

IN THE SUPREME COURT OF NEW ZEALAND

SC 53/2005

IN THE MATTER of an Application for Leave to Appeal
BETWEEN WHOLESALE DISTRIBUTORS LIMITED
 Appellant
AND GIBBONS HOLDINGS LIMITED
 Respondent

Hearing 1 December 2005

Coram Blanchard J
 Tipping J

Counsel G P Curry and B F Peachy for Appellant
 W M Wilson QC and M J Radich for Respondent

APPLICATION FOR LEAVE TO APPEAL

11. 47 am

Curry May it please the Court, together with my learned friend Mr Peachey for the proposed appellant.

Blanchard J Yes Mr Curry.

Wilson May it please the Court I appear with my learned friend Ms Radich for the respondent.

Blanchard J Yes Mr Wilson. Mr Curry.

Curry Sir the intending appellant has filed two documents in support. One is the normal appellant's submissions on application for leave and the second one was following what

we describe as leave from the Registrar, a reply to the submissions from the intended respondents.

Blanchard J Yes we've got those.

Curry Have you notice, not that being the case, Sir, in order to progress expeditiously what I'm intending to do is just submit some key points and if it were of assistance to the Court I do have an outline of those key points, if that would assist.

Blanchard J Yes, thank you.

Curry At the outset Sir, it's just focusing on what is the hurdle for the impending appellant, dealing with the general and public importance. Essentially I take these together rather than separately, both general and publicly important. And the crucial points in my submission are that the appeal does involve points of general principle as to the construction of contracts and commercial leases generally. It also involves the effect of standard conveyancing documents are use throughout New Zealand for decades and these include a common sublease, an arrangement set up by such a sublease and the purpose is to avoid the rule of law at a sublease for the same or longer period than the term of the lease operates an assignment of the head lease, and the scope of the direct covenant – and there was only one direct covenant between the parties to the intended appeal, that is between the lessor and the assignee in a standard form deed of assignment. It also involves well used sublease changes in the parties' relationships, an initial sublease, in this case that ended on the 30th of October 2002, termination of that relationship. So no longer landlord and tenant. Then a succeeding relationship of trustee and beneficiary and then a new lease, in this case to commence on 2nd November 2002, pursuant to a collateral undertaking contained in clause U, in this case clause U, of the sublease and included in the same document for convenience. The effect of those arrangements in my submission is substantive and not just semantic and if the appeal were to proceed the intending appellant would submit that the, a lessor should not avoid the outcome of the arrangements which were set up to avoid the operation of the rule in law that a sublease for the same term as the head lease operates as an assignment. The various subleases and assignments in this case are set out in the diagram attached to the judgment from the High Court and it's also attached to these points. Perhaps you may care to turn

Blanchard J Well we, we have seen that diagram before I think we are pretty familiar with what happened.

Curry So given

Tipping J Isn't it all, doesn't it all depend in the end on the true construction of clause 4 of the Second Schedule of the Deed of Assignment?

Curry That, that's critical to the whole case, Sir.

Tipping J Yes

Curry And the

Tipping J And the question is whether that is a point, point of general importance or whether it's particular to this case is, is that a fair summation of, of what we're about today?

Curry It's a fair summation of looking at it in isolation but in my submission the larger thing to look at or the larger juridical approach to look at is the approach to contractual interpretation.

Tipping J Right

Curry And essentially if I can deal with that the majority judgment looked at what it considered to be the purpose, and in my submission that really amounts to subjective intent. The minority judgment looked at the documents and drew a conclusion which was essentially based on determining the objective intent from the documents and so certainly I accept Your Honours focus in terms of looking at in the narrow sense.

Tipping J I understand your wider point too, Mr Curry, thank you.

Curry Thank you, Sir. And in, in paragraph 3 of this, these crucial points I observe that in those circumstances, the circumstance here is that really what, what's at issue is which innocent party will bear the loss. Because as the diagram indicates in the facts, Infogate right at the end went into liquidation and the issue is whether it's Rattray's

Tipping J But that's just a warm fuzzy point. The real point is the correct interpretation of commercial documents isn't it, who

bears the loss is the consequence of what may be the proper interpretation.

Curry Yes it is, Sir, yes it is. I'm simply making point.

Tipping J Well you can take it, at least I am and I'm sure my brother are very well aware of the ramifications of all this, all we need to be persuaded on or not is whether there's a general point here. A point of such general importance that it requires attention from this Court.

Curry Well

Tipping J And you've got your head point is, it starkly because of the difference in the Court of Appeal, puts up the correct approach to the construing of documents of this kind.

Curry Yes Sir and, and the other point is the, the documents themselves and their use in practice and the, the third point is the effect on, on parties and I submit in these critical points that parties such as, not just the direct parties concerned but generally, sub lessors, sub lessees, assignees, assignors, liquidators given, given the nature of these long term arrangements it's obvious there will be changes that occur over a period of time and there will be a potentially broad effect on those other parties. And so the interpretative approach in my submission is the critical one. That is, as to whether the law continues to seek out the objective intent of the parties to a contract or whether is to be introduced something by way of a purposive approach which was adopted by the majority. And so in, in points four and give I've sought to draw out the effect on the broader future parties who may be interested.

Blanchard J And you've dealt with paragraph six?

Curry Yes I have, Sir. In seven I just refer to the opportunity that allows to clarify the law and what you might consider is the leading case at the moment and the Court of Appeal, at least the majority in the Court of Appeal, did appear to diverge from that. As to the general commercial significance I've focused here on the recognition by the proposed respondents to that significance and generally that these arrangements are indeed used quite substantially in practice. I make the observation that commercially if Gibbons did wish to ensure that the burden to take a new lease was assumed by WDL it should have done so by

Novation. So essentially, Sir, they are the points for the proposed appellant.

Blanchard J Thank you, Mr Curry. Mr Wilson?

Wilson If Your Honours please. Your Honours this litigation has involved two issues. Firstly, whether the lessee under various names from Gibbons was required to take a new lease. And secondly, and if the answer to that first issue was that the lessee was required to take a new lease whether the original lessee was required to take a new lease, whether the appellant Whole Distributors as assignee were required to take the new lease. And Your Honours in summary our submissions today are that while the first of those issues may have raised an issue of general importance that is no longer a live issue. It wasn't a live issue in the Court of Appeal and the second issue does not involve any question of general importance turning it does on the construction of a particular document. To complete my summary it is our submissions that this wasn't a case where the majority and minority in the Court of Appeal adopted a different approach to construction, they adopted the same approach but came to different conclusions. In our submission it is important to distinguish the two issues and my friends in their written submissions at paragraph 4.2 to 4.4, and again at paragraph 9 of their outline today, have tended to run together the two issues because both 4.2 and 4.4 reflect Gibbons' position as to the first issue namely the commonness of the arrangement. Your Honours it is important in our submission just to, that this Court should understand the history of this litigation – I can do so in brief terms and in the High Court the primary issue was the first issue. And I take

Tipping J Did that not turn on the terms of the assignment at all?

Wilson No, no Your Honour because Your Honour Justice Ellen France in the High Court interpreted the sublease and in particular subclause (u) as creating an option to renew or a right of renewal and therefore did not have to consider the assignment point and if the

Tipping J Well if there was no obligation then no assignee could have then

Wilson Exactly end of story. End of story. So that was the basis on which the case was decided in the High Court. For Gibbons we appealed and in the High Court and I do point out with

respect to my friends that neither of my friends appearing now for the appellant appeared in either of the courts below whereas Miss Radich and I have appeared throughout for Gibbons and I've checked with Miss Radich and she confirms my very clear recollection as to the history of the litigation and that's the reason why, Sir, when Justice Chambers in his judgment at paragraph [41] of the Court of Appeal judgment put in quotes that I, put in quotes my submission that – I'll go to the actual paragraph [41] on, paragraph [41] my submission that Wholesale Distributors now accepts that the sublease did create reciprocal obligations at least until 2010. That reflected the point I just made that it was not only an issue in the High Court it was the ground upon which we were unsuccessful in the High Court.

- Tipping J The Judge, sorry and I, I haven't closely looked at the High Court judgment but the Judge in the High Court you say found that you amounted, it didn't amount to a contract for the taking
- Wilson Correct
- Tipping J That point wasn't pursued in the
- Wilson Correct
- Tipping J Well it was never a good point.
- Wilson Well I am bound to say we were surprised to lose on that point in the High Court.
- Tipping J Alright well that's by the by I suppose.
- Blanchard J Startling conclusion
- Tipping J Startling conclusion
- Wilson Yes and perhaps unsurprising with the counsel of the experience and ability of Mr Galbraith and didn't seek to rest the argument in the Court of Appeal there but rather it was perfectly open to him, I don't make any, don't suggest it wasn't open to the respondent, but changed their position in the Court of Appeal and the rest of their argument on the second issue, the assignment point.

Blanchard J It all turns on the meaning of the words “for the remainder of the term created by the lease”.

Wilson Well with

Blanchard J Read in, read in context.

Wilson Yes, see but in our submission the context is important firstly I can tell you straight, it’s obviously key to Your Honours consideration. Firstly, even just looking at clause 4 alone in our submissions it’s important to look at all of clause 4. And in particular the concluding words of clause 4 whereby the assignee WDL undertook to perform all the covenants in the lease.

Tipping J But this wasn’t a covenant.

Wilson We say (u) was a covenant.

Blanchard J But its during the remainder of the term of the lease, but come back to what those words mean in this context.

Tipping J Even if it was a covenant.

Blanchard J I mean we’re not, we’re not here today to determine what the meaning is.

Wilson I appreciate, I appreciate that.

Blanchard J But isn’t this a standard conveyancing precedent?

Wilson The, again there’s not evidence of this. And I accept that the, it’s a printed form but it was an important of our argument.

Blanchard J Who’s printed form is it?

Radich ADLS

Blanchard J Auckland District Law Society so this, this case possibly could have impact on quite a number of these situations because this arrangement to get around the ridiculous rule about subleasing

Wilson Yes indeed

Blanchard J Which I am bound to add is cured by the Law Commission's languishing Report

Wilson If only that had been the

Blanchard J I think I, I think I can assure you that there's going to be some action.

Wilson I am delighted to hear that.

Blanchard J Not because of this case.

Wilson Yes

Blanchard J But, but

Tipping J It's a point my brother feels keenly.

Blanchard J I do

Wilson I somehow got that impression.

Blanchard J It's only been eleven years in the course.

Wilson Important not to rush these matters.

Blanchard J But the point is that the interpretation of these words is quite important generally isn't it in this kind of context.

Wilson Yes but my response there is that although the base document here is a printed form and a large part of the argument in the Court of Appeal turned on the tight additions to the printed form and the other provisions of the form, I appreciate now is not the time to enter into substantive argument on the point, but if Your Honours would just care to note for example clause 1 which I accept part of the printed form whereby the assignee is assigned all the assignor's estate right title and interest in the premises and least is set out in the Third Schedule.

Tipping J Well that's the lease. The real problem is here that they didn't appear explicit to their distinguish between the lease and the new lease. I know, I know what the argument is but that's what creates the problem.

Wilson Well with respect sir I would not accept as any ambiguity in what the lease is when you look at the Third Schedule.

Blanchard J Isn't, isn't your better point that there might be arguable a one off nature in relation to the words that are filled in alongside expiry date of the lease in the schedule?

Wilson I can explain, Sir, that I was about to come to that point but

Blanchard J I'm sure you were I was just hastening you along.

Wilson Thank you, I won't hesitate to come to it but completeness we say the Deed of Lease is the lease document dated the 10th July including paragraph U

Blanchard J Including all the rights that go with it.

Wilson All the rights that with it.

Blanchard J Yes

Wilson Including (u) in the

Blanchard J I imagine that's probably correct in relation to clause one, of clause we are talking about the burden, not benefit.

Wilson Yes. We say the expiry date of the lease, now if there and it simply said 31 October 2002 that would have been a very different situation in our submission from the words which actually appear with a new lease being granted for a term expiring 31 October 2010. This is a question of interpretation that does turn in large part on those words and its unlikely in my submission that that would be a point of any wider significance and I should for completeness say it was also part of the argument that clause 7, I accept again it's a part of the printed form, the landlord's consent to the assignment being without prejudice to the landlord's rights under the lease and you of course could argue that among those rights was the right to have a lease, the new lease entered into and just also part of the argument was that going to the Second Schedule apart from clause 4, clauses 1 and 2 were also relevant particularly clause 2 whereby the assignee WDL indemnified the assignor from any liability arising out of the observance or performance of the covenants, conditions and provisions in the lease as from the date of assignment. So they would have, and there potentially if theoretically if leave were to be granted and the appeal were to be allowed

we'd still have the alternative of seeking to apply to have Infogate put back on the register for the purpose of Southways, suing – Infogate, Southways – to sue them and then have the liquidator call upon the indemnity here. So we get to the same result and that just shows the artificiality of the whole

Blanchard J This is the contradiction between clauses one and four in the Second Schedule?

Wilson Indeed, Sir. But Your Honours

Tipping J Well that contradiction is a very I suppose it's

Wilson No

Tipping J It's a contradiction in a standard form

Wilson Yes

Tipping J Might have wider ramifications mightn't it?

Wilson I think there's been no indication of any wider ramifications there but I accept that all these provisions are the printed provisions other than the reference to the lease and the expiry date of the lease, that's why I accept with respect the observation of Your Honour Justice Blanchard that that's the, that's an integral part of this particular document and that is a, a therefore a very significant reason in itself why the interpretation exercise here involved a one off exercise if I can put it colloquially rather than any general point.

Blanchard J It seems to me that it's a mixture of the two and the real question is does it still therefore have general importance as a potential precedent in other cases.

Wilson Yes, Sir. And all I can say there there's not evidence of that. That there have been the two earlier cases that my friends place reliance on the *Robert Jones Case* and *Sina* but they are in our submission they don't really assist on this point. Robert Jones was a case where Justice Anderson in the High Court found on a proper construction of the documents that the was a mandatory extension of term despite the intervening one day period but nothing turned on any assignment point although there may have been an assignment. *Sina* was a case where the Court of Appeal construed the documents as establishing a right of renewal

rather than an obligation to renew and therefore the issue didn't arise. So there's been no, no indication in the cases in my submission that the point has, and certainly no indication in the cases that this, any particular issue over the form of assignment has created any, any difficulties and I can't take the matter further than that. Just, my friend didn't deal with them today, but he did in his written submissions both his first submissions and the further memorandum lodged pursuant to the Registrar's consent as to whether the two points that he referred to as 3.2(a) and (c) in his original submissions as points which he was seeking to, could be seeking to argue if leave is granted. This Your Honours is on page 4 of the applicant's submissions. Paragraph 3.2 on page 4 of their first submissions. First of three. :Point 3.2(a) the collateral agreement, we haven't seen any reference and we have gone back through the documents, to the argument of (u) constituting a collateral agreement having been raised at all previously and with respect it's unsurprising that Mr Galbraith wasn't apparently inclined to argue in either the courts below that something within a contract can be not part of it and hence the collateral contract.

Blanchard J Is that perhaps just a way of saying that it wasn't something that ran with the leasehold interest?

Wilson Well that Your Honour really leads into the third point which refers to the subsequent assignment to Infogate and in summary what happened there is that particularly in the High Court and in the Court of Appeal my friends then acting for WDL ran something of a straw man argument to the effect that if their client were not liable in contract it could not be liable independently in the contract on the basis that the clause (u) obligation ran with the land. But the short point is that was never part of our argument. We didn't argue that in the alternative. And in support of their running with the land argument they did make the point it was perfectly valid in that context well one of the reasons that why running with the land argument couldn't succeed was that the land had passed to Infogate.

Tipping J Mr Wilson I don't understand how you can transfer an obligation unless you are released from it. I just don't see a prima facie could possibly be heard.

Wilson Well it is surprising that again I don't need to take Your Honours to it unless you wish me to, but the assignment from the present applicant to Infogate carries the perfectly standard forms that the

Tipping J Without prejudice and all that.

Wilson Without prejudice

Tipping J Well it's a matter of general law, you can't just say I'm transferring my obligations to my brother and I'm out of it.

Wilson Well in fact the contractual provisions went the other way in standard form so I don't need to take it further in case my friends are still serious about that argument.

Blanchard J Well the interesting thing is that clause 9 of the assignment to Infogate has the same provision in it, about the remainder of the term created by the lease.

Tipping J That's the assignment of 29 November.

Blanchard J Yes

Tipping J Document 4.

Wilson Again it's, yes it is, it's at one point, it's lease upper case L but a lot of defence arguments in the court below was because in that part of clause 4 it had

Blanchard J Yes

Wilson There's lease with lower case

Blanchard J And, and lease is defined in that as simply the lease of 10th July 1991, so

Tipping J These documents are not startling for their precision of drafting.

Wilson Well given the Infogate Motors as I said prepared by my friend's firm I'd better, won't be too

Blanchard J I wasn't going to mention that.

Tipping J Well I did it quite neutrally I didn't know who put that.

Wilson Hindsight's a great thing but for those of us not conveyancers it's easy to be

Blanchard J It's all a mystery.

Wilson Yes that's right. Perhaps to make I come

Blanchard J In any event I assume my brothers here that probably not a lot of mileage in that point, but depending on how it bears on the overall question of construction that it would seem to be central.

Wilson Well indeed but you've got to

Blanchard J If leave were to be granted there wouldn't be anything to bar the advancing of that argument for what it was worth.

Wilson Yes indeed. Perhaps the point that I would make and I can't place a great weight on it, in the present context is simply looking at the two assignments we can see are there, there aren't material differences between them but of itself could be said to militate against the proposition that the particular issue arising is of general importance and Your Honours I conclude with one point. I sense in my friend's written submissions and submissions today that he maybe inviting this Court to have a new look at the fundamental question as to what should be the approach of the, what principles the courts of this country should adopted in interpreting contractual provisions, my response to that would be that since Boat Park was decided by Your Honour Justice Tipping and the other members of the Court of Appeal that's proved a perfectly satisfactory basis and is daily referred to in the courts as setting out the tests and there is no necessity for this court to revisit that fundamental

Tipping J Well that's a very kind observation Mr Wilson in one respect but I've heard it said in certain circles and by certain commentators that *Potter v Potter* has muddied the water.

Wilson Well all I can say is that in that way to give evidence is that *Potter v Potter* is virtually never cited

Tipping J Quite right too

Wilson Yes

Tipping J No but seriously

Wilson Seriously Your Honour *Potter v Potter* my friends seem to be referring to it as more direct to the more specific use of extrinsic evidence.

Blanchard J Was *Potter v Potter* referred to the Court of Appeal in this case?

Wilson No Sir

Tipping J No.

Blanchard J So they presumably thought that they were on both sides applying a fairly standard interpretive techniques.

Wilson Yes indeed and I think there was no argument that

Blanchard J It may be a question about whether on one side or the other they were, they erred in that.

Wilson Yes

Blanchard J But it would seem to me it's more a matter of erring in application if there is an error. The more interesting question however is the meaning of these words in a standard form albeit in this case with the qualification in the schedule.

Tipping J If leave were granted on that issue I don't think we could preclude an argument directed towards interpretation technique.

Wilson No.

Tipping J No

Wilson I wouldn't seek to do that, but my submission is rather that there is no necessity in itself for this Court

Tipping J Right

Wilson To revisit the approach to principles. The point comes back to that which Your Honours with respect have clearly identified. So really come back to a narrow point.

Blanchard J Thank you Mr Wilson. Anything in response Mr Curry?

Curry Sir the points have already been made.

Blanchard J Yes thank you. We will just withdraw briefly to see if we have come to a decision.

12.22pm

12.25pm

Blanchard J We've decided that leave will be granted in this matter and the approved ground will be whether the appellant is bound to meet the obligations of the sub lessee under the 1991 Deed through to 31st October 2010 and to enter into the new lease from the 2nd November 2002 accordingly.

Both Counsel As Your Honours Please.

Blanchard J Costs will be reserved in the usual way.

FINISHED 12.26pm