assumption which had direct and substantial relevance to the balance of risk in the litigation as it then stood. It is a strong inference that the terms of the offer, that is the offeror's willingness to offer $250,000 to settle the proceedings, must have been influenced to a substantial degree by the fact that at the time the offer was made the offeror had three hurdles to jump before being rid of the indebtedness to Dysart which resulted from the judgment of the Court of Appeal.

[36] It is important to examine the matter as it would reasonably have appeared to Mr Nielsen at the time he made the offer. At that time the first hurdle, namely the need for an extension of time before the leave application could be considered, would or should have been regarded as a low one. The opposition to the application on this basis had little merit. The second hurdle constituted by the need to obtain leave to appeal was much more substantial. The application for leave was based solely on the miscarriage ground. Mr Nielsen, who was in receipt of legal advice throughout, must be taken to have known that leave is difficult to get on that ground.[20] The third hurdle was, of course, posed by the merits of the appeal itself, if leave were granted. But if he cleared the first two hurdles, Mr Nielsen's negotiating position became substantially stronger and that of Dysart correspondingly weaker.

[37] It is commercially unrealistic not to recognise that Mr Nielsen would almost certainly have offered significantly less to settle the matter after obtaining leave to appeal.[21] He would have known that once leave was granted, Dysart would be facing the implications of a full scale appeal. Although grants of leave to appeal should not be seen as any kind of signal from this Court of ultimate outcome, it would again be commercially unrealistic not to recognise that Dysart's position in any negotiations became weaker following the grant of leave. Not only was there a reasonable apprehension of greater substantive risk from Dysart's point of view, but Dysart was also now vulnerable to the considerable extra expense of defending the judgment of the Court of Appeal.

[38] All these matters must be taken into account in deciding whether the unexpected arrival of the decision of this Court at 12:30 pm on the Thursday morning represented a fundamental change in circumstances causing the offer to lapse before it was accepted. The fact that the arrival of this Court's decision on the Thursday was unexpected and could not reasonably have been anticipated answers any suggestion that Mr Nielsen should have provided expressly for lapse in that event. The significance of the change in circumstances to the balance of risk is to some extent underlined by the speed with which the offer was accepted after the leave decision was received. That acceptance, of course, forestalled any withdrawal

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20 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] 3 NZLR 522n (SCNZ).

21 As Mr Godinet realistically acknowledged in the course of argument.

of the offer. The fact that Mr Nielsen's counsel understandably chose to seek his client's instructions before taking any steps to withdraw the offer does not bear one way or the other on whether the offer automatically lapsed at 12:30 pm in terms of an implied condition to that effect.

[39] Mr Bryers, in his submissions for Mr Nielsen, agreed that the essence of his client's case lay in what he contended was a fundamental change in the balance of risk. Mr Godinet, for Dysart, sought to uphold the reasoning in the Courts below, with particular reference to the proposition that the dispute remained alive after the leave decision was given. While that is undoubtedly so, and Mr Nielsen had another hurdle to jump before being free of the judgment debt, that is not the essential point. From the negotiating and balance of risk point of view, Mr Nielsen's circumstances materially improved upon the grant of leave. The essential question is whether this factor represented a fundamental change of circumstances justifying the implication of a condition that the offer would lapse should leave be granted before acceptance.

[40] The key factor in the resolution of that issue derives from the words of the offer itself. They make it clear, beyond argument, that the offeror contemplated that if his offer was to be accepted, acceptance would take place prior to the delivery of this Court's decision on the leave application. It is a relatively short step from that circumstance to the proposition that the offeror was thereby signalling an intention not to be bound by his offer if he was granted leave prior to acceptance. We would infer that it was of importance to him that acceptance be communicated, if at all, prior to the delivery of the leave judgment.

[41] When one adds to these points, which are evident from the terms of the offer itself, the commercial implications of the change in the balance of risk which would inevitably result from the granting of leave, we are satisfied that the change in circumstances brought about by that event was a fundamental one. When the leave decision unexpectedly intervened, a fundamentally new dimension entered the arena. Mr Nielsen's willingness to offer $250,000 to settle the proceedings was thereby fundamentally undermined. On the basis of the legal analysis set out earlier, Mr Nielsen's offer lapsed on the delivery of this Court's leave judgment. It was not

therefore open for acceptance when Dysart purported to accept it a short time later. No binding contract arose upon that purported acceptance.

[42] We would therefore have allowed the appeal with appropriate consequential orders.

McGRATH J

Introduction

[43] This appeal raises the question of when an offer to enter into a contract ceases to be capable of acceptance because a significant supervening event has occurred after the making of the offer but before an acceptance was communicated to the offeror. In the particular case, both parties became aware of the change in circumstances prior to the purported acceptance.

The facts

[44] The facts are fully set out in the judgment of Tipping and Wilson JJ. Those on which the case ultimately turns can be stated shortly.

[45] In 2007 the appellant, Mr Nielsen, and his brother, were held liable under a guarantee to the respondent, Dysart Timbers Ltd. On appeal the Court of Appeal affirmed the judgment in favour of Dysart for a total of $314,867.02. Mr Nielsen then applied to this Court for leave to appeal against the Court of Appeal's judgment and, as required by rules of Court, filed written submissions in support. Dysart opposed the application, and its written submissions in response were filed on 6 August 2007. As the rules permit but do not require an oral hearing of such applications, thereafter it was open to this Court to determine the application for leave at any time in accordance with statutory criteria.[22]

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[22] Under s 13 of the Supreme Court Act 2003.

[46] On Thursday 9 August at 9:23 am, the solicitor for the Nielsens emailed the solicitor for Dysart as follows:

> Re Dysarts v Rod & Greg Nielsen
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> I have been instructed to put forward an offer of $250,000 in full and final settlement of the above matter. This sum can be paid on Monday at which time the leave application to the Supreme Court will be discontinued.
>
> Can you please take urgent instructions.

[47] At 12:30 pm on the same day the Registrar of this Court emailed the parties' solicitors providing them with this Court's judgment on the leave application. The Court extended time for the grant of leave (overcoming a problem for the appellant caused by irregular service of his application). Leave to appeal was also granted, the approved ground being whether the Court of Appeal had erred in its approach to the interpretation of a relevant contractual provision and the "true meaning" of that provision.[23]

[48] Within an hour, Dysart's solicitor emailed the Neilsens' solicitor as follows:

> My client advises that it would be prepared to accept the payment of $250,000 in full and final settlement of this matter. Payment to be made on Monday 13 August 2007.

[49] The appeal against the May 2007 judgment has been superseded by ensuing litigation over the independent question of whether Dysart's email concluded a contract for settlement of the dispute which has now reached this Court. Whether the earlier appeal is heard will depend on the outcome of this appeal.

Differing conceptual approaches

[50] The essential problem of contract law raised by such cases is whether the supervening event, in this case the Court's decision granting leave to appeal, has such an impact on the subject matter of the offer that acceptance of it can no longer provide the consensus between the parties necessary for formation of a contract.

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[23] *Nielsen v Dysart Timbers Ltd* [2007] NZSC 65.

[51] Alternative conceptual frameworks are suggested in the decided cases for determining whether in such cases there is a concluded agreement. The first is to address the question as raising an issue of contractual construction. This approach often looks at whether the Court should imply into the offer a condition as to the continuing factual position between offer and acceptance. Such a condition will be a condition precedent which, if not satisfied, will prevent an act of "acceptance" from concluding a binding agreement. On the other hand, if the condition is fulfilled, on acceptance a contract comes into existence and the parties are bound.

[52] The contractual construction approach by reference to implication of a condition in the offer is exemplified by the decision in *Financings Ltd v Stimson*.[24] The defendant signed an agreement to purchase a car which on its terms was to bind the plaintiff only when it had also signed it. By the time that the plaintiff did so, the car had been stolen and recovered in a badly damaged condition. The defendant contended there was no contract. In the Court of Appeal, Pearson LJ said:[25]

> The judge found in terms that this car suffered severe damage before the acceptance and that there was substantial depreciation as the result. On that basis it seems to me that we should by implication read into this offer, in order to give the transaction that business efficacy which the parties must have intended it to have, an implied condition that this offer was capable of acceptance only if the car remained in substantially the same condition with substantially the same value. That condition in this case was not fulfilled because the car was severely damaged and its value was substantially depreciated. Therefore, when the [plaintiffs] purported to accept it …, it was an offer which was no longer capable of acceptance, and therefore no agreement was concluded.

Donovan LJ agreed, saying:[26]

> Who would offer to purchase a car on terms that if it were severely damaged before the offer was accepted, he, the offeror, would pay the bill? …The county court judge held that there must, therefore, be implied a term that until acceptance the goods would remain in substantially the same state as at the date of the offer; and I think that this is both good sense and good law.

[53] An analogy can be drawn with the rule that where no time is stated for the acceptance of an offer it must be accepted in a reasonable time. Historically this rule

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24 [1962] 1 WLR 1184 (CA).
25 At p 1194.
26 At pp 1190 – 1191.

is thought to have been based on an implied term in the offer.[27] This supports a contractual construction approach and also the use of implied term analysis when appropriate.

[54] The other conceptual framework for determining such cases which has judicial support is to apply a rule of law by which, when circumstances materially change following the making of an offer, it ceases to have legal effect. This approach has been taken in Scotland. In *Macrae v Edinburgh Street Tramways Co*,[28] the defendant made an offer to settle a claim in an action for payment. The action was referred to a judicial referee who issued a draft award for less than the amount offered. Two months later the plaintiff purported to accept the offer. Lord President Inglis said:[29]

> It may, in my opinion, as a general rule in the law of offer and acceptance, be stated that, when an offer is made without a limit of time being stated within which it must be accepted, it may become inoperative by reason of any important change of circumstances, without any formal withdrawal of the offer being made. It may have been made in such circumstances as to be a reasonable offer as between both parties, but after it is made circumstances may so alter as to make it utterly unsuitable and absurd, and I do not suppose that it can be disputed that when the change of circumstances is so important the offer would not remain binding.

Lord Shand referred to the notes of the intended award being "so material a change of circumstances that it was no longer open to the pursuer to accept the tender offer".[30] *Macrae* was applied in Scotland by the Court of Session in *Bright v Low*,[31] a case where acceptance of an offer followed delivery of judgment in litigation.

[55] In 1993, the Scottish Law Commission, citing these decisions, concluded that in Scots law an offer may terminate on a material change of circumstances. In a footnote, the Law Commission also observed that:[32]

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27 *Meynell v Surtees* (1855) 25 LJ Ch 257 at p 260 per Lord Cranworth (ChD). Compare *Manchester Diocesan Council for Education v Commercial and General Investments Limited* [1970] 1 WLR 241 at p 248 per Buckley J (ChD).

28 (1885) 13 R 265 (Ct of Sess).

29 At p 269.

30 At p 270.

31 (1940) SC 280.

32 Scottish Law Commission, *Report on Formation of Contract: Scottish Law and United Nations Convention on Contracts for the International Sale of Goods* (Scot Law Com No 144, 1993) at para [3.16], footnote 29 citing *Financings Limited v Stimson*.

> In English law similar results can be obtained by the rather less satisfactory technique of implying a term into the offer that it is not open for acceptance after the occurrence of certain events.

No reason, however, is given as to why the implied term approach is considered less satisfactory. Furthermore, the approach in Scotland has also been explained in other cases on a basis consistent with a contractual construction method being that an important change of circumstances gives rise to an inference that an offer has been withdrawn. This has been said to be the case where the Court considers the extent of change in circumstances to be such that the offer has been rendered incapable of acceptance or where a change in circumstances vitiates consensus.[33]

[56] Similarly, impossibility of acceptance of an offer on its terms has been recognised in English law to result in an offer lapsing on the basis of a contractual analysis. *Krupp Handel GmbH v Intermare Transport GmbH (The "Elbe Ore")*[34] concerned a claim for damages following a collision at sea. Prior to an arbitration hearing, charterers made an offer to settle the entire claim, which was neither accepted by owners, nor revoked. Following a subsequent hearing on liability, the arbitrator made an interim award on that question in favour of the charterers. The owners only then purported to accept the offer of settlement. The charterers contended the offer had lapsed. Bingham J held that there was no valid or effective acceptance of the offer:[35]

> In my judgment, the offer, on its terms, must be deemed to have lapsed on the making of the interim award, at which time the settlement of the entire claim by agreement became impossible as the major part of the claim had been determined by decision.

[57] The attraction of the Scottish approach is its simplicity but it is unstructured and turns on questions of degree of changes in circumstances. It is difficult to predict outcomes of the approach. The conceptual basis for imposing the test is not obvious.

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33 See *Sommerville v National Coal Board* (1963) SC 666; *Leask v City of Glasgow District Council* [1993] SLT 674 (OH).

34 [1986] 1 Lloyd's Rep 176 (QB).

35 At p 180.

[58] In its operation in Scotland, the rule of law appears to follow a course closely similar to that taken by the doctrine of frustration, where of course the supervening event occurs after the parties have concluded a valid contract. In *Macrae*, Lord President Inglis contemplated that there would be an alteration that made what had been a reasonable offer "utterly unsuitable and absurd".[36] This has the connotation, as in frustration cases, of an event which makes performance of a party's obligations impossible or so radically different from what the parties intended that performance would be of a wholly different contract to that which the parties had agreed. It is also sometimes said that frustration operates to discharge contractual parties from their obligations because it would be unjust or absurd to continue to impose them.

[59] There is, however, an important difference that must be considered before accepting the validity of the analogy with frustration in the present circumstances. No contract has been concluded at the time of the change in circumstances. Frustration has a high threshold for fundamental policy reasons, linked to the sanctity of context. As Lord Bingham once said:[37]

> Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

[60] There is also a need not lightly to treat offers intended to be capable of contractual acceptance as losing that capacity because of a change in circumstances. But that imperative is not as strong as it is in the law of frustration. Frustration, moreover, has a test which is imprecise in relation to the degree or extent to which an event affects the foundation on which the parties contracted.[38] This limits its utility as a basis for determining, even by analogy, cases such as the present.

[61] Interpretation of an offer is not materially different from interpretation of a contract. An offer must equally be read in light of surrounding circumstances

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36 At p 269.

37 *Lauritzen AS v Wijsmuller BV* [1990] Lloyd's Rep 1 at p 8 (CA).

38 As Stephen J pointed out in *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at pp 162 – 163.

reasonably understood to be available to the offeree at the time it is made. A test based on contractual construction can take a number of forms, as the cases already discussed make plain. It offers more flexibility than does the rule of law approach in that respect.[39] That flexibility is also appropriately circumscribed by the overriding principles of contract interpretation. The fundamental question on a contractual construction analysis will be whether, having regard to the terms of the offer, the change of circumstances, and the subsequent "acceptance", viewed as a whole and objectively, there is a concluded agreement.[40] The Court's ultimate task under this approach is to ascertain whether a reasonable person in Dysart's position, knowing as its solicitors did of the change in circumstances, would believe the offer was still open for acceptance. This is a test which ultimately will turn on whether the "acceptance" produced a common contractual intention that can readily be determined by applying rules of contractual construction.

An implied term in the offer?

[62] Seen in this light, a contractual construction approach is conceptually preferable in the present case. That is conveniently addressed as in *Stimson* by considering whether the offer was subject to an implied term. The question of whether a term should be implied into a contract is an exercise in contractual construction which commonly arises when a contractual instrument does not expressly provide for what is to happen if an event occurs. It should, however, be borne in mind that, as the Privy Council has recently pointed out, the most usual inference in such a case is that nothing is to happen, because if the parties had intended otherwise the instrument would have said so, and the express provisions are to continue undisturbed.[41]

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[39] Professor Atiyah, in his thoughtful article "Judicial Techniques and Contract Law" in *Essays on Contract* (1986), pp 250 – 251, points out that on its facts *Stimson* could have been decided under the law of contractual mistake. That option is not available on the facts of the present case.

[40] An adaptation to the present circumstances of the test of Cooke J in *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 at p 563 (CA).

[41] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 11 at para [17] per Lord Hoffmann.

[63] The legal approach to implication of terms into contracts is readily applicable to offers to enter into contractual relations. I accept, however, that there is a need for the court to be careful in framing the proposed implied term. The formulation could be in specific and narrow, or general and broad terms. As both parties knew that the Court might decide the leave application at any time, an implied term in the specific form is more appropriate in terms of ascertaining the offeror's objective intentions when making the offer. A specific implied term would be that the offer would cease to be open for acceptance if the Court granted leave to appeal before acceptance of the offer. A broader implied term would be that there is no fundamental change in circumstances prevailing at the time of making the offer. But it is necessary that there be such an implied term if the appellant's contention on appeal that the offer could not be accepted after leave was given is to succeed.

[64] Such a term is reasonable and equitable but it may only be implied if that is necessary for the business efficacy of a contract concluded by acceptance of the offer.[42] Such an implication in other words must be necessary to make such a contract workable. The implication must also be so obvious that it goes without saying. It must be what the contract would reasonably be understood to mean.[43] This test must now be applied.

[65] For reasons I can state shortly, while I am satisfied that the offer made by the Nielsens' solicitor did contain an implied term, it was not in the form that is necessary for Nielsen to succeed.

[66] The time at which the appellant's solicitor made the offer to settle was a crucial stage in the litigation between the parties. Both knew that this Court would

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[42] In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at p 283 the Privy Council held that:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied:
> (1) it must be reasonable and equitable;
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
> (3) it must be so obvious that 'it goes without saying';
> (4) it must be capable of clear expression;
> (5) it must not contradict any express term of the contract.

[43] In *Belize Telecom* at paragraphs [23], [25] and [27], the Privy Council saw the elements of the test in *BP Refinery* not as a series of independent tests, but rather as various expressions of the central question of what the contract would reasonably be understood to mean.

shortly determine the appellant's application for leave to appeal against a judgment for $314,867.02 entered against him. If the decision was favourable to the appellant, the litigation would continue. If it were not, the Court of Appeal judgment against the Nielsens would become final. The appellant's solicitor did not specify in the offer a time, or event, before which the offer had to be accepted. Read in this context, the email making the offer simply sought an urgent response, confirming that payment of the agreed sum could take place on Monday. The reference to discontinuing the leave application is expressed as a statement of what Nielsen agrees to immediately do following settlement.

[67] The key circumstance for present purposes is that when the offer was made both parties knew that, *at any time*, this Court could determine the application for leave to appeal and, if leave were granted, their dispute would remain unresolved and proceed to a hearing in this Court. The subject matter of the offer, being that dispute, would be unchanged by a grant of leave.

[68] I accept that the decision granting leave improved the Nielsens' position in the dispute. But in a context where both the offeror and the offeree knew or must be taken to have known that this event could have happened at any time, but no provision for it was made in the offer, the obvious inference objectively is the usual inference in such cases, namely that the offeror intended the offer would remain open unless the offeror withdrew it before acceptance was communicated.

[69] I see no basis for concluding that it is necessary for a settlement agreement to be workable that the offer ceases to be open for acceptance if leave to appeal was *granted*. Nor do I accept that an implied term to that effect is an obvious one. The reference to a payment being made on Monday, and what would subsequently be done about the leave application is an administrative consequence which does not affect this assessment. The stringent test for implication of such a term terminating the offer is not met.

[70] For completeness, I would add that if the decision of this Court had been to refuse Dysart leave to appeal, rather than to grant it, the requirements for an implied term by which the offer was to cease to operate would be met. In that situation there

would no longer be a dispute between the parties to which the settlement offer could be addressed. On the *BP Refinery* test there would be an implied term in the offer that it would not remain open for acceptance if leave to appeal were refused. The result in these circumstances would be akin to that in *Krupp* where Bingham J held that the offer assumed that the entire claim made by the plaintiffs was unresolved and capable of settlement. But, of course, an implied term that addresses the position if the leave application was refused is of no assistance to the appellant in this case.

Conclusion

[71] For these reasons, I would hold that the offer made on 9 August to settle the dispute remained open for acceptance, and was accepted by Dysart's solicitor later the same day despite the Court's intervening leave decision. This appeal must be dismissed.

Solicitors:
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John Ropati, Auckland for Respondent