IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 23/2004

IN THE MATTER	of a Civil Appeal	
BETWEEN	**PAROSA BAHRAMITASH**	
	Appellant	
AND	**SATISH KUMAR and SUNILA KUMAR**	
	Respondents	

Hearing 21 June 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel DG Smith and JC Bassett for Applicant
D Singh for Respondents

CIVIL APPEAL

10.03 am

Smith May it please the Court, my name is Smith. I appear with Miss Bassett for the appellant.

Elias CJ Yes Mr Smith, Miss Bassett.

Singh May it please the Court, Singh for the respondents.

Elias CJ Yes Mr Singh, thank you.

Smith May it please Your Honours as is clear from the papers that you have received the appellant says that his settlement notice in respect of this matter was valid because he was in all material respects ready able and willing to settle at the time that he issued it. The criteria as to the

material respects was met, as the property was not untenantable. The obligation was therefore on the purchaser to tender settlement less if they believed it appropriate an amount for the diminution in value due to the extra soil. They did not do so. Their argument that they were ready able and willing to settle is invalid. It is clear that they sought compensation for pegging in addition to any amount that was relevant for the soil and therefore the amount that they sought to deduct was not justifiable on the facts which I have set out in full in my written submissions and the argument in that tendering settlement was futile is not made out for the reasons that I have set out in full. I think Ma'am that in terms of my submission rather than trawling through the set out of facts in the cases that I have done at the start of my submissions, it's probably best that I go straight to page 17, para.35. To determine whether the appellant is at fault or not requires us to consider what it was that the appellant was selling. Now you have at tab.27 of the case a copy of the agreement for sale and purchase and that quite clearly sets out that the property is in Mangere Bridge and it is the legal description. There can be no doubt that the appellant as vendor had the ability to transfer legal title to that property. There was no discussion or any suggestion that there was any defect in the title which would prevent him from doing so.

Tipping J Was he ready willing and able in the light of the fact that he insisted on too much?

Smith Your Honour, as you will know from the facts, the appellant was always of the view and it's a factual determination that came out in the High Court, that the soil had been on the ground prior to the agreement being entered into. Now on his perspective, and of course the Court held against him on that and that is the position that we bring the appeal on obviously. On his perspective he had land which he didn't believe was affected by the soil.

Tipping J Yes, but that's irrelevant, he was wrong.

Smith Yes it is, but in terms of the notice being given, the obligation to comply with the notice is in accordance with the contract and the contract in clause 4.2 provides that the obligation is on the purchaser to send a settlement less an amount appropriate for the diminution in value.

Tipping J But how can your client justify demanding the full price?

Smith The client, the settlement notice called upon and the settlement notice where is it.

Tipping J Page 79.

Smith Thank you Sir.

Elias CJ Sorry, page 79 what?

Smith It's tab 13.

Tipping J Volume 2.

Elias CJ Tab?

Smith 13.

Elias CJ Thank you.

Smith The settlement notice requires compliance with the agreement. It doesn't state an amount. It merely, or not merely, but if purely calls upon the purchasers to settle in accordance with the agreement and there is no statement about what amount is being sought. Now I would accept that there had previously been given a settlement statement which did have an amount in it but in my submission Sir the amount that was to be settled was in the basis of this settlement notice for the vendor to decide. There is no statement about what.

Tipping J Sorry, you said for the vendor to decide.

Smith Well if the vendor, sorry, the purchaser, I beg your pardon. If the purchaser believed that there was a diminution value due to that soil then it was on them to take the steps to determine what that was and to tender a settlement less that amount. Now His Honour Justice Williams made it clear that he thought that that amount should be justified by some form of extrinsic evidence rather than just an oral quote, which is in fact.

Tipping J I don't think I have quite made myself as clear as I should have. Paragraph 3 of the settlement notice seems to me to be a problem from your client's point of view, amongst other things.

Smith Well in the terms of material respects is the issue which I'm to come to Sir.

Tipping J Well alright, I doubt that this is going to be the fundamental point but.

Smith And that really comes down to the issue as to whether he was in all material respects ready willing and able to sell settle.

Tipping J Well at that time he was propounding the view that he wouldn't settle for anything less than the full amount wasn't he?

Smith Sir, the reason that I went to in my submissions to some lengths to set out both the evidence which was given in evidence in chief and also in terms of the cross examination in my submission the end situation was that Mr Sutcliffe who was the Solicitor handling this transaction had

said that his final statement was that if the purchaser had turned up with a reasonable amount for a deduction then he would have settled.

Tipping J But that's not what he was saying at the time.

Smith In fact I don't think he was saying particularly anything, he wasn't responding to the letters which came from the purchasers' Solicitors.

Gault J What about these file notes, they're really at the heart of it aren't they? He acknowledged there were telephone discussions when he gave his evidence, there were then produced by the sister on the other side notes on the day of settlement and the following day the day the notice was given in both recording that the full amount would be insisted upon.

Smith Sir, in the evidence he referred there to be notes in this bundle, I can't tell you what bundle he was referring to but it was not the bundle that was before the Court.

Gault J The point is they were produced before the Court these file notes, and the person that produced them said they represented the discussions they had had on the telephone. Mr Sutcliffe acknowledged there were telephone discussions in addition to the exchange of correspondence. Why do they not constitute as evidence?

Smith In my submission Sir they were brought in in re-examination.

Gault J So they're before the Court, they are evidence. It doesn't matter how they came in does it?

Smith And, and they weren't produced to the Court, they were referred to. They were never put to Mr Sutcliffe in their terms which they are set out there and my submission my learned friend should have asked Mr Sutcliffe whether those notes properly represented conversations which he had had.

Gault J Well certainly that is a criticism that is open but does that make them in some respect not evidence?

Smith Well in my submission Sir unless they are actually put to a witness.

Tipping J Well Mr Smith this is a hopeless argument. Look at page 179. There's quotation from them by the witness; there's reference to there being two file notes which you have no objection taken to that. When you get to line 30, 31, his instructions are to settle for full amount as per the statement or not at all. The witness is reading from the file note.

Smith Yes Mr um, the Solicitor for the purchasers was reading from the file notes and they were his file notes.

Tipping J Well that's his evidence about what he was told by Mr Sutcliffe and it's not challenged anywhere.

Smith I have to accept that they were not it was not challenged it was never.

Tipping J I mean there was a question "do you tender that in evidence". "I do", and then a note Mr Dale does not need these documents produced.

Smith It says that Sir.

Elias CJ In other words accepting the evidence.

Smith Well I can't take that any further the file notes, um my submission is that Mr Sutcliffe has never confirmed that that was a true record, now if you.

Tipping J He's never said it wasn't either.

Smith No he has not.

Tipping J And Mr Dale didn't ask to recall him to deal with the point.

Smith And he did not.

Elias CJ And he didn't require the file notes to be produced.

Blanchard J Well it wasn't for Mr Dale to recall him, Mr Sutcliffe at that point hadn't given evidence.

Smith That's correct.

Gault J And when he did he acknowledged there were telephone discussions.

Tipping J Oh yes you're right about that.

Tipping J And if he wanted to deny it he had the opportunity didn't he?

Smith Well it was certainly um if it was put to him it was up to him to deny it, yes. When Mr Sutcliffe was aware that they had been put.

Tipping J Well I think you've got a battle on the basis that the purchasers were told that they needn't bother to turn up and put in a tender in unless they tendered the full amount. And that has two significances. One it was wrongful to insist on full amount and it has materiality on the futility argument.

Smith It does go to those issues Sir. The position on the path of the appellant is that the obligation in fact was for the purchasers to turn up and offer settlement and they did not.

Tipping J How could your client assert that he was ready willing and able to settle in terms of the contract if he was insisting on too much.

Smith Sir, the contract says that in a situation where there is minor damage and I use that word as such as we have here which doesn't render the property untenantable and that the purchaser is to settle with a sum which represents the diminution of value. Now at no time was there any assessment about whether there was a diminution in value, there was oral quotes referred to vaguely. The only evidence that was produced as to what the value was some obtained some three weeks after the contract had been cancelled. The obligation on the purchaser by 4.2 was to do that and they did not.

Blanchard J Well they had been told don't bother coming along unless you've got the full amount. It was futile to come along with anything, even a dollar less than the full amount.

Smith And all I can refer to Sir is the way the evidence transpired from Mr Sutcliffe was that wasn't his position at the time, um that that settlement was to take place.

Blanchard J But he's made a representation that the only amount that will be accepted is the full amount.

Smith If the Court accepts the file notes as you are indicating then that would appear to be the position.

Tipping J You dispute that if the matter of futility has to be a viewed object it would, because that's what **Davis & Stewart** decided, not me, the Court of Appeal. Well I decided that that was the decision of the Court of Appeal. You can't second-guess what someone's inner thoughts might be can you? You have to go on what they portray to the other side.

Smith I think that has to be right Your Honour. I mean clearly how could we determine anything if we were to try and do it on a subject of basis.

Tipping J It would be impossible wouldn't it, so why does it matter what his mental revelations or what he thought he might get instructions from his client to do, how does that come into it.

Smith Well how it came into it the questions were that his position quite clearly, the Solicitor's position, quite clearly was that they hadn't turned up to offer it to him and he believed quite clearly that that was their obligation to do so and he operated on that basis.

Tipping J The real truth of the matter it seems to me is that the stance was being taken because his client insisted that he wasn't in any way responsible for putting the soil on the land. Now quite clearly if those are your

instructions you'd insist on the full amount. The only problem is he was wrong.

Smith Sir, in the cases which have talked about failure of settlement notices in terms of asking for too much most of them as I see it are in relation to clause 5, which is a breach of warranty or a mis-description of title or of that like. When we have a situation such as this which is a complete disparity between the two parties in terms of a factual matter such as this which doesn't go to title or description my submission is that the contract is there to try and provide for some process for it to be brought to conclusion because the matter is so minor that we shouldn't end up standing in front of any Court let alone the Supreme Court arguing about it, and if clause 4.2 is to be given an unpractical effect, then my submission is that the onus was on the purchasers, the respondents to tender settlement less their appropriate amount which they believe was relevant in terms of the soil and the soil only.

Gault J That may be so but does that make the settlement notice valid when there is this problem that on the evidence it would seem the vendor was insisting on the full amount which was not in accordance with the contract, because as you point out the contract provided that the settlement should have been for the full amount less an appropriate sum.

Smith True, and the only point that I can really make to that Sir is that where you have a situation where there is a complete disparity between, as His Honour Justice Tipping referred to, between the two positions concerning whether there's damage or not, then for the matter to move forward then it's for the purchasers to actually do so.

Gault J Well it's easy to say I suppose in retrospect but the Solicitors should have had their heads knocked together. It doesn't help with regards to the present problem.

Smith No, and in fact probably that could be said about many a case.

Elias CJ Most litigations.

Smith Yes, I know, in fact if everybody was sensible.

Tipping J Moving on from that mournful thought I wonder whether the really key point is not so much whether the appellant was in default, that is to say whether the vendor's settlement notice was valid or whether he was ready willing and able and so on, but whether or not the purchaser was in default so as to justify cancellation. Isn't that the ultimate crunch point?

Smith At the ultimate crunch point that must be so.

Tipping J Yes. What I can't quite understand is how the vendor says the purchaser was in default simply by not tendering when he'd made it clear that there was no point in it.

Smith Well Your Honour clearly if the finding is that the file notes are in and they are concrete evidence, then I have to accept the point that you have made. I don't think there can be any other logical conclusion.

Tipping J If this is not futility of tender given the evidence it is in, it would be hard to think of a case that amounted to futility I would have respectfully thought.

Smith Well, the position in terms of the documentation which was before the Court prior to these file notes being referred to didn't give rise to that conclusion and so the position clears comes down to those file notes if the Court accepts them and you've indicated that you do, then that must be so.

Elias CJ Well it's not really the file notes because it's the evidence that was given. The file notes weren't produced. They didn't have to be.

Gault J I think ultimately they were weren't they?

Smith No they were never produced.

Gault J They were not. Well why are they before us?

Smith Well that's precisely the point I made when I actually forwarded the case to the Court. They were put into the case on appeal to the Court of Appeal and there appears to have been no point taken in respect of that.

Blanchard J Yes but it would be grossly unfair to ignore them and treat them as though they were not evidence for the reason that as I tried to draw attention to before, there was a question "do you tender that in evidence?" "I do" and then your client's counsel intervenes and says he doesn't need the documents produced.

Tipping J That means he consented to them going in without formal production.

Blanchard J Well either that or it's a cunning trick and knowing Mr Dale I'm quite sure it's not a cunning trick.

Smith I don't believe Mr Dale would do a cunning trick.

Blanchard J He wasn't trying to be cute but in those circumstances they have to be taken to be part of the evidence.

Tipping J What is so puzzling is that Justice Williams in the High Court seems to have completely overlooked this evidence.

Smith Well it's not referred to at all in his judgment.

Tipping J No, so this is extraordinary because this is the key to the whole case.

Blanchard J And then in the points on appeal the point is taken in the Court of Appeal but evidently the Court of Appeal didn't feel that it needed to get to a consideration of this question of fact.

Gault J Well I wonder about that. It seems to me if the Court of Appeal said that the vendor was not ready willing and able to settle it must overturn the finding of fact in the Higher Court that settlement was not shown to have been futile, but how can the two stand together?

Smith I don't think it can. Sir the evidence that in terms of Mr Sutcliffe I have gone through in full which is at page 12 of my submissions and.

Gault J His evidence as summarised in para.58 of Justice Williams' judgment I couldn't find. Justice Williams said, "he said in evidence that he would have sought instructions from his client on the point and may well have settled". I can't find him saying that anywhere. Yet what he said was if he wouldn't accept a $10,000 reduction he would have settled on a reasonable reduction.

Smith That's what I think he said.

Gault J I don't know where Justice Williams got this from.

Smith Neither do I Your Honour. It's not, I can't see it. What he said was if he had turned up at my office with a reasonable amount less the deduction I would have done so but he did not tender settlement and that's the closest you get to what Justice Williams has in his judgment.

Gault J I find that a bit hard to reconcile with his instructions that the soil was placed on the section before the contract was signed, and to do that without reference to his client in those circumstances seems an extraordinary position to take. I think he was frankly floundering quite honestly and I don't mean that pejoratively, I just mean that he'd sort of lost the thread.

Smith Sir could I take you to my submissions where the closest the question of what Mr Sharma whose file notes that we have talked about was and it was Mr Sharma from my office said in evidence today "you were not prepared to settle unless settlement was made in full" or words to that effect, and Mr Sutcliffe said "no, I don't recall saying that at all".

Gault J Unfortunately witnesses do tend to say that they don't recall. When that is the face of adamant evidence it's not very satisfactory.

Smith Well, but Your Honour my point is that having got that response, it's almost like starting to lay the foundation to put the document to him and then it didn't.

Tipping J Well it also means that's extraordinary that there wasn't close cross-examination about these telephone discussions from both sides. It just didn't happen. The other Solicitor he wasn't challenged was he?

Smith No. There doesn't appear to be any objection saying this wasn't anything that came out of cross-examination, and it clearly didn't come out at cross-examination.

Tipping J Well but there would still have been an opportunity or leave could have been sought to challenge him on that point if it was going to be in dispute.

Smith Well I would have thought that it would have been very difficult for Justice Williams to have denied that given that he had allowed it.

Tipping J Oh yes, totally impossible. So it's all very odd, the more so that the Judge doesn't touch on what was the key evidence in the case. I agree with my Brother Gault, whichever way you look at it the point is capable of influencing whether either party was in default.

Smith Yes, and I can only go to the response that Mr Sutcliffe gave which raises the doubt as to whether in fact those file notes, which is why I made the objection to them coming in, are in fact being validated as being a file note of a conversation that took place.

Gault J The evidence was given up for discussions, the file notes were apparently waved around by way of confirmation but it was the oral evidence that was the evidence.

Smith Yes and in that oral evidence is Mr Sutcliffe's denial.

Tipping J Well not quite if it's only fully recorded. If you've got a Solicitor who says this was a conversation that took place, here's my file notes to support it and the other side says I don't recall.

Smith Then the next question should be well were you going to settle in full.

Blanchard J Well never mind what it should have been we're faced with pretty persuasive evidence that it did take place, particularly in view of the stance of your clients' counsel at the trial.

Smith Well I can't take that any further.

Blanchard J No you can't, you're stuck with it.

Smith So then if I could move to the other points that are relevant and that's the question of what's a material part of respect. There is a definition of what's untenantable in respect of rural land contained in the agreement for sale and purchase but nothing in terms of what's untenantable for vacant land and it's left to the Court to determine whether that soil made him in material specs unable to settle, and I have dealt with that in my submissions starting at page 18, the closest example that I can come to is Justice Chisholm's decision in **Southland District Council v McClean & Ords** that when you look at what the test on untenantable is that there has to be a substantial interference with the tenant's ability to enjoy use or operate the premises and the submission is that the addition of another couple of piles of soil next to one that existed already did not render that property untenantable and that therefore in the material respects as regards the state of land the appellant was in the position to settle.

Blanchard J Isn't this a little beside the point. Isn't your client's difficulty that if your client had intimated that tender would be futile and it waived tender your client has to be taken to in the same position as if tender had been avowedly made and refused. In other words that your client had failed to settle a default of an absolutely fundamental kind.

Smith That's got to be a consequence of that Sir. I don't think I could argue possibly otherwise.

Blanchard J Yes.

Tipping J Your problem is that your client cancelled. He's got to show that he had grounds to cancel. If the grounds asserted a failure of tender and if futile there are no grounds for cancelling and all these learned discussions about various ways of looking at it in the Court of Appeal are beside the point.

Smith Well they are in that sense. With respect the Court of Appeal didn't really come to the nub of it at all and then they had these file notes before them just as you have and that was not addressed. The Court of Appeal's approach I thought was interesting because it referred to the soil encumbering the land and then sort of moved to deal with it as if that was an encumbrance, as if it was an impediment of title as opposed to a physical change to the land itself.

Tipping J A very creative use of the concept of encumbrance but I think they were just doing it by analogy frankly.

Blanchard J Well for myself I suspect that possibly the Court of Appeal went wrong in failing to appreciate the significance of clause 4.2, leaving aside the tendering or no tendering question your client wasn't in default there because your client had an option, either fix the problem by removing the soil and he didn't want to do that because he didn't admit that the soil had been put there during the period between contract and

settlement, or he could perfectly, legitimately and in accordance with the contract elect to take the lesser amount and I think possibly the Court of Appeal has been guilty of overlooking the significance of the clause in that respect in its effect on what is a default by the vendor.

Smith I agree with that and if the Court will recall that was the basis largely that the application for leave was made was that the effect of 4.2 had been completely gone past in terms of this agreement which then brings us back of course as to the question as to futility and we're going to keep coming back to it I somewhat imagine for as long as this discussion continues. At the end of the day if the Court accepts that those file notes are evidence of it being futile then that really is the be all and end all of the appellant's case. I think it would be silly of me to stand here and suggest otherwise and all I can do is point to, as I have, to Mr Sutcliffe's response to that and that in fact there were no cognisance taken of it by the Judge in the first instance or of the Court of Appeal in the second.

Tipping J But the problem I think in this case has been there's been too heavier focus on whether the vendor has done something inappropriate in contractual terms. The key question is whether the purchaser had done something to justify cancellation. With absent cancellation specific performance was open and with great respect I think the Court of Appeal said that other people had come into the problem in the wrong place, well with great respect I think they came into it at the wrong place too. There was one simple point of entry that is whether the cancellation was valid and that's the whole question.

Smith And in fact in the question of any of these cases based upon agreement for sale and purchase that must be the starting point virtually every time.

Tipping J Either the contract's still alive, in which case specific performance is possible, discretionary, or it's not, in which case it does seem odd that such simple facts have led to such legal complexity.

Smith And, and that's exactly why there is some puzzlement in terms of the conveyances out there as a result of the decisions which are sitting on the record at the moment.

Tipping J Well that's why leave was granted.

Smith Yes I understand that. Sir I don't know, Ma'am I don't know if I can take this much further. Clearly the Court has read my submissions and we seem to have come to the nub of it reasonably quickly and succinctly and unless there's other questions the Court wants to ask of me.

Elias CJ Thank you Mr Smith.

Court adjourned 10.37am.

Court resumed 10.44am

Elias CJ Yes Mr Smith is there anything you want to add about the other orders made.

Smith Oh, thank you Ma'am.

Keith J Tab 12.

Smith Ma'am given that the matter is turned on something which has not been referred to in either Court, and that's the question of these notices I would submit that the settlement date which has been ordered by the Court is something which would appropriately be altered to something um somewhat more recent and that I don't think that the other orders are of any appropriate amount.

Tipping J Well have to fix a new settlement date won't we.

Smith That's what I'm saying Sir, that's what I'm saying.

Keith J That was four weeks after the date of judgment.

Smith Yes, yes, and so that clearly needs to be made something relevant to today's date.

Gault J Does that have some significance in respect of interest.

Smith Um, yes it does, but of course it's open to the Court to address that situation in terms of the respondents.

Tipping J We can't excuse your client can we from his contractual obligation?

Smith I don't believe you've got the ability to Sir. I don't think so.

Tipping J I have some sympathy for him in a sense it's turned on something that's really only arisen at the last minute but on the other hand he was quite wrong in the stance he took.

Smith Yes, and that's the way contract law operates.

Blanchard J We may need to hear from Mr Singh on this point but the Kumar's will presumably have been getting some interest on the money which has been sitting waiting for settlement.

Smith Yes, and in fact I think the usual terms provide for an adjustment between the two don't they?

Blanchard J I think it might be clause 3.10(2).

Smith Yes, yes there is a set of, I think I'm right that the vendor that has to pay an amount according to interest rate for the late segment, the purchaser pays the amount of interest that would be earned in overnight deposits is the corollary so there is a set-off between the two.

Blanchard J And the interest rate for late settlement was 12%.

Smith 12% Sir.

Blanchard J So if we don't postpone the date your man will be excused from the difference between that figure and the lower amount which presumably is being attracted on a deposit.

Smith Yes Sir, as it stands.

Gault J We should perhaps specify a date on which this settlement is to take place but the contract should go in the incidents of cost.

Smith Yes, that is my point because otherwise we're in a, um and given, um I don't believe there's any reason as to why that date was made four weeks out from the Court date, I don't believe it needs to be that long. I mean it's just a matter of completing a settlement.

Elias CJ Well there's the option of clearing the spoilage or paying the sum.

Smith Um, if I can just confirm with a learned friend I think the spoilage might have actually gone now, is it? Perhaps my friend can address you on that. I think given the way that this matter has gone that the sum that the Court of Appeal ordered of $2,000 is probably an appropriate amount, I think I said so in my submissions and it's a cleaner way of dealing with it, we don't have to worry about performance and all that sort of stuff.

Blanchard J I don't think we would get into altering that sum, even if we were asked to.

Elias CJ So your content if the date specified is a couple of weeks?

Smith Yes Ma'am.

Blanchard J What about costs.

Elias CJ Oh yes, I should ask you also to address us on the question of costs. I don't know if whether you've had an opportunity to see.

Smith **Prebble and Huata.**

Elias CJ Yes, if there's any reason why you would wish us to depart from that approach you should address us now on it.

Smith Ma'am as I understand the reasoning the reasons that you gave in that decision you were looking at firstly a rate of something I think was $2.500 a day in respect of counsel and I can't quibble with that amount. My submission that I would make though Ma'am is in terms of the way in which this matter has progressed through the Courts and the reasons that have been given, and in my submission particularly as the Court has identified we've got to a situation that neither Court below have taken cognisance of the particular point and in my submission given the way that that progressed it was relevant that the appellant brought this appeal on the basis on which he has and in my submissions the incident of costs for that reason should be taking into account the narrow focus of the matter in respect of the **Huata** decision I think Your Honour referred to the amount of preparation and the like that is required for a case of that sort of complexity. This I would submit was a much smaller and closer focus and that the award of costs should reflect that.

Elias CJ We is that, do you make that submission to resist any departure from the **Huata** general approach but you don't resist the application of that approach.

Smith I can't resist that approach. I saw that as a statement as to what this Court saw as appropriate.

Elias CJ Yes, thank you. Yes well you've heard what we have said Mr Singh. Do you want to address us on the orders we should make, and in particular the date of settlement. You haven't cross-appealed in terms of the $2,000 and you've heard we wouldn't be minded to entertaining the argument about that and perhaps you could also address us on the question on the question of costs if you are seeking any departure from the **Huata and Prebble** approach.

Singh The first thing regarding the $2,000, no, I'm not seeking any variation to that. The costs I think what the Court has directed so far is fair, there should not be any departure from that. Insofar as the date is concerned the money is in my trust account and we can settle whenever. A fortnight would be more than appropriate. There is one matter that I would like to say and that is following on from Justice Blanchard's observation of the Court of Appeal's decision in 4.2, and the only reason I'm putting it so there is no confusion later on for conveyances. Sir, I believe the Court of Appeal in 4.2 at para.30 of the judgment that appears at 10,11 was not actually saying that what the approach the appellant took was wrong, they actually said that we actually had more difficulty with it. I think the Court of Appeal simply jumped to the obvious conclusion to say well if the appellant was denying the soil was present he may then go on and express there is an alternative that is available to the respondent and that is to ask for specific performance at that time the Court does its equities which it has and if I'm not mistaken if we don't actually clarify that point

conveyances will say well if you don't follow clause 4.2 this is what the Supreme Court has said, you're out, and that would be wrong in line of the authorities that have come out, apart from that I have nothing else to add.

Elias CJ Yes thank you Mr Singh. We'll indicate that the decree will be upheld. Settlement is to take place on the 5 July 2005, the order made by the Court of Appeal as to the abatement by $2,000 will stand and costs will follow the **Huata and Prebble** amount and we'll give reasons for that decision later. Thank you.