IN THE SUPREME COURT OF NEW ZEALAND SC 68/2005

IN THE MATTER of a Civil Appeal

BETWEEN **ROGER WILSON STEEL AND CHRISTINE LYNNE ROBERTS**

Appellant

AND **ELEFTARIOUS SEREPISOS**

Respondent

Hearing 23 May 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel R C Laurenson and J L Williams for Appellants
S M O'Sullivan and R J B Fowler for Respondent

CIVIL APPEAL

10.04 am

Laurenson May it please Your Honours, Laurenson with my learned friend Mr Williams for the appellants.

Elias CJ Thank you Mr Laurenson, Mr Williams.

O'Sullivan May it please Your Honours counsel's name is O'Sullivan, I appear for the respondent with Mr Fowler.

Elias CJ Thank you Mr O'Sullivan, Mr Fowler. We think we would like to hear first from the respondent on the cross appeal if counsel are happy with that course, thank you.

O'Sullivan It will be my friend Mr Fowler.

Elias CJ Yes, thank you.

Fowler If it pleases the Court for the assistance of the Court I have prepared a respondent summary of oral argument that will be available which might ease the note-taking.

Elias CJ Thank you.

Fowler Can I indicate initially to the Court that the suggestion that this particular piece of the argument goes first does indeed accord with the respondent's analysis in terms of sequentially which arguments in sequence perhaps should be addressed by the Court first. If I can take the Court to the first page of the summary of oral argument, I've just covered there the three planks that subject of course to any issues the Court is raising the matters that would be addressed. First of all what is described as the ambit of the s.225 reasonableness augmentation and I'll come back in a moment to explain the significance of that word 'augmentation'. The section LIM that I intend to cover is really responsive to the appellants' argument on the cross appeal which is in a sense their counter to the cross appeal propositions which is that there is some implied term collateral contract or rectification that's available and I'll deal with that second and then finally which in a sense is the narrowest plank of the respondent's cross appeal is the argument on reasonableness. So if I can take that first one over the page, the ambit of the s.225 reasonableness augmentation. And as to that in my submission the nub of the argument on the cross appeal comes down very simply in the end to this narrow point and that is whether there are two LIMs or three LIMs to the implied obligations on a vendor that augment the statutory s.225 condition, and I have set out there the analysis, the respondent's analysis of what those are; (1) to take all reasonable steps to procure a subdivision consent; (2) to submit to reasonable conditions, and then thirdly, and this is the one that's from the respondent's perspective of the rogue one, to take reasonable steps to comply or perform such conditions - that's the LIM that the respondent disputes. I have set out there, I don't know that it's necessary to go there but if the Court were interested in looking at the written argument, the written submissions to see why it is that I suggest that it comes down just to that 2 versus 3 that's where you will find it in the written submissions where that point goes narrowly head to head. Now in my submission the starting point is that some augmentation is necessary to give effect to the s.225 statutory condition thus augmentation LIMs 1 and 2 that I have set out there are necessary and understandable, no difficulty with those as a matter of policy and I submit as a matter of law. But LIM number 3 is not and as I've mentioned already is as far as the respondent is concerned is the rogue element in this appeal and while on that topic the description and the picture used by the Court of Appeal with the greatest respect is in my

submission not apt that is the expression not describing these conditions as, these augmentations as not absolute, that's not apt and the reason that I make that submission is that no contractual obligation is absolute, it is always subject to such things as the doctrine of frustration, mistake and so on. So where does that take the analysis? In my submission the respondent argues that the **Clough** analysis, that is by the **Clough** analysis I mean the page at 317, sorry the passage at 317 that's featured so much in the written submissions is correct. Why, well it comes back in our submission to a simple matter of coherent development of contract. In contract the inquiry normally in the first instance where you are addressing breach is to ascertain what is the obligation or term that is at issue. And then once the bounds or what's been described I think in the written submissions is the four corners of the contract, once the bounds of the contract are ascertained the only relevance of performance is whether or not there has been compliance. You ascertain the balance of the contract and then the only relevance of performance is compliance. Over the page with the very limited exception of frustration which of course was raised and disposed of in this proceeding. The **Clough** dicta at page 317 lines 12 to 15, is the Court familiar with that or it's been covered a number of times in the submissions, it's tab

Tipping J Which page in the written submission?

Fowler Tab. Perhaps if I take, if I take the Court straight to the passage it's under tab 1 of the casebook in Your Honour pleases.

Elias CJ Which casebook?

Fowler The main one, the bulky one.

Elias CJ Yes.

Fowler Page 317 line 8, the passage starts at line 8, "We accept that the contract is to be treated as importing an obligation on the vendors to take all reasonable steps to obtain approval as Mr O'Brien contends, this is supported by **Hargreaves Transport** and other cases cited at 9 Halsbury's Laws of England." No doubt the vendors would have to submit to reasonable building line and sewerage conditions notwithstanding that they involved much expense and affected other land of the vendors. If that were necessary to achieve the submission provided for by the contract and put shortly abettor or not as my learned friend argues in his written submissions, it is the respondent's submission that that is a correct summation of the law and indeed just returning to the

Tipping J Approval in line 9 means approval of the plan of subdivision, because the obligation or the condition is to deposit the plan isn't it?

Fowler Indeed, to procure the deposit.

Tipping J To procure the deposit of the plan.

Fowler Yes, so that the reasonableness is directed to the steps to achieve that and the wheels fall off so to speak if the steps that are required are unreasonable, that's the procurement and that's LIM number 1.

Tipping J But why would you limit it to whatever, why is not any relevant step capable of bearing on whether reasonable steps have been taken? You're trying to create a rogue step aren't you?

Fowler No I say the rogue step has already been formulated by others if you look at the way the case has been argued and the

Tipping J But if you have a condition that is reasonable in itself so you can't say it's all off because that's an unreasonable condition

Fowler Then that's the end of it.

Tipping J But I know you say that's the end of it but why should it be the end of it, why should it not be, you're building up to this, ah I see.

Fowler I'm building on that if Your Honour pleases, yes.

Tipping J Ah I see, yes.

Fowler Because it highlights performance and that's where our argument is that one is losing contractual coherence, that's what I'm hoping to develop.

Tipping J I'm sorry I'm jumping ahead.

McGrath J Is it your position Mr Fowler then that when we go back to your 2 and 3 that in 2 we focus on what it was that the Council stipulated, not as in 3 on what had to be done to do it? Would it satisfy what the Council stipulated?

Fower Yes, yes indeed. Now just picking up on that passage, perhaps unsurprisingly the respondent submits that the facts of this particular case before you now is in fact a paradigm of the proposition in **Clough**, ie, once the condition itself is reasonable the fact that compliance turns out to be more expensive or involve more vendor land is irrelevant because at that point you simply tip over into contractual risk. Reasonableness of performance requirements, that's performance requirements, in my submission is irrelevant to contractual risk and the risk falling on the vendor, which is exactly what happened here, where the owner of 55 Palliser Road declined to give consent and that risk had not been contractually excluded by the vendors. We further submit that the reasonableness infusion if I can call it that at the third LIM is misplaced conceptually. Reasonableness is certainly a more dominant

feature in tort and equity but has in my submission a much more limited role in contract. Yes you can see it in LIMs 1 and 2, and some other aspects of contract such as the non-specification of time in a contract but it is limited, it is relatively limited and that is in my submission for good reason. Furthermore it's problematic in terms of interpretation, reasonableness hinged around performance is always going to problematic for the parties in terms of knowing whether they're facing breach of obligation or not. There is a degree of tension with contractual certainty which in a sense loops back to what I've already covered and the next major policy point in my submission is that there is even a degree of confusion here with frustration, and if I can just demonstrate what that submission is about, if performance is impossible or in the classic terms of frustration radically different, frustration may apply so you've always got that safety net of frustration sitting there where performance of an obligation turns out to be radically different from what you'd contemplated, but if you're going to have a special rule here you've got an odd-ball sort of double threshold because if performance is simply unreasonable that obviously is different from your frustration threshold. Now that

Tipping J You're moving off this now are you?

Fowler I'm about to move off so if there are some points that need to be explored I'm happy to do so.

Tipping J Yes, well when the Court of Appeal in **Clough** said that the contract is to be treated as importing an obligation to take all reasonable steps etc, what I found interesting in that Mr Fowler is that isn't the ultimate doctrine, here the condition was not fulfilled was it? The plan was not deposited so the condition was not fulfilled?

Fowler In **Clough**?

Tipping J No, in the present case.

Fowler In the present case.

Tipping J The condition was that the plan will be deposited well for our present purposes it never was, was it?

Fowler No but the subdivisional consent was obtained which would be the gateway to being able to deposit

Tipping J Well no, just bear with me

Fowler Sorry.

Tipping J I can understand that that is a possible different way of looking at it and that is essentially the way your part wishes to look at it but the

condition was not fulfilled as a matter of fact in that the plan wasn't deposited.

Fowler Yes.

Tipping J Yes, therefore this contract never became unconditional?

Fowler That's unquestionably correct.

Tipping J Right, now isn't the ultimate doctrine that you want to say don't you that Mr Laurenson's client can't rely on that the contract not becoming unconditional because that state of affairs arose through his default or their default. Isn't that the ultimate doctrine you can't rely on the contract not becoming unconditional if that state of affairs has been brought about by your default?

Fowler Yes it comes back to a simply assertion of breach.

Tipping J Exactly, now isn't the issue here whether the appellants is it, yes the Steele and Roberts camp, whether they were relevantly in default

Fowler Yes.

Tipping J Whatever their duty was to procure the fulfilment of that condition.

Fowler Yes.

Tipping J Now isn't it against that background that we have to examine whether this is truly a rogue extra step that you are asserting it is a rogue extra step?

Fowler Yes, yes indeed I accept that.

Tipping J If it was unreasonable for them in the circumstances to fulfil the condition how can it be said that they were in default?

Fowler Because at the point it comes back very simply Your Honour to the question of two LIMs or three. That with the greatest respect is a circuitous argument because it starts out as a breach of contract claim obviously, the assertion being that the appellants have not done all that they ought to have done in terms of the augmentation under

Tipping J Have they done all that they ought reasonably to have done?

Fowler Well it's the introduction of the reasonableness once the parameters of the contract are fixed by virtue of LIMs 1 and 2 where we part company or at least I part company from I think the reasoning that Your Honour is putting to me.

Tipping J Well what I'm trying to get some guidance from you is why you draw the circle of reasonableness in the narrow way, I mean obviously it's advantageous to your client to do so, why conceptually should one draw it in that narrow way?

Fowler In two words Your Honour contractual coherence.

Blanchard J Can I put the matter in another way. It seems to me that the better question is what was a reasonable condition? Now what was 'to be a reasonable condition' means reasonable as between vendor and purchaser as well as between vendor and Council in this context. The condition as I understand it would have enabled compliance by the vendor with the requirements of the Council by creating the drain either by connection to Lot 55 I think or No. 55.

Fowler To No. 55 or back through

Blanchard J Or back through the property.

Fowler Correct.

Blanchard J But when we're looking at the question of what is reasonable as between vendor and purchaser we have this question of whether it was reasonable that the connection should be by either of those ways or whether the only reasonable condition would have been for the connection to be via No. 55.

Fowler Well with the greatest respect Sir the peppering of reasonableness' that are laden in that proposition come back to colliding with the terms of the contract and contractual certainty. The simple fact of the matter is that the vendor did not exclude the other possibilities out of the contract of the connection being made other than via 55. That's the problem. I could walk with that proposition if the contract allowed or excluded that or that the contract was conditional on connection via 55 and I suppose where that goes to is the implied term that my learned friend in his collateral contract argument that is the second LIM.

Blanchard J Well it's pretty clear that s.225 and its predecessors have been read down because if the section was read literally it could impose most unreasonable requirements.

Fowler Well I balk slightly at the most unreasonable if Your Honour pleases but certainly the augmentation could permit as the Court of Appeal itself contemplated performance turning out to be more expensive or a bit more difficult than had been contemplated by the parties and there's

Blanchard J Or a performance which is essentially of a different nature from what has been contemplated by the parties. Now the argument you're facing is that the requirement put the drain through the residual property of

the vendors was of a different nature from what was contemplated at the time the agreement was entered into.

Fowler Whether the contemplation was simply a preference that is the contemplation that it would go via 55 or an exclusive contemplation perhaps as moot, but I'm not sure that I would accept that it was a radically different provision or whatever and that in fact was faced by the High Court at first instance and rejected.

Blanchard J Are you going to take us to that passage?

Fowler At volume 1 if Your Honour pleases the case on appeal, page 68 under the heading of Frustration the learned Judge addresses that topic at 71 'in this case the performance of the contract would not require a substantial departure from the parties common intention at the time of the contract' and then at 72 over the page 'there is no supervening event of so radical a nature as to alter the obligation from that which they undertook' and so on.

Blanchard J And the Court of Appeal took a different view didn't it?

Fowler Well the Court of Appeal if anything took a on the question of whether it amounted to an agreement or not, took a softer view

Blanchard J I wasn't looking at it as if it constituted a contractual term.

Fowler No, well I don't recall that there is anything at all in the Court of Appeal judgment Your Honour that at all mitigates or diminishes the frustration finder.

Elias CJ Mr Fowler, I'm sorry have you finished?

Fowler Yes.

Elias CJ The analysis at page 3 of your summary, and this may simply be what Justice Tipping was putting to you, is based on the obligation being to procure subdivision consent but that's not what the Statute requires.

Fowler No no it isn't and that's why I used the word 'augmentation' Your Honour because the Statute 225 simply creates a statutory term to be implied on to every contract where the plan hasn't been deposited and the agreement precedes it, so it's quite, well in my limited research, its quite an interesting and novel well perhaps unique provision that is these particular LIMs however far they extend so it's a sort of augmentation to make 225 work and when you stop to think about it looking at the 225 obligation it would appear to make sense that at least some of these LIMs are necessary to make 225 work. The issue then is how far do they go?

Elias CJ On your analysis dividing it into the three LIMs all strings of the question you're asking which is about procuring subdivision consent if you substitute the statutory requirement of procuring depositing of the plan then they evaporate don't they as separate inquiries?

Fowler Oh indeed, indeed, can I

Elias CJ But the reasonableness of the conditions and the reasonableness of the steps to comply with those conditions are implicit in the overall inquiry.

Fowler Yes, yes I would accept that. Can I make it absolutely clear that we say there is no third LIM.

Elias CJ Oh I understand that.

Fowler And that distillation is from everything, from looking at **Clough and Martyn** and the other cases the written submission my challenge is that it's hard to get away from that

Tipping J Well in a sense that is analytically so but it's according to the ground rules of your analysis. I mean the reason why this condition was not fulfilled was because the Steele and Roberts camp declined to go to the extra expense and the other burdens if you like of putting the drain in the other way.

Fowler Indeed.

Tipping J But the issue surely is whether that was contractually between vendor in person a stance that they could reasonably take.

Fowler A stance which they could take, that's the difference. The reasonableness has no part of that.

McGrath J Sorry, when you identify the third LIM and say that it's not contractually inherent to continue to have it is it really your argument that in terms of contractual principle that question should always be left to be dealt with as a matter of risk, the parties providing for it if they wished to and if they don't taking whichever way the risk falls and that it is therefore wrong in terms of contractual principle to extend reasonableness into a form that the third LIM takes which is inherent in the Court of Appeal's judgment?

Fowler That's absolutely it in a nutshell Your Honour.

Anderson J I wonder if the analysis should go like this that s.225 imposes a condition for the benefit of both parties according to its tenant and as a matter of general principle if the term of a contract requires something to be done which can't be achieved unless other steps are taken by a

party. That other party has to take reasonable steps in fulfilment of the condition.

Fowler Yes.

Anderson J And if that party whom that obligation rests says that the condition has not been fulfilled then under the general principle that you can't take advantage of your own wrong, they're not allowed to say that if they haven't taken reasonable in accordance with the contemplation of the condition.

Fowler Yes Your Honour but it still comes back to how far that augmented condition goes and it

Anderson J Why do you say it's augmented, there are just consequential logical implications of it?

Fowler Well it's Judge-made law to make s.225 work, simple as that. You don't find it in the Statute.

Elias CJ And do you say the authorities don't go as far as step 3 and that there's no policy in making the Statute work which requires them to?

Fowler That's correct.

Tipping J So in short your disavowed step the difference is, I'm looking at para.1 on your page 3 of your summary, little 3, Mr Laurenson wants it to read to take reasonable steps to comply and you suggest it should be to take such steps as are necessary to comply?

Fowler Yes, at that point

Tipping J It's as simple as that.

Fowler Simple as that. It's a simple contractual obligation. You meet it or you don't and the only safety nets you fall into then are frustration or mistake or whatever.

Blanchard J But it still steps over the question of what is a reasonable condition.

Fowler Well no Your Honour, if the condition is reasonable on its face in the Court of Appeal there is a passage in the Court of Appeal judgment that I can point you to that actually faces this. The condition might be reasonable on its face but it might turn out to be somewhat harder to actually perform it or meet it by circumstances that have intervened and if you don't address that risk in your contract in your contractual terms the vendor has to assume it. If to transfer it to the facts of this case it was always open to the vendors to exclude the risk that they might not get the 55

Blanchard J What would have been the situation if the Council's condition had been that the drain must be created through the residual lot?

Fowler Through Lot 1.

Blanchard J Would that in these circumstances have been a reasonable condition?

Fowler In my submission yes. That is through Lot 1, yes.

Blanchard J Because that's really the issue.

Fowler Yes, yes it would be on its face reasonable and I don't detect from anything in the judgments of the lower Courts that would assert that such a condition would not have

Blanchard J Well you took us a few moments ago to what Justice Miller said and I then asked you what the Court of Appeal's position was and you didn't think there was anything different in the Court of Appeal but I find in para.43 of the Court of Appeal a statement which seems to take a very different position from that of Justice Miller and they say 'all in all the subdivision involving drainage through Lot 1 would be of a substantially different character to what the parties had contemplated at the time of their agreement'.

Fowler Well

Blanchard J That contrasts with Justice Miller 'performance of the contract would not require a substantial departure from the parties common intention at the time of the contract' so they're talking about exactly the same thing.

Fowler I'm not sure Sir if that's necessarily so because there is that word 'contemplated', what the parties had contemplated and I think His Honour or the judgment is there being directed to the contemplation that the connection be made via 55.

McGrath J Is that word 'contemplate' referring back to the doubts that the Court of Appeal had as to the binding nature of the expectations that the drainage would be over 55?

Fowler Well I can only work from the face of the judgment if Your Honour pleases but that would be my submission. Is there anything else on that first plank that the Court wishes to raise at this stage?

Tipping J There is nothing in **Clough** I take it or post-**Clough** that could be said to be helpful one way or the other on this performance has to be, it's the performance of the condition or as my brother Blanchard put it 'translating it into a reasonable condition to do what's now required'.

Fowler Well my learned friend may have a different perspective but we're not aware of any authority that bears on LIM 3.

Tipping J But why, this is the heart of the case in my view and I'm sorry but I think I would like to detain you a little longer on this sort of theoretical business of contractual risk. When the parties go into something like this and they have an expectation jointly shared that the condition which they anticipate is going to be fulfilled in a particular way and I think this case goes that far doesn't it? It was within the contemplation of both sides that this was the way that they were going to fulfil it if they could.

Fowler If they could, if they could and that's as I touched on before Sir there's a moot point.

Tipping J I can understand your point about certainty because any reasonableness criteria introduces uncertainty at the margins but why cannot the Court control the allocation of risk through the concept of reasonableness?

Fowler Because at that point you are straying into what the parties properly should be contracting about or parlaying about which is allocation of risk and to translate it to this particular case as I said before was always open to the vendors going into this contract knowing that they did not have in their back pocket the consent of 55 to exclude it, they did not.

Elias CJ So would you take the view that if the condition proved impossible then you're into frustration?

Fowler Yes, there's always the safety net of frustration.

Elias CJ And I was just imagining how that might arise. Is it, I don't know enough about resource management law to know whether is it possible that this the drain through Lot 1 might of itself required resource management consent because of the nature of the topography?

Fowler I'm not aware that that was the case Ma'am but one could imagine that just to take in extremist positions that it turned out that a particular route or routes were impossible because there happened to be when one dug down some impassable scene or polluted soil or something like that that would make performance either impossible or radically different in terms of expense. Radically different, not a

Elias CJ Radically different yes.

Tipping J Surely there must be cases which look at the ambit of what amounts to default or wrong as my brother Anderson called it in the context of not being allowed to rely on non-fulfilment of condition if that has occurred through your own default or wrong. Surely the question of whether it's a default or whether it's a wrong is capable of being

informed by questions of reasonableness interparties, not abstract reasonableness but reasonableness interparties.

Fowler Oh I sure that there are cases as a matter of broad contract that would address that would address that in terms of default if Your Honour pleases, but I still come back to the fact that we are facing here a special common law augmentation.

Tipping J No I don't see it as quite those terms Mr Fowler, I see it that this condition has not been fulfilled, the question is whether Mr Laurenson's client can rely on that non-fulfilment to resist specific performance or to resist any remedy.

Fowler Any remedy.

Tipping J Yes, now whether it's a default or a contractual wrong I would hesitate fore holding that the concept of reasonableness in the performance of the condition, not just the establishment of the condition, but the performance of it is irrelevant.

Fowler Well I have to go back to the fundamental proposition Your Honour that still as a matter of contract performance has no, that the concept of reasonableness around performance, once you've ascertained contractual obligations, once you've set what the four corners of the contractual obligations are then reasonableness is irrelevant to performance

Blanchard J But this is not an ordinary contractual condition dreamed up by the parties, this is something that the legislature is imposing and doing it by means of the section which was intended to be remedial and the Courts have pretty clearly from **Clough** onwards if not before recognised that the Statute has to be glossed in order to make it workable. Now it seems to me that there's plenty of room there for concepts of reasonableness in the application of the Statute.

Fowler Well my only possible response to that Your Honour is that as a matter of contractual coherence and policy that the infusion of reasonableness should be limited for the reasons that I've attempted to argue this morning.

Blanchard J I understand the argument but it doesn't seem to me that the doctrine of frustration is much of a safety net.

Fowler Well I'm not sure with the greatest respect that I would accept that it's not much of a safety net. It's there to meet situations where performance turns out to be radically different or impossible and that obviously is first principle's mainstream contractual law. I'm not sure that this situation requires a special or softer standard I suppose is what I'm arguing in terms of performance.

Elias CJ But isn't the reason, sorry, isn't the reason why it might require a different approach, the one that's been put to you that it's a condition imposed by Statute for remedial purposes?

Fowler Well it could be but it is also in terms of the way the augmentation works and the way the Statute works clearly, although it's for the benefit of both, it's a vendor's obligation, the obligation is on the vendor to pursue these things, it's not particularly tidy or coherent to leave this third LIM in place such that there is an obvious escape route once reasonableness arises with regard to performance.

Blanchard J It could lead however on the view that you're taking to cases under the section that are harsher than would have been the case if the law illegality had prevailed.

Fowler Yes. Your Honour would be referring to remedies under the Illegal Contracts Act?

Blanchard J Well at the time it was first enacted there probably was no Illegal Contracts Act.

Fowler No, that would be right.

Blanchard J No remedy at all.

Fowler That would be correct.

Blanchard J In other words it may be less harsh in some circumstances and this would be one perhaps arguably if the whole thing fell apart because it was illegal.

Fowler Yes it would be.

Blanchard J And one wonders whether that's what the legislature wanted as a result of the enactment of the remedial legislation.

Fowler One would have to accept that possibility, yes.

Elias CJ Yes I have just a loose thread about the emphasis that is placed upon this being for the benefit of the purchaser because I would have thought that s.225(1) which is the principal provision is for the benefit of everybody really and indeed probably for the public interest and then there is protection for the purchaser if obtaining fulfilment of the condition is delayed.

Fowler Perhaps I didn't make it clear Your Honour the point I was making was that it's clear authority that the provision is for the benefit of both parties, the obligation though in terms of procurement and meeting reasonable conditions is on the vendor. That's the way it works as we

would analyse it. Does the Court want me to turn to the second broad plank now or is there anything else?

Elias CJ Yes thank you.

Fowler As I indicated at the beginning this is really responsive and that threads of this that relate to some of the matters that have already been explored and this is the appellants' suggested implied term collateral contract rectification stranded argument and the first point I seek to make about this is that the finding of the High Court in my submission did not equate to a finding that the agreement or understanding, two different terms that have been used thus far, that linkage via 55 Palliser was to be the exclusive route. Now I perhaps need to take the Court however to exactly what was said in the judgments on that and the first reference is volume 1 of the case on Appeal, pages 62 to 63, and I must acknowledge straight away that at para.52 on page 63 the High Court judgment finds 'I accept Mr Steele's evidence. I'm satisfied that the parties agreement that the defendants would pursue subdivision extended to an agreement that stormwater and sewerage would be connected to the public drains on 55 Palliser Road'. However in my submission it's necessary to look at the page that leads to that conclusion starting at the bottom of page 62 where His Honour poses the question to be answered and then over the page at the top of 63 'as already noted that would require the agreement of the owners of 55 Palliser Road because a short connecting drain and an easement were required'. Then His Honour addresses Mr Steele's evidence then refers to Miss Austin, she was the Real Estate Agent. Miss Austin recalled a discussion with Mr Serepisos the gist of which was that he was aware that potentially the sewerage was to come along the side of the neighbour's property. She also discussed the matter with Mr Steele etc. Then at para.50 Mr Serepisos did not agree that the defendants made it clear that the stormwater and sewerage would be connected to drains on 55 Palliser Road, but I am satisfied that he had very little specific recollection for negotiations. Attached to the agreement for Sale and Purchase was a plan on which the drain running across 55 Palliser Road had been drawn, although the plan did not depict a connection to Lot 2, he acknowledged that he knew the drain was on the plan.

Blanchard J Well it couldn't depict a connection to Lot 2 because you didn't know where the house was going to be.

Fowler Well it didn't show either option, that's the short point.

Blanchard J Significantly it had the drain on 55 Palliser Road on the plan.

Fowler Yes but that was an existing drain.

Blanchard J Yes.

Tipping J But three-quarters showed that that was the way they were going to do it.

Fowler Well it didn't, the short point is Your Honour it didn't show either option. Yes it showed existing drains on 55 but in terms of how Lot 2 was going to be serviced it didn't rule out either option.

Elias CJ Do we have the plan, I haven't looked through it?

Blanchard J Yes we do.

Fowler Volume 3, 210. I think if the Court looks you can see the drainage line shown on 55 running straight along quite close to the boundary.

Elias CJ It doesn't show drainage lines anywhere else does it?

Fowler No indeed and Your Honour that's my point.

Elias CJ So I mean

Blanchard J And you wouldn't draw in the connection because that would have committed Mr Serepisos to putting his house in a particular place.

Fowler Well you could have shown a connection from 55 to the boundary.

Blanchard J And just shown it marked 'hypothetical'?

Fowler Well presumably you could have marked in some manner or form the fact of or the existence of agreement that there was to be some linkage to that drain.

Elias CJ But isn't just showing this drain, isn't it obvious they must have been contemplating a hook up to that drain.

Blanchard J And that's what the trial Judge found.

Elias CJ Yes.

Tipping J Several places he found it.

Fowler Apparently it was drawn on. The drainage on 55 was drawn on.

Blanchard J It was drawn on, well that's very significant.

Tipping J Well it looks like it's drawn on.

Blanchard J Well we've been told it was drawn on.

Fowler The other passage that I wish to take the Court to is in volume 2.

Elias CJ Well sorry you were taking us through all of these paragraphs to try to make what point, that the Judge's conclusion isn't supported?

Fowler The conclusion to my submission is not necessarily that this was the exclusive route. It might have been a preferred route. It's open also to the interpretation that this was a preferred route which Mr Serepisos in some manner or form acknowledged but it doesn't necessarily seem in that context of what the Judge was addressing.

Tipping J Well look at para.69, the finding of default.

Fowler Indeed.

Tipping J That looks to be as though that was the way they were going to do it and he wasn't able to do it that way so he was in breach.

Fowler And they assumed the risk.

Tipping J Well that's a different issue.

Anderson J The only think you can conclude is that the parties contemplated that that would be how the drains hooked up. That was their expectation.

Fowler Can I complete the references here for Your Honour because I'm not sure that one could say that that's the exclusive contemplation. Yes it was contemplated as a preference but whether in fact that's the exclusive

Anderson J Preferred to what? Where is the evidence of something else that they might have preferred this to?

Fowler Well the point is Sir that other alternatives were not excluded by the contract.

Anderson J Theoretically.

Fowler Well more than theoretical the evidence was that for certainly no more than $18,400 extra cost it could go through Lot 1.

Anderson J I understand that but I'm talking about when the parties were negotiating the contract.

Fowler Well perhaps again Sir perhaps it might be more of a matter of interest to the purchasers than the vendors, who knows, but it would be perhaps not surprising that preferences might be discussed. It might not have been a matter of Mr Serepisos particularly that the preference was that it go via 55, but the issue of whether it's a preference or whether it's exclusive is as I say moot.

Anderson J Well how do you get around the Judge's finding in para.52, at page 63 in that case?

Fowler Well that as I'm saying Your Honour is certainly in terms that I submit leave open the possibility given what he's been addressing that it amounts to issues of preference and it's not necessarily exclusive.

McGrath J You're really adopting the Court of Appeal's approach aren't you or at least their doubting approach in saying that yes there might have been this contemplation, expectation, whatever you want to call it but it didn't amount to a contractual agreement and they invoked the Contracts Enforcement Act

Fowler Indeed.

Anderson J I appreciate the different implications from that. What was their expectation or within their contemplation may inform the question of reasonableness.

Fowler Indeed.

Anderson J Whereas if they had an agreement well that was the end of it.

Fowler And that obviously is what this plank of my submissions is seeking to address. I have referred there to some other evidence. I've referred to the word 'potentially' which was picked up by the Judge. He has also referred to there in the notes the **Maunder** evidence who was the appellant's surveyor which does refer to other feasible alternatives and feasible options and I've given the reference to that there. But I do acknowledge and I must acknowledge that the evidence of Mr Steele is in more exclusive terms and I've given the reference to that and I'm not sure I need to take the Court right through that. So there was certainly evidence from Mr Steele but one could only I think read in terms of it being as far as he was concerned an exclusive.

Tipping J If it was exclusive and the Judge seems parches your submission to have been inclined to find as much what impact does that have on the other LIM of your argument, none according to you. Is there no room even for frustration?

Fowler No because the vendors took the contractual risk. As I say this whole point is in

Tipping J Isn't it radically different if everyone has had a

Fowler There's a finding that it wasn't.

Tipping J Well

Blanchard J Well the Court of Appeal as I say

Tipping J You nearly said it was radical.

Blanchard J Then you said the opposite.

Fowler Well there's also the passage on the reasonableness discussion and terms of going via Lot 1 which they described as closely balanced.

Tipping J The Court of Appeal in para.43 said it was 'all in all the .. etc' would be of a substantially different character to what the parties had contemplated at the time.

Fowler Well I come back to the point Your Honour that I made before that the word contemplation is used there and that in my submission looks like it's a reference to the contemplation of going via 55. The side agreement or understanding for want of a better term. As opposed to what one would call, what we say are the four corners of the contract itself.

Tipping J I know the legal argument, but it's becoming, you could have something thoroughly unreasonable but not yet frustrating?

Fowler Yes.

Tipping J Yes, that's inevitable isn't it?

Fowler Yes, that's the cold hard answer and the Court of Appeal goes some distance towards that of course in its reasoning.

Elias CJ Well the trial Judge who thought that there was an agreement to go via 55. I'm struggling as to why if that proved impossible it wouldn't be frustration. I know you're not supporting that, you're going with the Court of Appeal analysis.

Fowler If 55 turned out to be impossible

Elias CJ Yes, well it is impossible because it's in the keeping of someone else.

Fowler Then it falls into the basket of contractual risk because it is possible via Lot 1.

Tipping J Doesn't this all demonstrate because frustration is such a blunt instrument you're either in or your out and you have to be quite a long way before you're in that in policy terms a reasonableness criteria and although adding a little bit of uncertainty might add a huge amount of justice?

Fowler I have to confess Your Honour

Elias CJ Or even a reasonable amount of justice.

Tipping J I'll settle for a reasonable amount of justice.

Fowler I have to confess Your Honour I hadn't come equipped to reconstruct or deconstruct the doctrine of frustration so I take the point, it is, it can be a blunt instrument but the parameters of frustration are clear and of course I don't need to say to the Court

Tipping J Well we're not here to explore the option of frustration really are we?

Fowler Can I move, remembering that this whole argument as I think the Court has already apprehended is only responsive to my learned friend's response to my argument on the first plank but if we are wrong in that first proposition about exclusivity and the finding does equate to an exclusive route in my submission that still doesn't help the appellants because if you work through the analysis they got Condition E reasonable on its face. At that point they are taken out of the s.225

Blanchard J Well no, conditionally it wouldn't be reasonable on its face. If there was a contractual condition that the connection be via No. 55.

Fowler Well Condition E would permit that Sir.

Blanchard J It would permit it but it would be unreasonable insofar as it might permit or in contractual terms as between the parties require the connection to be made in another way.

Fowler Yes but that's just going back to the contractual terms. Condition E would still be reasonable in its face.

Blanchard J I don't think it would.

Fowler And it

Blanchard J You have to go behind its face in order to determine what is a reasonable condition when you're looking at it as between vendor and purchaser. I think your argument on that is overly semantic frankly.

Fowler Well can I take Your Honour through it and then I'm happy to

Blanchard J Well we've been through it haven't we?

Fowler Well I still say it comes back to a matter of contractual risk. Yes when you actually look at Condition E on its face it's unremarkable, and if Your Honour's approach is to say well lets step behind it that is simply going to the terms of what the contractual framework is between these particular parties and then presumably looking at Condition E through that prism.

Blanchard J If there was a contractual provision that the connection was to be to Lot 55 a Council condition requiring the connection to be made via the residue of the vendor's land wouldn't be reasonable would it?

Fowler No.

Blanchard J So therefore a condition that could be fulfilled in either way wouldn't be reasonable?

Fowler No, no, with the greatest respect Your Honour I still say Condition E on its face would still be reasonable. It is its application in terms of the

Tipping J Its performance.

Fowler Its performance, its performance, I'm obliged to Your Honour, would taking in terms of the third LIM would be unreasonable but the condition on its face

Blanchard J I'm afraid I don't accept that. It seemed to me that the condition would be unreasonable as between the parties because it could force the vendor to have to do an implementation in a way which doesn't comply with the contract. This is all posited on there being a contractual term although I suspect that the same analysis would apply even if it was only an expectation.

Fowler Well I still respond with the greatest respect that that is reinterpreting Condition E in some manner or form that is different from what the words require on their face and the words on their face permit either alternative and if the other alternative is available the fact that the first one's been shut off by absence of consent is neither here or there.

Anderson J Your argument really to this effect, there is nothing unreasonable about a Council imposing a requirement for sewerage and stormwater drainage and that in this case that's what they've done in Town Planning terms generally, nothing unreasonable about that but fulfilment of the condition is something that is within the power anyway of the vendor, and if it's within the vendor's power then it can't be frustration and can't be unreasonable.

Fowler Yes I would accept that.

Elias CJ Unless the parties had in contemplation a particular form of fulfilment which is why we're back into that being quite a key factor in the case.

Fowler And if that contemplation was elevated to a matter of contractual obligation then it would fall to be determined eventually as a matter of risk who'd assumed it and who hadn't.

Anderson J It might be a question of mutual mistake mightn't it?

Fowler I did mention mistake earlier if Your Honour pleases which is part of the reason why we balk at the not absolute appellation that the Court of Appeal utilised. Just to round off that particular issue in terms of risk, of course I draw the Court's attention to the finding of the High Court at page 67, volume 1, para.65, so what I'm submitting here is even if you've got your exclusivity implied term there's a clear finding by the High Court "the agreement was not made conditional on the defendants procuring the consent of Miss Fisher and Mr Smythe"– they were the owners of 55 Palliser Road to drainage easement. So as I guess I keep banging away I submit comes back to a matter of contractual risk and the problem with the implied term is it will continue to run up against that particular finding of His Honour at first instance. Does the Court wish me to address the rectification pleading request? I can briefly.

Elias CJ Oh yes perhaps you'd better cover it quickly.

Fowler Well the point is as always is the case when there is a request for an amendment to the pleading at appellate level as well will it fit around the evidence and the ambit of the case as argued at first instance because if there's a misfit then obviously there is a problem and putting the point very shortly, and I've got it at the bottom of my notes there on page 5. Indeed different evidence would have needed to have been briefed directed to the creation and passage of the written agreement and as to the omission of the suggested term and just as one example I have referred to the cross examination of the Real Estate Agent which you can find in volume 2 of the case at page 177, lines 1 to 20. Perhaps If I give the Court a moment to absorb that. Ending of the line at or leading up to the conclusion of the agreement, yes at about that time. Now my submission it's evident from that that this proposition of some form of agreement or understanding has been certainly put to the Real Estate Agent who obviously was the person who would be doing the usual shuttle diplomacy but what has not been put and it's tantalising because the propositions been squarely that there was some understanding has not been put is whether the written agreement, what route it took, why it didn't include this term and so on and so in my submission that sort of proposition is fatal to a pleading change at this stage, particularly at this appellate level.

Tipping J Just remind me Mr Serepisos gave evidence did he?

Fowler Yes.

Tipping J Presumably he wasn't cross examined as if this was a rectification suit.

Fowler No. I said this was just an example.

Tipping J Yes, quite but that would be another quite good example.

Fowler And finally on this my submission is that if the Court did hold that there was an implied term or collateral agreement of the nature that has been suggested then I suggest there's a bridge to my learned friend Mr O'Sullivan's argument and in the written argument on that relating to the importance of giving notice. In other words if we're faced here with an exit from the contract on the basis of an implied term or collateral agreement that's not part of the written agreement we would submit all the more reason that there should at least be some form of notice before the agreement is discharged. Now unless there's any aspects that the Court wishes to explore further on that then I'll turn to the last and the narrowest point and this is the difference over reasonableness of performance. As I've reminded the Court already the Court of Appeal regarded this particular issue as closely balanced obviously on further appeal this Court is in just as good I submit a position as the Court of Appeal was to determine this. The short points are that the extra cost to the vendors, that is of going via Lot 1 was at most $18,400 and $2004 and that has to be seen in the context of a contract of $207,000 which on the evidence was above valuation and $10 to $20,000 that the vendors were apparently assuming for the decking. Finally

Blanchard J But the monetary cost of doing the work was not the only matter that was troubling the vendors.

Fowler That is true.

Blanchard J Weren't there going to be exposed pipes?

Fowler Yes there were, yes there was evidence that there were amenity issues that I think is the expression that the judgments refer to.

Anderson J Which would reduce the value of Lot 1.

Fowler Well one would say perhaps that a number of features of subdivision could reduce the value of Lot 1 anyway.

Anderson J But sewer pipes above ground as you look at their kitchen window probably would have some effect on value.

Fowler There might be ways to address that.

Anderson J As for the 460 point which you're coming to, I'd like to think this as belated as the rectification issue.

Fowler Well it is a matter of law, it is open as a matter of law and it's really just a

Blanchard J Well now wait a minute you've got limited grounds that you're allowed to argue, how does it fit within those grounds?

Fowler Because it goes to the reasonableness Your Honour. It is really just another means of going via 55.

Blanchard J Which ground do you fit it within?

Fowler I'm just turning for the question settled by this Court for the respondent on the cross appeal then I'll address Your Honour's point. First of all

Elias CJ Is this really separate from the notice point that we are going to

Fowler It is going to be part of the notice point but there is perhaps one matter my learned friend Mr O'Sullivan has kindly pointed out that if the Court looks at the evidence of Mr Maunder at volume 2 on the case, pages 160 to 161 as a matter of evidence the s.460 option is we say 'there referred to' because if you look at para.18.5 you will see that, and this indeed was the expression that I referred to a moment ago in terms of Mr Maunder's evidence that there were three feasible alternatives, and you'll see in 18.5 how he set those out. The first one is the link to the existing public drains on 55, the second is a direct link to the public services on Palliser Road via new pipes. That's your s.460 option and 18.5.3

Elias CJ No, is it?

Fowler Yes

Elias CJ Is that the section

Fowler It's public services, it's the ability of the Council to go on to 55 and install public services to the boundary between 55 and the new Lot, whereas

Elias CJ No I thought that was 18.53 of your points.

Fowler No, no. I'm sorry yes I've got them the wrong way round.

Elias CJ Yes, yes.

Fowler But that's the three options.

Elias CJ Yes.

Fowler Anyway I'm sorry I identified the wrong bundle

Blanchard J Was s.460 actually referred to anywhere.

Fowler No, no it wasn't.

Anderson J The implication of invoking it is that there's no practical route through Lot 1.

Fowler Well if you look at what s.460 says and I've attached it because it's unfortunately not in the casebook. Subsection 1 commences where in the opinion of the Council the only practical route of any private drain is through one or more of the adjourning premises, etc etc. Then obviously what would happen as you necessarily would have had in the opinion of the Council a finding so to speak that it could only go in practical terms via 55 but the converse of course is that if they declined it there would be likewise an opinion that there was another practical route.

Anderson J Yes but then the practical route might be their reasonable route.

Fowler True, yes.

Blanchard J Am I right in thinking nobody thought of the possibility of asking the Council to use s.460?

Fowler Well the purchaser never got that opportunity.

Blanchard J But the map really didn't surface until the litigation had then commenced.

Fowler No, certainly the purchasers never explored that. The purchasers never explored the 460 opportunity and we say that goes to the reasonableness. It is another factor in the reasonableness.

Anderson J You'd go further and say it's not precluded now wouldn't you?

Fowler True. Now that was all that I intended to cover by way of oral argument if the Court pleases unless there are any other matters that the Court wish to explore.

Elias CJ No thank you Mr Fowler. We'll take the morning adjournment now.

Court adjourned 11.20am

Court resumed 11.38.08am

Laurenson Your Honours the first submission in reply is that the clear obligation in my submission arising from the implied terms in s.225 is that the obligation to take all reasonable steps applies to both LIMS; one to obtain the approval of the subdivision and the other to comply with reasonable conditions. I submit that is clear on the face of the decision in **Clough and Martyn** itself and it has been followed in cases in authorities since the decision in **Clough and Martyn**. Now my argument on that why it is clear from **Clough and Martyn** appears at para.4 of my submissions in reply. And in that part of my submission it commences at para.4 but page 6 of the submission in reply and I would refer first to para.4.7 at page 7 where I say that statement of the

rule which I set out in the 2 LIM manner in para.4.5 is obtained from **Clough and Martyn** by the description of the implied term advanced by council in that case and recorded at page 316, lines 30 to 35 of the report and there the judgment of His Honour Justice Cooke records that argument and the formulation of the rule to be, he formulated this. I'm sorry I should start earlier. Mr O'Brien submitted that the contract constituted by the exercise of the option should be treated as containing an implied term then he says he formulated this in slightly different ways in the course of the argument but the form he was finally content to adopt was that the vendors must take all reasonable steps to comply with the conditions imposed by the Council. So in my learned friend Mr Fowler's argument this morning that is the third LIM which is in dispute as far as the respondent is concerned. It is formulated that way by Mr O'Brien in argument and then the next pick up of that is at page 317, line 8, where the Court of Appeal says 'we accept that the contract is to be treated as importing an obligation on the vendors to take all reasonable steps to obtain approval as Mr O'Brien contends'. But what Mr O'Brien has contended earlier is not to take all reasonable steps to obtain the approval but to take all reasonable steps to comply with conditions imposed by the Council to obtain the approval. Now I believe it was a comment from Your Honour Justice Tipping earlier this morning that one would evaporate into the other and I would submit that that would be correct, that the concept of taking reasonable steps to obtain a subdivision in my respectful submission necessarily involves, includes the concept of taking reasonable steps to comply with whatever conditions are necessary to achieve that approval.

Tipping J Provided the conditions themselves are reasonable.

Laurenson Yes, and there is no suggestion that the conditions should not be reasonable. Justice Cooke in the passage that follows there, and this is the passage which is uplifted by the respondent went on to say that the obligation is more absolute for the vendor subdivider but the next passage after the one that I've just quoted at 317 goes on, this is supported by **Hargreaves Transport Limited and Lynch** and other cases cited in Halsbury's Laws of England 'no doubt the vendors would have to submit to reasonable building line and sewerage conditions'. Now the notion of reasonable condition is imported then.

Tipping J But it's also imported in Mr O'Brien's formulation that they were adopting at the previous page, line 34.

Laurenson So long as such conditions were reasonable, yes, so he has already formulated that and the Court of Appeal is accepting Mr O'Brien's contention. Now further on there are other references in the decision which are picking up on the submission of Mr O'Brien. Another one is at page 317, line 35, commencement of the paragraph there 'hence the implied 'term rightly contended for' does not help the appellant'. Now the implied term 'rightly contended for' that reference there is referring back to Mr O'Brien's formulation.

Blanchard J Just above that I notice that the Judge is talking about a material difference not a radical difference or something that might bring in the doctrine of frustration. Separate point but I just thought I'd mention it because I noticed it as you were taking us through there.

Laurenson As Your Honour pleases the subdivision in **Clough and Martyn**, or the claim failed because the subdivision was different from what the parties contemplated in that it had a service lane intersecting land which was meant to be a prolongation of an existing title. Now it has always been the argument on behalf of the appellants in this case that the subdivision that they could achieve if they accepted the respondent's plea to do something else with the drains or something different from what they contemplated and the Court of Appeal in my submission recognised that as the essential core of the argument or as the basis of the argument in this case where they say at a passage that, and I'll just find it. Yes it's para.36 at page 27 of volume 1. The paragraph reads 'the appellants' maintained that they were not required to provide site stormwater and sewerage drainage over Lot 1. This was put in two ways, firstly agreement found by the Judge meant that the subdivision contemplated by the agreement is different from what would be involved if drainage was provided over Lot 1. An argument which in a sense invokes the actual decision in **Clough** – a different subdivision. And while I deal with that there is also in my submission support for that in the finding of Justice Miller in the High Court at para.75 of his judgment where he is referring to the grounds for refusing specific performance and I refer to the last two sentences of para.75 'but reading the whole paragraph I have come to the clear view that it would be inequitable to grant specific performance in this case for several reasons. First the parties agreed that the drains would be connected to 55 Palliser Road, it is not now possible to do so. I accept Mr Laurenson's submission that this is a bar **to** specific performance in this case, it is not for the Court to modify the agreement before ordering that it be performed', so in my respectful submission it was quite clearly the finding of the High Court that this obligation to have the drains linked through 55 Palliser Road was part of the agreement – the contract to provide a subdivision. Now going to why that is the test on the face of **Clough and Martyn** there is one other passage that has been a digression but there is one other passage where the implied term contended by Mr O'Brien I submit is the ratio of the case and that is a passage at page 318, line 17, and it is this 'but in this case no matter whether the criterion be described in terms of necessary implication, business efficacy or the officious bystander, we are quite unable to find implied anything more than the term about all reasonable steps which was propounded for the appellant and has already been discussed' so there is again an endorsement and picking up on the test earlier given by counsel for the appellant which is at page 316. Now in argument this morning it was asked whether that two LIM test to take all reasonable steps governing both LIMS has been the subject of any comment in authority in New Zealand, in my submission at page 9,

para.4.9 I refer to a case **McFarland**, and it's been given the wrong name, it is **McFarland and Williams** and it is the case which is No. 12 of the large bundle and I refer Your Honours to paras.14 and 15. It's a judgment of His Honour Justice John Hanson in Dunedin and para.14 discusses the test in **Clough and Martyn** and then I refer to para.15 His Honour in the second part of the paragraph refers to the tests as 'however what is being sought is not a new subdivision, it is the obtaining of easements and it seems to me that a vendor who is required to take reasonable steps to comply with the reasonable conditions of resource consents necessary to achieve the subdivision' and carries on, but he is adopting the test as being one that requires reasonable steps to comply with reasonable conditions, not a requirement to take steps to comply with on the face of it a reasonable conditions which is the argument of the respondent. And in my submission it is implicit also in the decision of **Hay and Laurent** which is a judgment of His Honour Justice Smellie and it's the third authority in the large bundle and that was under the Counties Act, similar provision of s.225 and it is a case which invokes **Clough and Martyn** really in all respects for all the issues of this appeal but I refer to page 190 through 92. At the top left is the page number and it's the first column on that page where Justice Smellie commences a new paragraph saying 'accordingly I now consider whether the defendants have taken all reasonable steps to procure approval of the plan'. Now admittedly he is not saying 'and to take all reasonable steps to meet reasonable conditions', but if you then follow that passage through you will see that he agrees with Mr Harrison's submissions which commence in the second column of that page that the party had taken all necessary steps, I'm sorry had taken all reasonable steps to procure the necessary approval. If you read through those arguments of Mr Harrison it ends up with K on page 193 93 'the party continued up to 1977 work on sewerage and water supply and through 1978 until as late as May of 1979'. Now in my respectful submission that is implicit in that is that what the party was doing was taking all reasonable steps to comply with a sewerage condition.

Tipping J Is there anything in the English case that the Court of Appeal relied on in **Clough**? I've just had a quick glance at it, it doesn't seem to directly touch on this.

Laurenson That's **Hargreaves and Lynch**.

Tipping J **Hargreaves** yes.

Laurenson Yes.

Tipping J Only if you think there is anything that is particularly helpful, I doubt that it could be said to be authority either way on this issue as to the extent of the duty to take reasonable steps. There the finding was that they didn't have to appeal to the Minister against the local body's refusal to approve the plan.

Laurenson Yes but I would submit that is squarely honoured because the ratio of **Hargreaves** is that to seek to appeal a planning refusal is an unreasonable step in the circumstances.

Tipping J It wasn't performance of the condition it was an attack on the condition or the terms of the approval itself so it doesn't touch on the distinctions that is sought to be drawn between the condition itself and performance of it. That's why I say I'm not sure that it really helps much.

Laurenson Well Lord Denning in that case, I'm sorry, if one refers to the head note you see para.2 at the foot of page 215 of the report.

Tipping J This is tab 4?

Laurenson Yes this is tab 4, that the purchasers had to use due diligence and take all reasonable steps to obtain approval of the details but that once the local Planning Authority refused to approve them the purchasers were entitled to rescind. Now the

Blanchard J But the contract only required that the purchaser should receive permission to use a property and to develop it so there really wasn't any question of implementation.

McGrath J No, that's right.

Blanchard J So I don't think the case touches on the point.

McGrath J Just a question of whether the condition is spent or not.

Laurenson Well there is this comment of Lord Justice Russell's at page 220, it's the second to last page of the report, second paragraph 'on the other point I would entirely agree that it is implicit in the contract that the purchaser would take all reasonable steps by way of attempting to get not only the outline planning permission but also the approval of detail under the condition. Now is that not exactly the distinction that is being rejected by the respondent in this case that you're talking about it's implicit to get the approval and they were referring to it as in terms of detail but is that not the same as conditions of approval? But in any event Your Honours I would be submitting, I do submit, that if the contract is silent then it is implicit in any event that the obligation to perform a condition is in those terms to take all reasonable steps to perform it, that is the general law. It can be described in terms of taking reasonable endeavours or taking all reasonable steps and I submit the law on that is clear by two matters or I refer to two authorities, one is a discussion of the law in the New Zealand text of **Burrows Finn and Todd** at page 249, para.8.2.5, page 249 where the passage says 'where the contract has not stated in definite terms any particular standard of endeavour the Courts will imply a term requiring reasonable efforts to be made'. What will be sufficient to comply with

such an implied term will of course vary with the circumstances of the transaction but for example a party who has to take reasonable steps will only have to resort to legal proceedings if there are reasonable prospects of success and in support of that statement they refer to the authority of **North Shore Demolitions and McKay** but I'm not relying on it for this purpose and then it goes on 'the operation of the implied term is well illustrated by **Connor and Pukerau Store Ltd**' and that case is in the bundle of authorities and it is tab 6 and in that case the obligation was on a purchaser to arrange finance and no standard of performance was prescribed in the contract and the Court of Appeal held that that required the purchaser to take all reasonable steps or endeavours, including in that case seeking finance from the vendor. So in my submission the general law on this in the absence of a specific standard provided for in the contract is simply that as Mr O'Brien advanced in **Clough and Martyn**. I make the further submission Your Honours that reasonableness has to take from the circumstances of any case and that although a condition on the face of it may appear usual or unexceptional as far as a subdivision is concerned and theoretically a condition that there be drainage from the subdivided section is a condition in that category, if there were two ways of providing that drainage, one at little cost and one at substantial I submit it is still within any subdivider vendors right to claim that doing it in the substantial cost way is unreasonable in the circumstances if there were two options and one is obviously more costly and different from a natural and more readily achievable.

Elias CJ What if there aren't two options?

Laurenson Well if there weren't two options then it still comes down to factors like increasing it to an absurd position. If the only way draining could be taken from a property, or storm water could be taken from a property, which on the face of it is a usual provision for a subdivision but the only way of doing that was to provide an aqueduct across a valley which was greater cost than the value of the section itself then that would be unreasonable. So there is a spectrum in my respectful still within the notion of

Elias CJ I'm surprised you're pitching it that highly.

Tipping J I think there was a doctrine of Roman law

Laurenson It's not reductio it's increasio.

Tipping J Yes.

Laurenson No but the point is that to answer your question, what if there is only one way? Now my learned friend's argument would be that if it had not been dealt with in the contract or in the contemplation of the parties on the face of it is a reasonable condition therefore you would have to do it and in my respectful submission in the test of taking all

reasonable steps to comply with reasonable conditions if the only way was to involve considerable cost and hardship out of proportion to the circumstances then you would not have to do it, you could claim it was that the steps to perform it were not reasonable.

McGrath J You're putting it in a very extreme way but do you accept Justice Cooke's formulation in **Clough** that I think it is that budgetary expectations can't set reasonableness?

Laurenson No I do disagree with that. I submit that budgetary expectations bear on reasonableness, have to bear on reasonableness. I submit that yes I do not accept it and budgetary expectations would have to. If for instance you're selling a section for $20,000 and that the cost of meeting conditions or be it all usual and unexceptional on the face of them took the matter beyond any realistic proportionate return to the vendor I would say

McGrath J But you're back to putting your argument in a very extreme basis which doesn't really seem to equate to the circumstances of the present case. We're dealing with a situation involving around $20,000 but I'm not really sure why you're going in this way because I thought your argument was really dependent not only on cost but on cost and a whole lot of other factors.

Laurenson Well yes, amenity factors and those sort of things.

McGrath J To some extent the fact that extra costs may be involved over and above what the person who had the duty to procure a deposit of the plan expected. There must be some tolerance, the authority's quite clear on that. Some extra sum has to be absorbed.

Laurenson Well yes but within the confines of the general exercise of application of reasonableness to the circumstances, that's really all I'm saying.

Tipping J Didn't the Court of Appeal find that on constant values of money this was going to cost 12 times more than the other way?

Laurenson Correct.

Tipping J It must be a matter of degree mustn't it? I hesitate to use that word

Laurenson I haven't used the word 'degree' but that's probably the word that I should have been using at an earlier stage. Yes, it's all a matter of degree in the circumstances as to whether it's reasonable or not.

McGrath J And is degree perhaps to be assessed not only by reference to what the expected costs would be but the overall size of the transaction?

Laurenson Yes and you can also bring in other factors such as the effect on amenity and similar things as that. It's all matters to be thrown into the

mix of the particular circumstances. All I'm saying at this stage is that my submission is that if there were two ways of doing it and one is unreasonable in all the circumstances compared with the other way you would be entitled to as a vendor subdivider in my submission to say that to perform the contract would be unreasonable, would require unreasonable steps for you to take.

Anderson J Why is it reasonable in relation to the other party that that party should be deprived of the benefit of the bargain because the opposing party is going to make less profit than expected?

Laurenson Well the purchaser can always provide for that in negotiating the agreement.

Anderson J The vendor can you mean?

Laurenson Well the purchaser can too. Because the purchaser by signing this agreement, although I'm not sure to what extent this is relevant to the present case, but under the law the vendor is the one to now, once the contract is signed and if the contract is in all other respects silent, the vendor is the one who is to achieve the subdivision on the implied terms imported by s.225. So the purchaser is taking the risk that what thereafter happens will be reasonable for him to get the purchase or her to get the purchase of the section.

Anderson J Unless they anticipated profit wouldn't frustrate a contract would it? You were saying it should have the same effect.

Laurenson No because we're not dealing with frustration we are dealing with the importation of reasonableness which is what s.225 does.

Anderson J I don't know why one should imply a term that if one party makes less out of it than that party thought the party should be able to call it off. Would that apply generally? Is it to be implied in every contract where parties are intending to make a profit?

Laurenson Well does every contract have a provision that you are only to take reasonable steps to achieve a position and that would be my immediate answer to that. Most contracts don't

Anderson J Yes I see that

Laurenson The transaction is an immediate one and there's always in subdivision an element of stepping out into the unknown because you do not know what the requirements of the local authority are going to be.

Anderson J Why not approach it on the basis of whether something is reasonably within one power rather than reasonably within one's way?

Laurenson Well I would certainly adopt reasonably within one's power but aside from that all of that in my respectful submission is a hollow argument, or an unnecessary argument in this case because the parties did provide for what was going to happen here and that was the agreement that they struck that drains be linked through No. 55.

Tipping J Mr Laurenson are you not with great respect making this a little bit more difficult than it needs to be? You read the section as though it said subject to a condition that the vendor will take all reasonable steps to deposit the plan. That's the effect of it, and then whatever is a missing step that is said to inhibit that you just simply say is it reasonable in all the circumstances to require the vendor to do that, and that covers the two alternatives, the only one possibility, everything. If you imply a term you will read it and the purchaser is signing up equally to a contract which has that waiting in it. I'm not disagreeing with you I'm just saying with respect that I think it's not necessary to make it as complex as it's seeming to sound.

Laurenson Well I apprehend that point Your Honour to be the same as the one you made earlier that one tends to evaporate into the other.

Tipping J Yes.

Laurenson Yes, well I'd agree with that

Tipping J I mean that's your argument, whether we accept it is another matter, but that is your argument. There is a reasonableness filter through which the obligations of the vendor, if they are sought to be imposed on the other side, has to pass and the purchaser can't impose an unreasonable obligation on the vendor, and in the end the Court has to decide.

Laurenson I don't disagree with that Your Honour. The only

Tipping J Well do you need to say any more on this point than that? I mean what more is there to say? I mean if there's more authority that is helpful fine but frankly for myself I've entirely got the argument.

Laurenson Thank you, I will move on. I was going to say that in this case though the parties provided for what the contract was to include and that is by the agreement through No. 55. Now I suppose the point does still remain that there was the obligation on the vendors to take reasonable steps to meet that condition that's perhaps why I faulted a little at the point you were putting the last proposition to me Your Honour

Tipping J To judge the reasonableness of what you're clients are being asked to do or not, it is a relevant circumstance that the parties had this contemplation or agreement or whatever you want to call it.

Laurenson Well I agree with that, yes, but also I put at a higher plain that it is in fact an agreed term and coming back to the earlier point I made that that was the condition of the contract, that storm water go through the next door neighbour. If they didn't agree, that is the next door neighbour, there is no sale, that is the transaction.

Tipping J It's a pity they didn't write it, you're having to rely on an oral collateral term aren't you.

Laurenson That is correct but may I remind the Court and the respondent that Justice Miller made that finding a number of times in his decision. He made it as the basis for not awarding specific performance and there was no appeal against that from the High Court to the Court of Appeal by the respondent. They did not challenge that finding both as to fact and to its effect and it's in many ways disappointing for the appellants that they still have to be arguing it at this level when it was not challenged at the time the matter went from the High Court to the Court of Appeal. In my submission, and it has been made in my written submission, that it has to be determinative of this case that that agreement has been found and in fact is not challenged and I also in my submission point out that in argument from Mr Fowler my learned friend this morning there has been no submission as I heard it nor in his written submissions which suggests the Court was not entitled to take it into account by way of at least the common intention or contemplation of the parties and that it is a factor at its very lowest to be put into the mix of matters to be determined in the earlier submission of reasonableness. Without that in my respectful submission I don't believe I have much more to say to the submission on the cross appeal. We have not heard today an argument that the Court is not entitled to take that common intention into account.

Tipping J You have heard an argument which makes such point irrelevant in law.

Laurenson Yes, well in my submission it's not irrelevant because of my first submissions in this case and you have indicated Your Honour you've heard all that you wish me to say on that and therefore I don't believe I can say much more.

Tipping J Yes, I just wanted you to fully understand the impact on their argument this point doesn't arise the question of the collateral agreement, but let's move on. I don't want you to feel in any way misled Mr Laurenson because it seems of course the point arises indirectly because their argument fences you out from it.

Laurenson Yes but they can't fence out from it.

Tipping J Alright well if we're back to that that's fine.

Laurenson Yes. It's there. The agreement has been

Tipping J I'm not inviting you to repeat.

Laurenson Right, thank you.

Anderson J Your statement of defence in the High Court didn't assert that the agreement was conditional on drainage coming through 55.

Laurenson No, as I said in the submission it was led to show the common intention of the parties.

Anderson J Yes, I find it easier to look at it in terms of being a common expectation that informs the issue of reasonableness rather than as some sort of collateral contract between them amounting effectively to a condition that would have been inserted by rectification if that had been sought in a timely way.

Laurenson Well I acknowledge that Your Honour but the fact of the matter is there is a strong finding by the High Court Judge and that has never been challenged at the appropriate time by the respondent.

Anderson J I accept that even on the basis of the Court of Appeal decision you have a finding that the agreement was entered into in a mutual expectation that drainage would be performed in a particular way.

Laurenson Yes, and in the overall result of this case in my submission I do not see how the respondent can now seek to advance an argument which seeks to fence out that finding when the finding has not been challenged at any stage. Just to round that off in my submission at its lowest level the ruling of the Court of Appeal in applying that common expectation is correct. In argument this morning my learned friend referred to para.71 and 72 as supporting a submission that Justice Miller in the High Court considered performance of the contract by putting the drains through the residue of 53 Palliser Road was not a substantial departure from the parties common intention which was to put them through 55 Palliser Road. In my respectful submission and I haven't had the ability this morning since that to have a closer look at that but I have never read para.71 and 72 as indicating that in contrast or comparison is the alternative route. It's not saying that at all. It's referring to whether the failure to get the neighbours' consent, the impossibility to get the neighbours' consent was a substantial departure from the parties common intention to get that consent. That is the distinction which he is drawing when he is talking about substantial departure and that he then goes on in 72 to say for instance the second sentence, well it's all of 72, 'there is no supervening event of so radical a nature as to alter the obligation from that which they undertook. The evidence did not show that the defendants' had anything more than a reasonable chance to procure the consent of Ms Fisher and Mr Smythe so the difference he is drawing is between that and what in fact happened which was an impossibility of getting it. It is not drawing a comparison between the two routes of drains and he does make a

finding, makes the comment at para.9 that the drains through Lot 1 would be a significantly greater expense because it would involve removal and replacement of paths and the land is very steep in places so I disagree with my learned friend's use of para.71 and 72 as a support for the proposition he was asked to justify. And the final comment I wish to make in reply is that s.460 which has been raised at this late stage was never in argument in the High Court nor was it introduced until argument on the day in the Court of Appeal. It was certainly was not introduced before the submissions of the respondent in the Court of Appeal. In my submission and the action in this case has no relevance. Now that is all I wish to say at this stage in reply to my learned friend's cross appeal.

McGrath J S.460 was raised in the Court of Appeal, is that what you're saying?

Laurenson Yes it was but very late and it was not advanced as a ground for, I may have to be corrected here, but my recall is that it was first raised by way of submissions in reply.

Elias CJ Thank you Mr Laurenson. I'll just hear from Mr Fowler if he has anything to say in reply.

Laurenson Thank you.

Fowler There are no matters that I wish to take any further from what we advanced this morning Ma'am.

Elias CJ Thank you Mr Fowler. Well Mr Laurenson you can address us on the appeal.

Laurenson I commence my oral submission Your Honours by suggesting this is really, the following is really the issue on the appeal and this matter of notice and that is were the appellants entitled to repudiate the contract without there being a wrong

Tipping J I don't think you mean repudiate.

McGrath J Avoid.

Tipping J Discharge.

Laurenson Yes well it's difficult but if you look at the

Tipping J Well don't just get hung up with terminology at this stage Mr Laurenson.

Laurenson Well were they allowed to avoid it without there being a consequence in damages to them?

Tipping J Could they get out of it?

Laurenson Yes.

Tipping J It might be a helpful colloquialism.

Laurenson Or did it come to an end by reason of the failure of a condition through no wrong of their part?

Blanchard J Well that's a different concept. You're not arguing that the contract simply dissolved without any form of cancellation notice are you.

Laurenson I did argue that in the High Court.

Tipping J But you're not arguing that now.

Laurenson Well I believe that is still available but if one relates it to the ground of the appeal for which it has been given leave, the issue is are they allowed to cancel it without first giving a notice of a kind making time of the essence to the respondent to perform the condition which is to get the consent of the neighbours at 55 Palliser Road. Now as a fundamental proposition I submit there is no obligation of a party to a contract in the circumstances of the appellants to give any notice of that kind. That in defending a claim for specific performance they are entitled to say the contract is at an end by reason of the failure of a condition and that pertains irrespective of this notion of a notice. They are allowed to say that. It is at an end because it has failed after they have taken reasonable steps to achieve and perform the condition but notwithstanding those reasonable steps it cannot be performed and the obligation is on them to perform it. End of matter. They are not in breach of the contract therefore they are not liable for damages. Now this notion of a notice cannot put them in a different position if at all times they were not in breach of the notice.

Tipping J Not in breach of?

Laurenson Of the contract, of their performance under the contract.

Tipping J There was no default on their part or no wrong on their part.

Laurenson I prefer the term 'wrong' because their obligation was to do things. They have not happened but they have not happened through any wrong of the vendors. Without there being a wrong the notice, any notice, and I submit the notice is totally misconceived in these circumstances, but even if there were some basis for a notice it cannot attract to them damages or a liability for damages because they never have had the liability.

Blanchard J What do you mean even if there was some basis for a notice? I didn't understand that.

Laurenson Well I'm saying there is no basis for a notice.

Tipping J Right.

Laurenson I'm being too fair to the

Tipping J Well you're muddying the water.

Laurenson Correct. Alright there is no basis for a notice in these circumstances. Now

Tipping J Was this a notice that was said to arise I understand no under the contract itself or was it a notice that the Court of Appeal has found to arise as a matter of the common law or equity or a combination of them? There's no contractual

Laurenson No there's no contractual term to give a notice. The Court of Appeal says that it is derived from **Hunt and Wilson**. It is derived from **Hunt and Wilson** that if a party first wishes to cancel a contract for the non-performance of a provision then notice is to be given. Now that's the argument. It was

Tipping J But isn't there an immediate flaw in that argument because we're not talking about cancellation?

Laurenson Correct.

Tipping J We're talking about treating the contract as discharged on account of the non-fulfilment of the condition.

Laurenson Correct, correct, and it's in the circumstances where parties were defending a claim for specific performance. Now when I ask in approaching this I ask this question, when was this notice meant to have been given when they had received the proceedings, sometime after they received the proceedings or after they knew that Mr Serepisos was about to issue proceedings. The Court of Appeal say that the notice should have been issued at the time of correspondence that occurred between May and November 2003 when there was the threat of proceedings and in fact proceedings were issued on the I think the 31 July 2003 but the simple position of the appellants is that notice is misconceived. The judgment of His Honour Justice Cooke in **Hunt and Wilson** only applies where there is in contemplation a notice by one party, the innocent party or the promisee of a condition in a contract to be performed by the other party and that is the metes and bounds of that judgment of His Honour Justice Cooke with the utmost respect and in my submission I take you through the various reasons why I say that must be the case. Now what has happened in this case that the appellants claim that the contract is at an end because of the failure of a condition is exactly what happened in **Martyn and Clough**. It's what happened in **Hay and Laurent**, which I have

referred to. If going back **Martyn and Clough** is referred to in His Honour Justice Cooke's judgment in **Hunt and Wilson** as an example of an exception and that in my respectful submission has been incorrectly picked up by the Court of Appeal and by the respondent with respect because **Martyn and Clough's** application to this case can only be, I'm sorry, **Martyn and Clough's** application to the notion of a notice can only be in the context of were Mr Serepisos first to have issued a notice to the appellants to get them to get on with doing the job before he sought to cancel the contract. It doesn't apply to the position where the vendor subdivider appellants are seeking to resist a claim for specific performance. Now my submission traverses the judgment of His Honour Justice Cooke in **Hunt and Wilson** and I seek to set out in my submission why it only applies to a notice by a promisee or a promisor of a condition. I refer to the decision of Your Honour Justice Tipping in **Mt Pleasant and Withell** where I say that the only contemplation of **Hunt and Wilson** was in the circumstances that I described. I refer to principle including that the notion of, the equitable notion of making time of the essence only applies to a promisee or a promisor and I seek to justify my submission by applying what I submit is just basic and orthodox contractual principles.

Anderson J I think there might be a paradox in the facts that a defaulting party is entitled to a period of grace but an innocent party isn't.

Laurenson But

Anderson J This requires also an examination of why equity requires no notice to be given and it's because the defaulting party might have an opportunity to do something about it to save the contract. And let's suppose it's an innocent party who may possibly be able to prevent the contingency that avoids the contract, why shouldn't that innocent party be given a notice?

Laurenson Well yes that sounds all very reasonable and fair and the respondent has argued

Anderson J Equitable perhaps?

Laurenson Well has argued fairness, equity and certainty but come back to this if there is not a default by the promisor how can the absence of the notice make them viable for damages, and that's what we're facing in this case.

Anderson J Well that's a question of what the damages would be.

Laurenson Are they in breach of a term? What term are they in breach of? There's no term that they have to give a notice.

Tipping J An ex-hypothesi, they have taken reasonable steps. If you hadn't taken reasonable steps, if your down on the cross appeal you'll go down on this point equally or your client will go down on the case but we're talking now on the premise aren't we that your client has taken all reasonable steps?

Laurenson Correct. Or that the agreement was that it would be, yes, they've taken all reasonable steps to achieve the agreement. They have not been able to do that. Now what can a notice do that changes their legal estate if we put it at that way, at that point they are not liable for damages. Now if it was a term of the agreement that, and this is always available for the other party to bargain that you have six weeks to do the job and if you haven't done it then you've got to give me a chance to do it after that, that can be a term of the agreement, but this is not a term of the agreement, it's being somehow imposed on a notion of fairness. Now is there an implied term in the agreement therefore are they able to show that there is an implied term of the agreement. They are not doing it in those terms.

Anderson J There's no implied term in cases where equity requires the defaulting party to be given notice, it's just an equitable overlay.

Laurenson Correct, it's

Anderson J And it's not a question of seeing it in terms of fault but seeing it in terms of an opportunity to prevent the occurrence of the contingency that makes the contract fail.

Laurenson Yes but my point is that you still have to route it back to what is because at the moment what is the legal consequence in damages to

Anderson J It would have to have a policy justification because it can't as you say necessarily be found in the terms of the contract expressed or implied.

Laurenson Well you're liable for damages if you're in breach of a contract. Now they're not in breach of a contract if they have taken all reasonable steps

Anderson J What happens to somebody who has to give this sort of notice and doesn't?

Laurenson Well they can't get specific performance.

Anderson J And suppose it's the vendor?

Laurenson They can still get damages though.

Anderson J Because sometimes, I mean it's not unknown, for the purchaser to assume under the contract the obligation of obtaining the subdivision.

Laurenson Yes but that's not the case here.

Anderson J No but it can happen.

Laurenson Yes.

Anderson J So you could have a situation there where the vendor says well you have the obligation to achieve the subdivision, a lot of time has passed, I'm giving you a notice making time essential. But what if that obligation to give such a notice hadn't been performed? The vendor must be liable for some reason, for purporting to discharge a contract which it was bound by until the expiry of that notice.

Laurenson Can you just take me back to the 'it is the purchaser who has undertaken to get the subdivision'.

Anderson J Just imagine any hypothetical case where there is a party in default, a purchaser of some property in default of a particular condition on the purchaser.

Laurenson A condition on the purchaser. That is like getting finance?

Anderson J For example.

Laurenson Right.

Anderson J And no time is stipulated so equity requires the vendor in these circumstances to give a notice making time essential. But suppose the vendor doesn't, suppose the vendor just sends a notice saying reasonable time has elapsed, time's up, contracts off and I've sold to Fred next door. The purchaser must have a remedy in damages because the contract was not capable of avoidance until the expiry of a notice making time essential. The same applies here. If a notice is required to be given in this case then the contract hasn't been discharged. They're still on for it. It may not be capable of performance ultimately but it's still on for it.

Laurenson If their obligation is to use all reasonable steps to perform it and when Mr Purchaser sues them for damages what are they in breach of, they are not in breach of their obligation to use all reasonable steps, they can't therefore be in breach of the contract because that then is importing an absolute responsibility to them to achieve whatever the contract sought them to achieve. That very position that Your Honour has put in my submission exposes the complete flaw in this matter. A vendor, Mr Steele and Mrs Roberts and not in breach of the contract because notwithstanding they have taken all reasonable steps they can't perform the condition. They're not in breach of the contract. The contract is at an end. They don't need to give notice to achieve that position otherwise to be different is putting on them an absolute obligation to achieve the contract.

Tipping J Well even in those circumstances there would be no qualm to give a notice they'd just be absolutely liable for failure to perform.

Laurenson Correct.

Tipping J So it works either way.

Laurenson Yes.

Tipping J Your proposition works on both premises. But can we just go back a step. Before the Contractual Mistakes Act when we still talked about repudiation, although I think that Act does still use that terminology.

Laurenson There is repudiation, yes.

Tipping J It was necessary

Laurenson You mean the Contractual Remedies Act Your Honour?

Tipping J Sorry, Remedies Act not Mistakes Act, I beg your pardon, the Remedies Act, the rationale for a notice was simply to be able to hold the party in repudiation if they didn't perform the notice.

Laurenson Correct.

Tipping J It's no more complicated as I understand it than that. Now there was no issue here attempting to hold Mr Serepisos in repudiation.

Laurenson Absolutely not.

Tipping J He was just an innocent bystander if you like observing what your client was doing and once it's assumed for present purposes that you had taken all reasonable steps and not satisfied the condition the contract is discharged.

Laurenson Correct, that's how I submit is the position and that's what **Hay and Laurent** say and that is what **Clough and Martyn** said.

Tipping J I don't understand exactly what basis the Court of Appeal juridically considered that this notice was necessary.

Laurenson Well that's where I struggle Your Honour and I hope I have answered it in my submissions but my learned friend Mr O'Sullivan advanced the question of notice in the High Court and it was picked up by His Honour Justice Miller and he advanced it in the Court of Appeal. Against my protest certainly in the Court of Appeal it simply doesn't apply to a position where the non-obligor is meant to be the recipient of the notice. It has no basis of it.

Tipping J The origin as I understand it was you have at equity you have to make time of the essence. You did so via notice and until you did so you couldn't hold the other party in repudiation simply on time ground.

Laurenson Yes because the Common Law Courts, and they'll deny it in an absolute sense, but the Common Law Courts required that time was of the essence. Equity intervened and said you couldn't make time of the essence you had to allow

Tipping J Well equity will allow time to be of the essence contractually but if it wasn't so provided equity required the notice.

Laurenson Correct, correct, and unless a term was made of time of the essence you couldn't enforce it immediately so equity gave that indulgence to a non-complying obligor party to a contract.

Tipping J And **Hunt and Wilson** at bottom is a case about time.

Laurenson Correct, correct, and therefore I am saying apart from a notice that as a certain attraction that to be fair to everybody you perhaps should give notice for the other side to do something, there is no juridical underpinning to this at all. If the appellants are not in breach of their term they are not in breach of contract they are not liable for damages and the absence of a notice does not change that position whatsoever. If you look at the Court of Appeal decision the conclusion of it says 'para.54 at page 31 of volume 1..in the context of the case as a whole which includes the decision of the respondent not to appeal against the refusal of specific performance, the respondent is entitled to damages under the discretionary jurisdiction provided for by s.16(a) of the Judicature Act 1908'. When I read that and read it again I said what damages, what damages are they

Tipping J Damages for what.

Laurenson Yes, are they in jeopardy for. For what damages are they in jeopardy.

Anderson J Because they had no contractual entitlement to intervene did they.

Laurenson They had no contractual entitlement, no.

Tipping J It's really a kind of strange interweaving of the idea of making time of the essence and a loss of a chance it seems to me.

Laurenson Yes, and it sounded in the passage of His Honour Justice Cooke in **Hunt and Wilson** that you're to have certainty in contracts for sale of land and this case might be testimony to the faint hope of that and it's ironic that it should be, this case of **Hunt and Wilson** should be so much in the argument of this case, but anyway aside from that it is drawn from a loose reading of His Honour's passage in **Hunt and Wilson**. If one party wants to end a contract they are to give notice.

Anderson J Where's that page reference again Mr Laurenson?

Laurenson That is in **Hunt and Wilson**.

Anderson J Yes.

Tipping J I think it's about 273 Mr Laurenson is it?

Laurenson Yes it's line 11 I believe. Yes it's that one there and the last bit 'that where no time is specified for fulfilment of a condition a reasonable time is allowed and in the event of a delay a notice is required to bring the matter to a head'. Now

Tipping J But that is on the clear premise in the light of the facts of this case and the earlier discussion, the notice to the party who's dragging their heels.

Laurenson Correct, and I

Tipping J That's why there's a reference to delay.

Laurenson And I submit that then His Honour discusses exceptions to it but then at line 40 of page 273 there is this 'but the present case cannot be regarded as exceptional. If such a notice had been given in November 1970 instead of notice treating the contract as at an end it might of produced the necessary activity within quite a short time. Up to then the purchaser's delay could not be called flagrant or intransigent. Now clearly His Honour had in contemplation a notice from one party to the other who was not performing and that's the whole premise of the case and in my respectful submission it

Tipping J Well **Farrant and Oliver** cited at line 29 makes that clear beyond argument that you don't have to give it if there's such persistent and flagrant delay that you infer repudiation from the fact of delay alone.

Laurenson Correct. All of those cases cited by His Honour Justice Cooke as exceptions are all cases which would apply not to the obligor, the promisor giving the notice, but to the promisee giving the notice. There is only one case in all the references to authorities which there is a fact situation where **Hunt and Wilson** is cited which is in the same circumstance as this case and that is the decision of, it's in the supplementary bundle, and it is the decision of **Stirling and Downsview Properties** and it is referred to Your Honour Justice Tipping in the decision of **Mt Pleasant and Withell** as being a case where the Court of Appeal considered **Hunt and Wilson** to be good authority. Now the **Stirling** case refers to **Hunt and Wilson** at page 27 of it and it's a passage which reads 'it is unnecessary for us to deal with a further argument raised by Mr Withell that before the contract could be treated as having come to an end the vendors would have had

to give notice to the purchasers fixing a reasonable time within which the contract was required to be fulfilled.

Blanchard J What were the facts of this case?

Laurenson Right. The vendors had to get the consent of Mr Russell to sell their farm. Mr Russell having a mortgage over the farm and after they had sold the farm it went up in value and they didn't want to sell it and therefore they exercised influence on the mortgagee for him not to consent to the discharge of his mortgage and it was therefore the obligation of the vendor under the contract; the vendor was the promisor under the contract, to use best endeavours to get the consent of the mortgagee and the case turns on the fact that those attempts were not generally made but the argument was raised by counsel for the purchasers, um see the purchasers sued for specific performance and the vendor said we can't perform because the contract is at an end because we can't perform the condition of getting the consent of the mortgagee. Purchasers' counsel argued that another reason why they couldn't claim the contract was at an end, that is the vendors, couldn't claim the contract was at an end, was because they had not given notice under **Hunt and Wilson**. Now it's almost exactly the same circumstances here and with the utmost respect to His Honour Justice MacKay in the Court of Appeal in that case and where he sees that **Hunt and Wilson** appears to well-found the argument of counsel, there has not been a contemplation of the juridical underpinning to why such a notice has been suggested in **Hunt and Wilson.**

Blanchard J I may not have understood the case fully but based on the description of the facts you have given us this is a very confusing passage because it then goes on to seemingly suggest that the vendor's solicitor acted too early because there was still a possibility of getting Mr Russell's consent.

Laurenson Correct, so in other words the vendor's solicitor had claimed that the contract was at an end because of the non-availability of Mr Russell's consent when the facts were that Mr Russell had in fact not closed the door.

Tipping J Yes it's starting to come back to me now. I remember looking at this, I didn't say much about it did I, I just noted it in passing?

Laurenson Yes, you noted that the Court of Appeal. Yes, I note the time Your Honour.

Elias CJ Yes, we'd better take the luncheon now. Perhaps over lunch Mr Laurenson you can reflect how much more you want to enlarge upon your written submissions. I'm just conscious of the fact that we will need to hear from the respondents on this.

Laurenson Are you prepared to give me a direction or indication of how much you wish to hear from me Your Honours.

Elias CJ Well for my part

McGrath J Mr Laurenson you haven't mentioned the Australian case, **Perri and Coolangatta Investments** and the two series of judgments if you like because there was a dissenting view, particularly by Justice Mason. I wondered if you were going to refer to that.

Laurenson Yes but it is only in the context Your Honour of a promisee giving a notice to a promisor.

McGrath J You distinguished the case on that basis.

Laurenson Absolutely, yes, they go back one step further and say that the promisee doesn't even have to give notice to a promisor.

Tipping J The majority in that case took a rather hard-nosed view which didn't appeal to me.

Laurenson But the

Tipping J But it's all in the context of giving notice to the other side on account of delay by the other side.

Laurenson Yes and Justice Mason said that notice should be given which is completely consistent with **Hunt and Wilson** if you accept **Hunt and Wilson** is only applying to a notice from a promisee to a promisor and that's all I would wish to say about it.

McGrath J Yes well thank you that's helpful.

Elias CJ That's very helpful and with that indication perhaps unless there's anything you particularly want to enlarge upon we'll hear from the respondent after lunch.

Laurenson As Your Honour pleases.

Court adjourned 1.06pm

Court resumes 2.19pm

Elias CJ Your Honours I have three brief matters to say before I conclude. The first is that in my submission it is significant that no authority has been referred to by my learned friends in either the English or Australian jurisdictions which support the contention of a notice in the circumstances of this case. Secondly, anticipating the reply of my

learned friends, in their written submissions at paras.916.4 and 916.5 and that's at page 14 of their reply, they make the comment that Mr Serepisos received no information as to the reasons for the delay or the difficulties faced with the neighbours and the next one they say that there were practical steps that could have been taken to get compliance suitable to the appellants, that's practical steps by Mr Serepisos. In my submission there is clear evidence that Mr Serepisos was informed and that appears from the notes of evidence and his cross-examination at page 138 of volume 3, line 17 through to 139 line 10. No it's not volume 3 I'm sorry, it's volume 2, which is the evidence volume but the page references are the same and the line references are the same and in that passage of cross-examination he acknowledges that he was told about the first neighbours **Fisher and Smythe** not giving their consent.

Tipping J Could you give me the pages again Mr Laurenson?

Laurenson 138 and 139 of volume 2.

Tipping J Thank you.

Laurenson And the passage starts at line 17 on page 138 and ends at about line 12 on page 139 and I refer particularly to page 139 'do you recall any comment that the original owners, people by the name of **Fisher and Smythe**, Janet Fisher and Brendan Smythe discussions with them initially but because they were selling they were not prepared to bind any purchaser. Answer; I remember that (that's Mr Serepisos) and then two gentlemen, Mr Chauvell and another who purchased the property, they being the two gentlemen you refer to? Answer; Yes I think so, they were not prepared to consent. I do recall something like that. Now in answer to the second matter about practical steps, I wish to remind the Court of the other significant finding of Justice Miller from the point of view of the appellants that the actions of Mr Serepisos were the principal cause why the appellants were not able to get the consent of the neighbours. It's a significant finding and the references for that are at paragraphs 21, 25 and 26 of Justice Miller's decision and that commences at page 51 of course of volume 1, page 21, 25 and 26 and paragraphs 66, 76 and 77, all different exemplifications of that finding.

Anderson J Sorry what were those last references.

Laurenson 66, 76 and 77.

Anderson J Thank you.

Laurenson And the final matter I wish to say Your Honours is that although I am now about to conclude I do advance all submissions in the written submissions even though I may not have referred to them specifically may I simply comment that considerable effort was made on each

submission and I don't want to seem to be diminishing any by not making a specific reference to it. That applies to both sets of written submissions. May it please Your Honours.

Elias CJ Thank you Mr Laurenson. Yes Mr O'Sullivan.

O'Sullivan If the Court pleases I have some notes which may assist. I might just deal with one of those issues that have been raised now if it pleases Your Honours because it's just in front of my mind and that's the issue my friend raised with regard to the evidence at cross-examination of Mr Steele, sorry of Mr Serepisos and I would like to take Your Honours to case on appeal volume 2 to the page 138 which my friend took you to just to put that evidence in context, I'll just take the Court to line 27 'my question to you is that Mr Steele kept you informed about the possibility of agreement from those three neighbours though only at the beginning you told me these two gentlemen that owned the house, he approached them and he thought they would consent, they didn't. Only in recent times did they become aware that the neighbours at 56 had changed two times so I wasn't aware that it happened that either of the other two owned the owners. I suppose my point, and I'll come to it later in my submissions, is that the crucial time is not early on when things are going smoothly but at the end when things weren't, I mean that was the point really of that evidence. In terms of the oral submissions, taking from the submissions I've already made there are some aspects of which I will simply run over because I understand now from the submissions already and discussions with Your Honours that the issue was probably found at bullet point 3 and 4 of my summary of the argument and that's probably better time spent to move to that. I didn't want to start off with just a clarification of what in fact the obligation and what in fact the condition was because from the discussion from where we seem to be at the moment in terms of that first argument of what was the obligation of the vendors under this agreement, there seems to me to be an obligation that they perform their obligations within a reasonable time, that they take at least three steps to obtain reasonable consents and they take reasonable steps to comply with those reasonable. If that is the condition that sits after my friend's Mr Fowler's submissions on our cross appeal then there is in my submission a condition that has three layers of reasonableness to it that are relevant to the notice issue that I'm coming to – time, consents, reasonable steps to comply. And that is an issue that I will come back to when I deal with the policy reasons why I consider that the **Hunt and Wilson** principle should apply and that notices should be given. The second issue I can skip over briefly. It's a question that clearly this was a condition that was implied for the benefit of both parties. I don't understand there will be any argument on that issue. So having set those two perhaps principles the first issue that I wish to deal with which I think starts the nub of the contest that is now between the parties is the question of the time for completion, because on the basis of the condition that I've just identified. That was the condition implied into the contract so it was part of the contract between parties

and it had no date for completion so it was open ended. In terms of the provision of authority for the principle that I'm going to ask the Court to adopt, it starts in my submission Your Honours at the **Aberfoyle Plantations** decision which is at tab 9 of the index of the list of authorities. I could take Your Honours to tab 9. This is skipping right through to page 43 of my oral submissions. This was a case that was dealing with and was one of the first authorities that Justice Cooke relied upon in the **Hunt and Wilson** decision and it was dealing with the condition in an agreement that didn't contain a time for completion and the excerpt that I would like to take Your Honours to is at the bottom of page 124, starting 'but subject to' and what Lord Jenkins acknowledges there are three types of conditions and I'll read this out. "But subject to this overriding consideration Their Lordships would adopt as warranted by authority and manifestly reasonable in themselves the following general principles – where a conditional contract of sale fixes a date for complete of the sale then the condition must be fulfilled by that date. That's not a position we have here. Where a conditional contract of sale fixes no date for completion of the sale then the condition must be fulfilled within a reasonable time. That's the position we have here. And the other one goes on to where the conditional contract fixes a date by which it has to be fulfilled, and that's not what we have here. And so the first proposition I make in respect of **Aberfoyle** is that that case was the start of the authorities saying that if you have a conditional contract and it doesn't fix a date for completion of or for satisfaction of the condition, then it has to be completed in a reasonable time. The law will simply imply that reasonable test which I started off with.

Tipping J Within a reasonable time, oh sorry no date for completion of the sale, yes I beg your pardon.

O'Sullivan If there's no date for complete and we have no date for completion and so the starting point of my submissions is that we have a condition implied by s.225 into the contract that requires completion within a reasonable time. That's taken up by His Honour Justice Cooke as he then was in the Court of Appeal and if I could take Your Honours to tab 23 because that's the **Hunt and Wilson** decision.

Tipping J Just before you leave **Aberfoyle** on page 125 Their Lordships in the paragraph starting 'See Smith and Butler' they're deliberately adopting the correct terminology aren't they of treating a conditional contract as at an end or as discharged. When a condition goes off through nobody's fault there's no question of cancellation is there? Do you accept that or not.

O'Sullivan What I will come to Sir is that and I'm sorry this is just another way of answering your question, is that either party to a contract not able to terminate a contract at will and while the condition is still to be completed the obligations are extent and then at some stage there has to be a bringing to end of that condition and that would discharge but it's

the bringing to end of the condition that I will focus on. It is the discharging of the condition and my position is that at the moment we have a condition that has no date for completion.

Tipping J I understand that but the Court of Appeal in the present case talked about cancelling the contract for non-fulfilment of the condition. No I don't regard that. It may not matter for your purposes but I do not regard that as an accurate statement of the position.

O'Sullivan Yes, it doesn't matter for my submission Sir. My submissions will focus on the base on which party to a contract, a condition contract without a time can then remove itself from its contractual obligations. That's the

Tipping J Treat the contract as at an end.

O'Sullivan Yes, that's the thrust of my submissions.

Tipping J Thank you.

O'Sullivan And so that takes me again Sir to the **Hunt and Wilson** decision and it's really the question of **Aberfoyle** principles which are taken up by Justice Cooke at the bottom of page 271. I would like to read a few of these passages just to put the **Hunt and Wilson** judgment into context. 'Although Their Lordships did not go as far as to positively deciding the point there observations certainly tend towards the view that if no time is fixed for completion and a condition is to be satisfied with a reasonable time the equitable requirements as to notice apply. It is also noted that **Aberfoyle** was not a case of a simple covenant by one party to do something, and this is a point which I wish to stress to Your Honours. The condition could only be filled if an independent third party co-operated, just as in the present case the conditions relate to decisions by third parties – if the valuer was an umpire and a mortgagee. In both cases likewise there were express or implied obligations on one or both parties to use reasonable diligence to obtain the decisions needed'. What I'm submitting to the Court at this stage that's really no different than the position we're in and if you look at the life of this contract, there were competing obligations on both parties. A classic example of that Your Honours would be the fact that the respondent was required to file his application with land use consent in order to get the resource consent through, so during the life of this, and that may not be different in lots of subdivisional-type situations, that there will be reciprocal obligations on both parties to make sure that the intention of the parties can reach fulfilment, can be completed, putting that in a converse way, clearly that you wouldn't be able to take steps that would stop that process, but for the purposes of this it seems in my submission to be an analogous situation to what we are dealing with and if we bring that forward and take that down to the bottom of that page, again I think the position is made clear by Justice Cooke and it starts at line 39. 'Whatever the appropriate period in any

given case, when the contract itself fixes no time for satisfaction of the condition and the position is simply that both such satisfaction and completion have to occur within a reasonable time, it would seem consistent with the general approach of equity to time questions and the sale and purchase of land to require normally at least some form of reasonable notice'. And the next part I also want to stress. 'In terms of the passage in **Williams** and the judgments of Upjohn LJ and Romer J relate to necessary acts by one of the parties, and that's your promisor position, to the contract, but the same should apply I think when some consent or action is to be obtained from third parties and as has been seen the **Aberfoyle** strongly suggests that'. So taking that from **Aberfoyle** and taking it forward we get to what really is the crucial part of the judgment from the respondents.

Tipping J But just before you move off that, because this is quite important to your argument isn't it?

O'Sullivan It is an important part of it Sir.

Tipping J Yes. Isn't His Honour there talking about telling the other side that if they don't achieve the result within a certain time the party giving the notice will call the contract off for that failure?

O'Sullivan That is one of the propositions that would apply Sir, but in this case and let's take the circumstances of this case as an example. It was a case involving the arbitration machinery which both parties had to make happen, both parties had the ability to make happen and this was really if you go to the sort of notice that perhaps Justice Cooke was anticipating was really a way of saying no this has carried on for too long, I want to bring matters to a head and that's quite clear if you go to line 34 just above 'Everything has drifted far too long. I give notice making time of the essence and requiring completion three months from today. That should allow ample time for all the valuations. If the price is not fixed or for some other reason you are not ready to settle by then, I will treat the contract as being at an end'. So what he's doing is he's just saying this has drifted on too long, it needs to be brought to a head, I'm giving you notice.

Blanchard J But it was a case where there were obligations to do something on the party that was in receipt or would have been in receipt of the notice.

O'Sullivan There were mutual obligations Sir. I don't see that as distinguished in a situation where in the current situation, and I'll come to that when I deal with it, that you have a mutual interest in the implied term, you have mutual obligations to make sure that you do what is necessary to get the contractual intention of the parties through, and what I'm saying by that Sir is that both parties were under an implied obligation to make sure that they did whatever was necessary to make sure the contract came to an end, so while I accept that the obligation might have been expressed, if I take Your Honour back, may be if I take your

Honour back to line 4 of the same page. He says 'in both cases likewise there were express or implied obligations on one or both parties to use reasonable diligence to obtain the decisions needed' so I accept the point you're making but I don't see it as distinguishing too much from the position we have here.

Tipping J But there was no relevant respect in which Mr Serepisos was in delay.

O'Sullivan No Sir there wasn't and it would be ridiculous to suggest that notice should be served on him and he didn't want a notice served on him because he had the benefit of the, he had the benefit of the condition at that time, in fact I made that point earlier in submissions. In factual sense he was the only one who really had the benefit of the condition.

Tipping J But to the extent the condition was also for his benefit. He had not chosen to avail himself with that benefit.

O'Sullivan No, he was giving them time Sir, that's correct. He was allowing the matters to run on.

Tipping J Yes, but how can you give notice to someone making time of the essence for doing something if they don't have to do anything?

O'Sullivan Because I think the time of the essence is not necessarily, what you are doing is you are crystallising the date where the compliance with the condition is required.

Tipping J Is essential.

McGrath J It's not a time of the essence notice is it?

O'Sullivan No because it's not a contractual notice in a sense.

Blanchard J Well why are you giving the notice if that's the case?

McGrath J To bring matters to a head.

O'Sullivan You're bringing matters to a head. You're putting

Blanchard J But you do that by making the time essential.

O'Sullivan Yes, well yes, my proposition is starting from the **Aberfoyle** is that because you haven't got a fixed date for completion you need to fix a date for completion. If that means you're making time of the essence of that condition, which is only a condition, it's not the contract, then I'm happy with the terminology. I'm just saying that you need to bring a date to the attention of the parties by which their mutual obligations and benefits under the contract will cease.

Blanchard J But what's the point of that if you have used best endeavours and your not in default and the party to whom you're giving the notice isn't obliged to do anything?

O'Sullivan The purpose will be dealt with in the sense of futility in the sense that clearly as a proper developer and as having a common interest in the completion of the agreement there was clearly a motivation for the respondent in this situation to make things happen and it was within his power to do so just I suppose if you like Sir that he'd gone out and spent a lot of time on getting a building consent which was necessary for the resource consent as well, so he had the opportunity to do that so I will deal later with the position in respect of the Court of Appeal. The Court of Appeal in my submission correctly said 'really what it depends upon is the stance taken by the parties, the practicalities of the circumstances and the utility, so if a notice is going to be given and it's going to be ignored then it simply means that the appellant will be in a position to rightfully discharge his obligations or terminate or whatever terminology you want to give it if he doesn't do anything. If he gives the notice and the respondent is able to facilitate the completion of the contractual obligations because he has the benefit of the implied term as well then I don't see that that offends any principle, in fact I think it's consistent with the policy of the Courts which is to give the contractual intention of the parties as much assistance as they can.

Anderson J Even if Mr Serepisos had had an opportunity to do something to facilitate he'd offered to pay for the carport. There was never any suggestion on his part that he would try and negotiate with the neighbours and offer them golden handshakes and all the rest of it and that's just speculation.

O'Sullivan Well it is Sir, but it's speculation because the position wasn't put to him in a way that it should have been in terms of that notice so I mean I think that's a cause and effect issue. If you receive a notice which says, well if you see the Justice Cooke's notice in the current context that says "everything's drifted on for too long. I can't get consent. I've done what I believe is reasonable. I've taken what I believe are reasonable steps. If this doesn't occur within the reasonable period of time all bets are off'. That's a different issue than being casually informed on a basis sometime prior.

Anderson J Justice Cooke as he then was envisages two situations, one where notices given for the completion of a condition or fulfilment of a condition and the other is for completion of the contract.

O'Sullivan Correct, yes.

Anderson J But the first one necessarily implies that the person given the notice is under an obligation to do something within the time of the notice, and the second one is not concerned with conditions it's concerned with

completion. So the situation that we have in this case doesn't seem to be comprehended by either of those.

O'Sullivan Sir looking at that second sentence which is as I understand it the sentence you're talking to 'I give notice making the time of essence and requiring completion three months from today that should allow time for valuations. I mean what he's simply doing is giving notice which says the conditions have got to be fixed on a certain date and that's when we're going to settle as well so he's bringing certainty to both within a reasonable time. I don't see those two things as mutually exclusive. In fact it's consistent with the **Aberfoyle** three principles that he referred to.

Anderson J Does your argument depend on the assumption that the recipient of the notice could lawfully have a reasonable opportunity to bring about the condition, the fulfilment of the condition?

O'Sullivan Yes it does and I don't see any difficulty with that proposition in terms of the utility of the notice and I accept the contrary point that if there's nothing that can be done then probably a notice is not required in the circumstances. But I will say here that there were specific things that could have been done.

Blanchard J If it can be shown that the notice was just futile in other words.

O'Sullivan Well there's two ways of dealing with that Sir isn't there. The first is that if the notice is futile you either give it and it can't be complied with or you don't give it and no damage can be shown.

Anderson J Well isn't the situation this then that there's a year wasn't there between the bringing of proceedings and the previous indication of discharging the contract?

O'Sullivan Yes Sir.

Anderson J It's about a year.

O'Sullivan A year and a bit.

Anderson J Now your client's proposition is the contract has not been discharged it is still on foot.

O'Sullivan Yes Sir.

Anderson J So during the year and a bit that he was regarding it as still on foot what did he actually do?

O'Sullivan Ok Sir what he did was he

Anderson J Did he go along and offer the neighbours large sums of money in an attempt

O'Sullivan No Sir, there's two things he did. He wrote to the, if I take you to volume 3, he wrote to the solicitors putting them on notice, he wrote to the appellants putting them on notice that he would be holding them to the contract.

Anderson J I understand that. I'm really concerned with what he did to try and facilitate the fulfilment of the condition.

O'Sullivan He did nothing Sir, he did nothing and my proposition as I said to you before that he had put the appellants on notice and he was waiting for them to do it.

Anderson J Isn't it pretty good evidence that if he received he would have been able to do absolutely nothing himself.

O'Sullivan Sir I suppose the point I make is that the receipt of the notice crystallises that obligation in a different way than a general chat about what's going on with

Anderson J No but in this case it's established law that you don't have to give such a notice if it would be futile and in the year and a bit that passed since he received an indication of what was happening there was nothing he was in fact able to do himself to persuade the neighbours to grant an easement.

O'Sullivan Well he didn't try Sir.

Anderson J Well if there had been any chance at all then no doubt he would have. But this might be one of those situations where it would have been futile.

O'Sullivan I'll come to the things that he could have done and one of them is identified by the Court of Appeal and I suppose what I'm saying again with respect Sir is that doing nothing when you're holding the persons at contract and trying to get them to comply with the obligations and waiting for them to do so is not evidence that you wouldn't take some action.

Anderson J Those that got a notice, I mean they effectively had a year and a bit's notice for what the appellants were intending to do and he did nothing. I mean there was nothing he could do yet the Court of Appeal assumes that he had an opportunity to do something.

O'Sullivan Yes Sir.

Anderson J I don't see the factual basis for that assumption. Come to it when it suits you.

O'Sullivan I'll come to that at the end in terms of what I consider that he could do in terms of him being given that notice.

Anderson J I'm sorry I deflected you just because I thought there might have been something of relevance in that line 27 to 31 or whatever, page 272.

O'Sullivan Yes I was on page 273 and the position I was reaching was that the crucial passage from the **Hunt and Wilson** judgment is at line 10 on page 273 which is "we are not here concerned with any fixed date. I refrain from discussing what limitations on the liberality of equity there are in that field. Where the contract fixes no date and everything is governed simply by the implication of reasonableness, it makes for clarity and justice to adopt the equitable approach. In the everyday subject of vendor and purchaser it is especially important that the law should be as simple as possible. Solicitors and others concerned would have little difficulty in working with an ordinary rule – indeed many experienced practitioners probably instinctively do so – that where no time is specified for fulfilment of a condition a reasonable time is allowed and in the event of delay a notice is required to bring the matter to a head. Perhaps the authorities have left something of a grey area in the law, but the **Aberfoyle** case and the others cited do at least point towards this solution'. So Your Honours that is the position that my submission should be adopted.

Tipping J Is that the best it gets in **Hunt and Wilson** from your point of view Mr O'Sullivan?

O'Sullivan Yes it does really Sir.

Tipping J Yes, that's the high water mark

O'Sullivan That is the high water mark in terms of authority Sir and I accept that that is an issue.

Tipping J Would it not be proper to read that with the earlier discussion, brief as it was of the rationale of the notice and the reference to s.90 the Judicatory Act and the whole history of equities approached in time and so on?

O'Sullivan Yes it would

Tipping J It's a time issue isn't here, it's not that your client was delaying and therefore had to be brought up with a notice. I can't see how one can read this across into a case that's got nothing to do with time from your client's point of view.

O'Sullivan Sir it's a combination of both time and steps are there to be taken because of that and the way in which that time factor is brought to a head and that's no different in principle

Tipping J What would this notice have said ..”unless you Mr Serepisos do something by a certain date we’re going to call this contract off”?

O’Sullivan It would have said in my submission very much similar to what Justice Cooke said in his proposed notice which is that things have drifted along for too long and I give notice making time the essence.

Blanchard J And requiring completion.

O’Sullivan And requiring completion.

Blanchard J They are in a position to require something to be done by the other side, both in relation to the completion of valuation process and indeed then completion of the contract, but here there was no ability to require your client to do anything.

O’Sullivan I know Sir that there was an ability to allow him to do something.

Blanchard J That’s a different thing.

O’Sullivan Well in principle, in terms of the policy behind this vision, I don’t believe it is a different issue. When one stands back from it what Justice Cooke is saying ‘it’s unfair to have the rug pulled out from under you if you don’t know about it’. I mean that’s a very pretty basic way of putting a submission Sir.

McGrath J So what you’re saying the law really does according to Justice Cooke, it imposes what I think has been called an essential preliminary before you could rely on the fact that the contract has come to an end because a reasonable time has passed.

O’Sullivan Yes Sir and also what I’m saying and perhaps if we go back to page 267, line 24. This I think perhaps captures it not quite on point but conceptually captures it. ‘All or some of the rights and obligations of the parties may be contingent on certain events such as the approval of Court or an independent third party, which in that sense may be called a condition precedent, but in the meantime, in the meantime there is a conditional contract in existence from which neither party is at liberty to withdraw at will. Indeed there are often though invariably binding obligations in the meantime’. What is being said is that we have a condition that doesn’t have a date for fulfilment. Until that date for fulfilment is, is until there is a termination of that whatever termination you want, whatever term you want, until there’s an ending of that condition the obligations of the parties under contract are extent**.** No party can just walk away from it and the way you bring certainty to that, and I go back to the words of clarity and certainty and justice, the way you bring clarity and certainty and justice is very simple is to fix a date by which that’s going to happen. It isn’t a difficult submission. It seems to be on foot with simple contractual law.

McGrath J I'm sorry you said the way you bring that certainty and justice is by, would you please complete that?

O'Sullivan Is by setting a time for completion of the condition. Fixing a date which was going back to the **Aberfoyle** authority. At the moment it's open ended as applied by statute.

McGrath J So by taking this preliminary step which sets a date and only after that date has been passed could you treat the contract as at an end.

O'Sullivan Yes.

McGrath J And that's how you achieve your certainty that

O'Sullivan I suppose we could put it another way Sir. It was an observation Justice Cooke made at page 270.

Elias CJ Why does it bring certainty if it's not accepted that matters have got to such pass, you're still into legal process in the way that you are here. Why is it bringing it

O'Sullivan Because the point I was going to make at page 270 is probably illustrative of it if I can take you to top of page 270 an observation of Justice Cooke. He says 'there is something unattractive in an approach involving a retrospective determination by the Court that the contract ended at a date which could not have been identified by the parties'. Now I might go a little bit further with it. It's an obvious observation but in the current situation we have the termination really at a date that wasn't identified by the parties at the time. So what in my submission the notice does in terms of certainty Ma'am, to answer your question, is give the party certainty of when their obligations will terminate.

Elias CJ Well it's wholly arbitrary isn't it? It's not identifiable by the parties by reference to anything that is going to happen.

O'Sullivan I'm not sure. It's made identifiable, at the moment

Elias CJ People aren't being required to do something so it's only a, it's like the Town Cryer going through the town ringing a bell, you say that's required.

O'Sullivan Ma'am what's required and if I go back and use the Justice Cooke condition as an example. Why it brings certainty is that up until the receipt of that notice the respondent in a situation, and it can be any party, is simply waiting for the completion of the agreement at some date which is unfixed and what the notice does is bring certainty to the parties as to when their contractual obligations can end.

Anderson J Well certainty as soon as one party likely says 'I'm out'.

O'Sullivan Yes Sir but that's retrospective.

Anderson J In what way, I mean

O'Sullivan Well it's instantaneous or retrospective but it's not serving a purpose in the sense of

Anderson J Well someone gives a notice and the other party says no, no, no, there's plenty of time to fulfil this condition and anyway the period of notice is too small.

O'Sullivan That's a position in a promisee and promisor situation too Sir. I don't see any distinction.

Anderson J Is there anything more to it than saying it would be a jolly courteous thing to do? Because what else does it achieve.

O'Sullivan What it achieves is that it gives the person who has an interest in completing the agreement, has an equal interest and in fact in the terms of the facts of this case has a greater interest and actually doing something to achieve it.

Elias CJ Well what about the bringing of an action for specific performance? That brings it all to a head and that's what happened here.

O'Sullivan Yes Ma'am but that doesn't answer the issue of when is it that the appellant is entitled to treat all bets as off and walk away from the contract. That's just an option that the respondent has and when the argument develops will bring whatever legal remedies he can. This is a simple issue that goes before it which is if a party to a contract wants to remove itself from its obligations and there isn't a time fixed for those obligations to be completed then you simply fix the time for completion, which is the **Aberfoyle** and **Hunt and Wilson** principle.

Tipping J When **Hunt and Wilson** was first decided in 1978 I recall it as being regarded as a breakthrough only in one respect, namely that it equated fulfilment of the condition with completion and the Court had determined that you had to give a notice for the condition in the same way as you traditionally had to give it for completion, but I don't recall any suggestion ever being made that it's purport was to do more than that Mr O'Sullivan and you're now saying that somehow or rather the Court has laid down some over-arching principle that you're not allowed to do anything in a contract case without telling the other side that you're going to do it, giving them sort of a general notice, some sort of an amorphous warning.

O'Sullivan It clearly is the position in a promisee promisor situation that I don't understand my friend to be arguing that when who has the obligation

Tipping J No quite. Well that's what **Hunt and Wilson** established.

O'Sullivan Yes Sir but subject to my observations that some of the

Tipping J The notice for completion was quite conventional ever since **Stickney v Keeble** it was uncertain whether you had to do the same for fulfilment of the condition of an open-ended kind in time. This case decided that if there was the delay on the other party's side in fulfilling the condition you had to give them a notice before you could call it off for failure to observe the condition. But it's all premised on the basis that someone's got a contractual obligation to do something and you're hurrying them up or giving them fair warning that if they don't do it by a stipulated time you'll be entitled to cancel or to call it off, whatever word you choose. I just don't understand the doctrinal basis for extending it beyond a contractual obligation. Like the other members of the Court that raised this with you, if it's not a contractual obligation on the other party's side why do you have to give it other than just as a sort of fair pay in action sort of idea?

Blanchard J And to protect yourself from litigation.

O'Sullivan Which is the cautious approach.

Blanchard J Yes.

Tipping J Well my brother's book of course is full of good hints as far as caution is concerned but I just don't understand the doctrinal basis of it.

O'Sullivan In my submission Your Honours it's based on the policy which was clarity justice and

Tipping J Oh that's warm fuzzy stuff Mr O'Sullivan, really.

O'Sullivan Well that was the policy behind bringing certainty and clarity to the position adopted in **Aberfoyle** and **Hunt and Wilson**.

Tipping J When you are telling someone you've got to do something you can't have the axe falling as I seem to have put it without warning, but if there's nothing to be done contractually I just

O'Sullivan If there's

McGrath J Can I suggest what you're saying is that it is policy based and that in this judgment Justice Cooke has laid down a policy and it is the unsatisfactory nature of parties rights being determined at an indeterminate point of time. Whenever the reasonable time expires it is more satisfactory that there be an essential preliminary so that whenever the reasonable time expires a notice has to be given that fixes a particular time and if the matter hasn't been resolved by then by one party or another then at that date the contract can be treated at an end.

And as to the doctrinal question, I think you would simply say is that it's a matter of policy and that Justice Cooke went back to the House of Lords case you mention with **Aberfoyle** to find the origins of it and that in a sense, never mind whether that policy was there or not, his judgment spelt out clearly the policy reason for it.

O'Sullivan Yes, I wouldn't have put it as well Sir. I wish I had of put that submission in Sir.

McGrath J Sometimes it's easier to put them in a certain way from this side

O'Sullivan I wish I had written it down Sir. Precisely Sir and I take that one step forward in that is if there is simply no distance between really the reasons for that in a promisee promisor situation although in that situation I've said that you are giving notice to the person who has the obligation. I absolutely

Tipping J Well wouldn't the notice be 'I think I've taken reasonable steps to fulfil this condition', do you agree?

Blanchard J Please mark my exam paper.

McGrath J Why would you say I agree on your view. Say I think I've taken reasonable steps on your view to satisfy this condition. I haven't been able to do so. It's at an end.

Tipping J That's the traditional view but Mr O'Sullivan is seductively trailing before us the idea that you've got as it were forecast that before you do it.

O'Sullivan All I'm saying Sir is at its basic level you've got to fix a time by which that condition, you have to do what **Aberfoyle** tells you but settle a time when the condition of

Tipping J But if you've done everything the law requires of you, ie take reasonable steps to try and get the condition fulfilled, and that's the premise on which we're speaking, if you've done that, if you shoot wrongly the Court will tell you, if you shoot rightly the Court will tell you so.

Blanchard J What's the situation if there is a fixed date but before the fixed date rolls around you come to the conclusion that it's all hopeless, you can't fulfil, you're surely entitled to call it off at that point.

O'Sullivan And that's consistent with Justice Cooke's exceptions which says that when it's quite clear that you can't complete that's fine, when there's something that's beyond the control of both parties there's clearly no need for a notice but here it wasn't beyond the control of both parties for the points I make in respect of utility of the notice. So really the promisor promisee distinction and who has the obligation might

Blanchard J Well if the easement had to be over the adjourning property it potentially was beyond the control of the parties.

O'Sullivan It potentially was but it wasn't beyond the control of the influence of both parties. To get to it now Mr Serepisos could well have either made application under 460 gone and seen the neighbours, dealt with them. Perhaps if I take Your Honours to notes of evidence. Let's deal with one issue first and that will put what could have happened into perspective. If I take Your Honours to page 203 of volume 2 in the notes of evidence and this is re-examination of Mr Steele and it's down the bottom at line 37. It starts there and goes over the page. Perhaps Your Honours to understand this if you could first go to volume 3 and look at document 349.

Tipping J What document?

O'Sullivan 349 in the yellow folder.

Tipping J Thank you.

O'Sullivan Now this is a letter from Mr Larsen's solicitor who was the person who also wanted to purchase the property. Perhaps if you just read first of all para.4 of that because that's the paragraph that's been asked questions on. So Your Honours if I go back to

Blanchard J I'm not sure I understand that paragraph.

Tipping J I don't understand it either.

O'Sullivan The question is asked about this in terms of, Mr Shauvel is one of the neighbours and the solicitor for Mr Larsen who was the person who also wanted to purchase the land writing to the appellant's solicitor just reporting on issues. The matters I've dealt with in my written submissions and I will deal with later. The question that's being asked in re-examination on page 203 of the notes of evidence is about that and I just wanted to put the re-examination in context.

McGrath J So this is a letter from a solicitor for a neighbour who has an interest in ending the contract.

O'Sullivan In buying the property. Has been interested in buying the property.

McGrath J Yes but the prime interest at the moment is in getting this contract brought to an end.

O'Sullivan Correct, correct Sir and assisting in that regard as the letter shows. In para.4 of that letter the author is stating "I want to refer to the portion "was anxious about Mr Serepisos". Were you aware Mr Shauvel was anxious about Mr Serepisos as a developer or neighbour of Mr

Shauvel? I never talked directly to Mr Shauvel but I talked to his partner and co-owner of the house Mr Hollander and had picked up some reticence about agreeing to the drainage easement for a number of reasons. And did any of these reasons include a concern or the type of concern reported in that para.4. I am no longer sure of that I think they did but I'm not certain. There were other concerns as well. In my opinion the neighbours were slightly evasive about the reasons they mentioned the need to consult with a landscaper and yes they did have some discussion about Mr Serepisos". I suppose I'm jumping to the end which is a utility issue but the question here is it's obvious from the evidence that the reasons evasive and non–descript for non-consent involve Mr Serepisos.

McGrath J Involves?

O'Sullivan Involves, well are related to the respondent and are matters within the responsibility to at least deal with in a sense of having the discussion and trying to manage the concerns and dealing with them.

Tipping J Are these points really heading off an argument that to give the notice would be futile, that there was something practical your client might have

O'Sullivan Well no Sir, what I'm saying is that there is the complete opposition, that this brings into stark reality the fact that there could have been discussions and if it was the respondent that the neighbours had concerns about then surely a discussion with the respondent was a way of resolving those issues, whatever they were. It's one issue in terms of utility.

Blanchard J He caused problems so he should be given an opportunity to try and fix the problems, is that the argument?

O'Sullivan Well no Sir there was nothing about the fact that he caused the problems in that section.

Blanchard J Well clearly the neighbours were wary of him.

O'Sullivan In terms of being a developer, yes Sir.

Blanchard Yes.

O'Sullivan And that is why it would have been of utility for him to have an opportunity to talk to the neighbours, understand their concerns and deal with them. That's one aspect of the utility of the notice.

Anderson J The Judges found, and I mean no disrespect to your client, but the Judges found that it was because of the influence of your client with the opportunity to get a consent had evaporated.

O'Sullivan Yes but on the other hand one of the neighbours was also influenced in terms of wanting the property and so there were a lot of different reasons why that didn't proceed. While you're in the notes of evidence would you please go to page 198

Elias CJ I'm sorry I was just thinking about what form a notice would take on your argument, perhaps we can come back to it if you want to complete what you're working through at the moment but I would be grateful if you would come back to it as I would like to know because I was looking at the reference given in the chronology to the so-called cancellation but what we've really got is the statement of defence which says the contracts at an end through fluxion of time but perhaps we can come back to that, finish off what you're doing.

O'Sullivan I think the other reason there was a utility notice is actually in the evidence of Mr Steele as well. If I take you to the notes of evidence of 198 you will be aware in the pleadings the position was taken by the appellants at the outset that the obligation to complete the subdivision was actually on the respondent. There was an extra provision prepared by the Real Estate agent that was never signed by Mr Steele and that ultimately was dropped at trial but up to the trial it was actually the respondent that should have been completing the subdivision and that was what was put to him here and line 17 this is what he says "my point is that whether or not that was part of the final so-called contract, it was clearly discussed and agreed between us at the time that due to Mr Serepisos's experience and the resources at his disposal he would significantly assist in the subdivision". So what I'm saying in submission is that even in a sense on the evidence of the appellants there is an acceptance that Mr Serepisos had the ability to influence the completion. In terms of the notice Ma'am, starting from the proposition that there is no date fixed for both parties as they stand prior to any notice don't have in their mind any date by which that obligation before the condition ceases or finishes. That note would simply be in terms of the notice that I've already referred to with Justice Cooke. Everything has drifted on for too long. I give notice making time the essence and I'll just deal with one issue which is the consent of neighbours. Unless I'm in a position to get consent of the neighbours by ex date I will be treating my obligations under this contract as at an end.

Elias CJ So all that's achieved by that that isn't achieved in the end by the notice given, I don't know whether it was given, only in the statement of defence that the chronology suggests that there was an additional notice but that all that would be achieved is the possibility of avoiding someone filing proceedings to bring the thing to a head.

O'Sullivan What would be achieved is that rather than the respondent believing that there was still an ongoing obligation on the part of the other party to comply with his contractual obligations, he would be aware that if certain events didn't happen that party would be treating the contract as

an end which would have a serious effect on his in terms of values and that sort of thing.

Blanchard J After giving that notice would the party giving the notice, Mr Steele say, be under an obligation to do anything?

O'Sullivan Well, it would give the other party the opportunity to assess what had been done but that's a question of I suppose of fact in terms of the specific circumstances. If there were other steps he could take that might be an issue

Blanchard J If there were other steps he could take his notice would be invalid. His cancellation notice would be invalid and indeed probably the warning notice would be invalid.

O'Sullivan I accept that if he's giving that notice he's taking the view that he's taken all reasonable steps and that the end result will be in a certain period of time that he will be treating himself as discharged from his obligations under the contract. All that the Court of Appeal judgment says which in my submissions is correct application of the policy and the other considerations are applied is to say that what is important is given the stance of the parties and the benefit and utility of a notice and to bring certainty to it if the person has got ability to make a difference and to achieve the result they should be given the opportunity and should know when their rights terminate in advance.

Tipping J Is there anything in the textbooks on contract law which advances this wider view of **Hunt and Wilson**.

O'Sullivan Yes Sir.

Tipping J Come to it when it's appropriate for your argument but frankly something needs to be put at least before me to give it some credence because you read **Hunt and Wilson** in the context don't you of the facts of that case, one has to, and I know I took a certain view about it in **Mt Pleasant** and I'm not necessarily right in analysing it in those what you would say was narrow terms, but it would be helpful if we had something to suggest that it should be read more widely.

O'Sullivan Yes Sir, just dealing with that position I suppose that Your Honour had in the **Mt Pleasant** case, and I'll deal with all of those at once.

Tipping J Yes but was does Professor Burrows book say about it, does he say anything that may be of assistance to you?

O'Sullivan I think my friend deals with it in his submissions and that's probably the best place to go. **McMorland** in **Sale of Land** (2nd edition) this is referred to at para.7.2

McGrath J Of your submissions.

O'Sullivan Of actually my friend's submissions.

McGrath J Yes I thought that was so. He in fact I think discusses the relevant **Burrows** extract as well.

O'Sullivan Yes.

Tipping J This is in the appellants' submissions at 7.2. I don't recall anything that was helpful to your case but I may be wrong.

O'Sullivan I'll hopefully address that Sir. At page 17 "Who may give notice making time of the essence. It can be argued that only the party who does not have the substantive benefit of the condition need give notice because that would allow the other party a final chance to fulfil the condition before the contract is lost, whereas receipt of the notice is of little value without that benefit who is normally not responsible for trying to achieve its fulfilment. However it can be argued against this that the party who does not have the benefit of the condition may have a very real interest in achieving the full execution of that particular contract and therefore in having the opportunity to try to achieve the fulfilment of the condition subject to a finance condition may have a stronger move for funding the finance for the purchase that does the purchaser. It is therefore suggested that whichever party wishes to avoid the contract must give notice to the other making time of the essence as to the fulfilment of the condition". That is consistent in my submission with the policy that I'm trying to bring to this Court which is that in this situation you have a situation where in fact the respondent has the substantial benefit of the condition in practical sense at the time because he has the mutual benefit of the condition at the time it starts, but he has the substantial benefit of the condition by the time he gets to a position where the other party wants to remove itself. And so Sir I think where I'm coming to in terms of the distinction is that the crucial is who wants to remove themselves from their contractual obligations. Not why, it's not a repudiation issue, it's which party wants to get out of their contractual obligations and in what situation should they be allowed to do that and my submission is that if they are to remove themselves, if they have the substantial benefit of the condition the mere fact that they aren't the person obliged to perform the issue does not change the equities of the situation and it was the equities in my submission that

Tipping J Well I was very precise in the way I expressed it in **Mt Pleasant** and I didn't see with respect **Hunt and Wilson** as being any support for this wider, well it is if you read passages in isolation I suppose but you can't claim I don't think that I in **Mt Pleasant** supported this wider premise. The passage is pretty precise as to cancellation and time and

O'Sullivan It is Sir. I suppose in my submission Sir I read that as contextual to the, and it's always very worrying discussing these with presiding

Judges, but I read that as contextual because that was the circumstances that you were dealing with but at page 331

Tipping J Of **Mt Pleasant**, which is tab?

O'Sullivan Tab 24, line 19 after referring to that **Stirling Pastoral** case which I refer to.

Blanchard J Sorry, which tab?

O'Sullivan Tab 24 of the big volume.

Blanchard J Thank you. And the page number?

O'Sullivan And the page number is 331 and it's line 19. "Technically this reference to **Hunt and Wilson** was obiter dictum but sitting in this Court it would be rash not to follow it. In any event, as I have said, I respectfully consider that what Cooke J said in **Hunt and Wilson** ought to represent the law in New Zealand for the reasons which I have mentioned being primarily clarity, fairness and simplicity". No I appreciate Sir that that was probably relevant to the promisee and promisor situation that you were dealing with but my proposition is that there is no difference in principle. It really is all about someone trying to relieve themselves of their contractual obligations and if a person is trying to relieve themselves of their contractual obligations they should do that, that is the crystallisation I suppose of whether or not a notice is required and taking that forward to the Court of Appeal which I support

Tipping J You want to relieve yourself of your contractual obligations well ex-hypothesi you have fulfilled your contractual obligation, you have taken reasonable steps. It's not a question of relief; it's a question of showing you have done everything which the contract required of you.

O'Sullivan It comes back to the conceptual point I made with the excerpt from Justice Cooke that until the condition is brought to an end you are under an ongoing obligation and in this context the appellants were under an ongoing obligation to bring about the condition until they lawfully terminated the contract. Those obligations existed until they brought it to an end.

Elias CJ I thought time had brought it to an end on the argument here, which is why I'm struggling with what you're giving notice of if that position has been reached. On your argument we never get to discharge through a fluxion of time until notice has been given, but what sort of notice would you be giving? Is there reasonable notice that you'd be giving, would that have to be measured by comparison with the time that had elapsed or how is it to be done?

O'Sullivan The reasonableness of the time would be no different than what would apply to a promisee or promisor situation, that is the reasonableness, I mean the same exercise needs to be adopted in that situation. The reason why you can't have a fluxion of time termination is because there's no time set for a fluxion of time and the **Aberfoyle** and **Hunt and Wilson** cases say that if you don't have time set you need to just set a date to bring certainty and to bring finality. The issue is this and it's accepted that the authority point Your Honour Justice Tipping makes is accepted there that the preponderance of cases on this issue are in the promisee promisor situation because practically that is the scenario that applies, but the policy behind that which is to bring certainty of terms to the contract is equally applicable to a situation where like this situation you have a person who doesn't know when the obligations are, a party who has an interest in the contract, has a benefit in the condition and doesn't know when that is going to end. I think that is probably as far as I can take that but I would like to move on to the, unless Your Honours have any further questions. I can move on quickly to the other issue which is the termination issue. The evidence of termination was that in my submission I use it as an example of the shifting sands basis upon which the uncertainty can creep in. Your Honours if you turn to volume 2 at page 21, sorry page 194, para.21 of the appellants evidence, Mr Steele. He says that "by mid 2002, because of inactivity, as far as they were concerned the relationship with Mr Serepisos had simply died and that the only evidence of that point was the discussion he had previously with Mr Serepisos and he told Mr Serepisos he had been advised by Mr Larsen that he could remove himself from the contract and the respondent responded "well I have a binding contract" and that was what forced the letter from the respondent indicated on the title. So that was the first if you like in a sense position but that was never made known, that only came out in evidence. The next is in volume 3 at page 359 and the point there is that the position taken by the appellant at this stage was that there was no binding and enforceable agreement that was void for uncertainty but the second in the event if they were unable to comply with the neighbours' consent. But that was a notice which was saying we're already out of there. One, you don't have a contract and two, all deals are

Tipping J I think I've dropped a stitch Mr O'Sullivan. What precise point are we addressing now?

O'Sullivan I thought Her Honour asked

Elias CJ My query I'm afraid.

O'Sullivan For the sequence of termination.

Elias CJ Yes.

Tipping J I'm sorry I couldn't quite out where we were.

O'Sullivan And the final one Ma'am that you referred to which was 362 which was when they returned the deposit, and in my submission that's just illustrative of the lack of clarity that arises when you don't have a notice of this type because in effect what you've got is a total shifting sands scenario.

Tipping J Isn't the ultimate issue notice or not going to be 'did the appellants take reasonable steps to procure the fulfilment of the condition'? Isn't that what this case essentially is about and the validity of the notice I think my brother Blanchard may have touched on, surely is going to really depend on that very issue?

O'Sullivan Perhaps there are two ways I can answer that Sir that because the law is that when you have a condition that doesn't have a time limit you should bring that to a head. There may be situations where, and at that time mutual obligations exist, there might be situations where one party in a reasonable sense has taken whatever steps it can but there are still reasonable steps that can be taken by the other party who has an equal interest in it to bring the matter to a conclusion so the way I am answering that Sir is I don't see the fact that one party has taken reasonable as excluding the ability of the other to do so and it might be that one of the reasonable steps that could be taken is to give notice but I don't think you need to go there, I think the notice stands for itself.

Tipping J So you're saying in effect that this is a case where unless you give a notice you haven't taken reasonable steps.

O'Sullivan I don't mean to put it like that Sir, I suppose I was arguing it both ways. My position is that the fact that one party might have taken reasonable steps in an objective assessment which always has that about it doesn't preclude the ability of the other party also has a mutual interest in the property and mutual obligations from also being able to take reasonable steps to conclude it. The two aren't mutually exclusive.

Tipping J Yes I see, thank you.

Elias CJ Well I'm still bothered about what on earth a notice would say that isn't in this letter of 21 May.

O'Sullivan Well the first point Ma'am is that wasn't a notice, because that was saying 'I'm terminating, it's saying we're not going to, it's saying to give time in a sense for completion, it's saying we don't think we're bound by the contract, it's a repudiation if you want for the want of a better expression. It's saying bets are off you can tell that the final paragraph makes that absolutely clear, so it's not an indication as in the **Hunt and Wilson** context saying 'I want to bring matters to a head, I know we haven't got a fixed day for completion, this is when it has to

be fixed by, I consider I've done all I can. If I'm unable to get satisfaction by ex date I will be withdrawing from the contract'.

Elias CJ So they just need to have added to this letter 'if you can't fix matters by ex date it's all off'.

O'Sullivan They just needed to set a date by which those obligations were fixed to come to an end. They just needed to fix a date for completion which hadn't been done. My submissions deals with, I appreciate this is the nub of the case but I'm also conscious of the fact that the utility issue is perhaps there and I was going to take just a little bit of time to go over the reasons why I believe a notice could have been acted on in respect of the stances adopted by the parties, but they are in my submissions I'm am in Your Honours' hands if you wish

McGrath J And your submissions are in your written

O'Sullivan Those are in my submissions in respect of the steps. I mean in a sense there isn't any magic to it.

Tipping J Well the heading's in 7.2, they encapsulate it do they, 3 points?

O'Sullivan Yes they do.

Tipping J Really the notice would have given him an opportunity to see if he could fix things

O'Sullivan Yes, facilitate things.

Tipping J That the other side apparently couldn't

O'Sullivan And the meeting with neighbours, sorting out the problems

Tipping J But conceptually the notice was necessary to allow him the opportunity

O'Sullivan Conceptually it was

Tipping J To fix, to see if he could fix up fulfilment of the condition.

O'Sullivan And understand that his rights were going to terminate if that didn't happen. If Your Honours have any further questions I'm happy to answer them otherwise I rest with my written submissions on those other issues that may not have been covered.

Tipping J I just have one if I may. Your client served for specific performance, alternatively for damages but why was it not open, it all comes back to this notice does it that the other side weren't entitled to say this contract remains conditional until they'd given this notice.

O'Sullivan Yes.

Tipping J They couldn't say well we've taken all steps, it's all focused on this notice? I just wanted to be absolutely clear on that.

O'Sullivan Yes Sir it's all focused on the notice.

Tipping J On the notice, thank you.

Elias CJ Thank you Mr O'Sullivan. Yes Mr Laurenson, do you want to be heard in reply.

Laurenson Briefly

Lost connection 3.39.28