

IN THE MATTER of a Civil Appeal

BETWEEN **WHOLESALE DISTRIBUTORS LTD**

Appellant

AND **GIBBONS HOLDINGS LIMITED**

Respondent

Hearing 7 March 2006

Coram Elias CJ
Blanchard J
Tipping J
Anderson J
Thomas J

Counsel G P Curry, B F Peachey for Appellant
W M Wilson QC, M J Radich for Respondent

CIVIL APPEAL

10.03 am

Curry May it please the Court I appear with my learned junior Mr Peachey for the appellant.

Elias CJ Thank you Mr Curry and Mr Peachey.

Wilson May it please Your Honours I appear with my learned friend Miss Radich for the respondent.

Elias CJ Thank you Mr Wilson, Miss Radich. Yes Mr Curry.

Curry Ma'am it may be of assistance I have prepared what I describe as counsel's notes.

Elias CJ Do they differ from your written outline?

Curry In the sense they summarise and refer to the written ones and use much more precise language at times.

Elias CJ Alright well we're all in favour of precise language so Madam Registrar can you pass those down? Thank you.

Curry So may it please the Court what is set out at point 1 is simply the issue is WDL bound to enter the new lease and I adopt the words in the documents with Gibbons strongly date mentioned and the second point in my submission is crucial, the meaning of the remainder of the term of the lease in clause 4 of the Second Schedule to the Assignment is determinative. Clause 4 is the only clause under which the appellant assumed obligations to Gibbons, it's the only covenant between WDL, the appellant and Gibbons, and the relevance of all other provisions in my submission is limited to the possibility that they may as part of the context assist in the interpretation of clause 4.

Thomas J At some point are you taking us to the documents?

Curry Yes Sir I can take you to them.

Thomas J No, no, no, just in your own time.

Curry To point 3, applying the plain meaning and unambiguous meaning, the term of the lease ended on the 30 October of 2002, so too did WDL's contract with Gibbons. The interpretation and accords in my submission were the established interpretative principles. I don't intend to go through those principles but it is convenient now if the Court pleases, if I do take you to the two really crucial documents. One is the Deed of Sublease, this is at tab 14, and in considering that document you will see on its first page there is the imperative demise that does hereby demise its present tense, demise a lease and refers to the premises and to the commencement date all as set out in the schedule. Thereafter in this document the term 'lease' or 'this lease' is used on numerous occasions but the crucial distinction that the Court may consider in this case arises when the terminology is considered in clause (u), and this appears at page 113 of the case, page 15 of this lease document, and you will see in this clause (u) a distinction is drawn between the term 'new lease' and 'lease', and the lease clearly refers to the term that expires in accordance with the Schedule to this document. The 'new lease' is an anticipated lease to be entered in the future and the 'new lease' is dealt with by a defined term and differing language from either 'lease' or 'this lease' as applies throughout this document.

Thomas J Given the structure that the parties adopted, they had to call it something didn't they?

Curry They chose to call it a new lease and rather than just a matter for choice of name in my submission it was critical to what was assigned. What was assigned was covenants under the lease, but not under the new lease.

Thomas J Yes I understand that.

Tipping J Is there some significance Mr Curry for your argument that in clause (u) immediately before the words 'new lease' in line 6 there is reference to 'expiry of the lease hereby granted'?

Curry Yes indeed Sir and I was going to deal with that when I got to the Schedule which is at page 114 of the case, page 16 of the document and the term there, this is the term of this sublease, 12 years less one day and the commencement date is the 1 November of 1990 leading to a term of this sublease expiring in October of 2002 so at no point in the documents does any expression relating to term go beyond that 2002 date.

Blanchard J What does the heading 'review of renewal' mean?

Curry Review of renewal, sorry Sir I'm just trying to locate it.

Blanchard J It's the second heading from the bottom.

Tipping J On page 16.

Curry Oh that's the.

Tipping J It's a typing error.

Curry From the Head Lease there was various contemplations of what would occur at subsequent dates for a renewal of that lease, each of those would constitute a new lease as it were and essentially the term provided for rights of renewal at those dates and you'll see at 2002 there's a contemplation of a trigger date and that's the borderline from this lease to the new lease.

Tipping J Do you not think it may be a typing error and it just simply should read 'review of rent'?

Blanchard J There are no internal renewals are there?

Curry No Sir, what's provided for is certainly not renewals of the lease but a provision to enter into as it were a new lease at that particular time, it could be extended.

Blanchard J What, on all of those dates?

Curry On, well the, I'm sorry.

Blanchard J I had assumed without giving it much thought that it was a typing error and it was supposed to be 'review of rental'.

Tipping J It ties in with clause n(1).

Curry Yes it does.

Elias CJ So it's not a typing error because that is called a date of review?

Tipping J Yes but it's review of renewal and it makes no sense.

Elias CJ Yes renewal makes no sense.

Blanchard J The thing that interests me about it is that includes the 1 November 2002.

Tipping J Yes.

Blanchard J But I assume that in the provision for the new lease there is a provision for the rent to be fixed because there's a complete inconsistency between clause (u) and that provision in the Schedule referring to the 1 November 2002. Since there is no lease on the 1 November 2002 clause (u) provides for the new lease to start from the 2 November 2002 and then goes on to provide for it to be fixed as, this may be the explanation, in accordance with clause (n) as if it was a review of renewal, so they recognise there that it isn't actually a review of rental under the old lease.

Curry That would seem to be the appropriate analysis Sir.

Elias CJ How do you explain P at the top of the page?

Curry Essentially what was contemplated was that the review of the term of that lease would occur on the 30 October and then there was a period in which there would be no lease at all.

Tipping J But the problem in that clause is the words 'in this lease' putting it more bluntly.

Curry Well the 30 October was still the date relating to this lease as distinct from the 31 October.

Elias CJ But what on earth would be the point?

Curry Well the point would be to review the position before going into a different phase of the relationship. No doubt that can be assessed as

part of that relationship. They were going into a relationship of trustee and beneficiary and then these parties, that was the parties to this Sublease, were contemplating entering a new lease after that period.

- Elias CJ Yes.
- Blanchard J Yes I think the answer's at the top of page 16. 'A new lease to be entered into shall be otherwise on the same terms and conditions contained in this present lease', so that under P you do your review and you notionally at any rate put the new terms such as they may be into the old lease and then they appear in the new lease. It's very clumsy but I think I can see the logic of it.
- Tipping J It's not inimical to your argument that whereas the immediate parties were bound to undertake a new lease, an assignee was not. The drafting is probably explicable on the basis that it was being looked at as though it was a continuum between these parties at least in the loose sense, but that doesn't make it a continuum with an assignee.
- Curry No Sir and that is fundamental. The assignee takes according to the terms of the assignment.
- Thomas J Yes but I'd like to know just what you do say about this. Clause (u) would seem to contemplate that the review of rentals will carry on as if in fact the lease was just continuing. So you go from the 31 October to the 1 November, there is a rental review, and then the terms of the lease would come into effect and there would be reviews presumably every two years.
- Curry Well that was the contemplation between these two parties relating to a new lease but it wasn't part of what was assigned because the assignment specifically, and I'll come to it, but it specifically talks in terms of the term of the lease and the lease is referring to that lease which concluded in 2002.
- Thomas J But you were seeking to take some advantage from the fact that in this document the lease refers to the lease expiring on the 31 October 2004.
- Curry Not 2004 Sir.
- Thomas J 2002.
- Curry 2002, yes. So essentially what I'm saying, the structure that was contemplated was that there would be a lease and that was essentially a 12-year lease. In order to avoid a full Assignment, what would happen in the future would be broken up, there would be a relationship of trustee and beneficiary apply and then those parties committed to an agreement to enter a new lease. That new lease of course could only be entered in the future when there was an estate held that could be leased, and so essentially what happened as between those two was not part of

the Assignment except for the lease, the first aspect of the lease which expired in 2002 referred to as 'the lease' and the term is referred to in the Schedule, and that term expired in 2002. That was essentially what the Assignment was concerned with. The Assignment didn't reach beyond that, and so if I could turn to the Assignment itself, this is at tab 15, the Assignment picks up the language of lease and it refers to the expiry date and in the First Schedule there's the expiry of the lease, it's the 31 October 2002, so that's when the lease expired and then the contemplation goes on with a new lease being granted for a term expiring on 31 October 2010. So there's that distinction in relating back to the sublease between the lease that expired in 2002 and those two parties contemplated entering a new lease in the future but the new lease did not form part of the Assignment.

Thomas J Well that's your argument. From the Assignment it would seem clear that the First Schedule's critical because I think it's mentioned in almost every clause in the Assignment. What do you make of the entry 'expiry date of lease 31 October 2002 with a new lease being granted for a term expiring 31 October 2010'?

Curry Well there's two parts to that. The critical one which relates to the Assignment is the expiry that occurs on the 31 October 2002.

Thomas J Now that's what you say. How would you define the word 'lease' in the phrase 'expiry date of lease'?

Curry I would define it as in a similar way to the way the term 'the lease' is referred to in the Sublease meaning the term of lease which expired on the 31 October 2002 and that Sublease makes that same distinction between this lease that uses that terminology something of the order of 20 times in that document and then in clause (u) it goes in to a crucial distinction between this lease or the lease and the new lease which is defined.

Thomas J Well what's the point of the words 'with a new lease being granted for a term expiring 31 October 2010', are they just there gratuitously?

Curry Well they are there as an observation but they do not, and in my submission, cannot, form part of what is being assigned.

Thomas J Yes, I understand your argument but surely the parties haven't included those words just to satisfy somebody's curiosity.

Curry Oh no, absolutely not. I answered your question, your prior question, by taking aboard that you meant the parties being WDL as one of the parties. As between the parties to the Sublease, which was Southways and.

Thomas J But this is the Assignment we're looking at now.

Curry Yes it is the Assignment but it's an observation about the continuing obligation of the parties to the Sublease and the parties to the Sublease have an ongoing relationship which is partly expressed in a lease but it's partly contractual and that ongoing relationship contemplates a new lease being granted.

Blanchard J Surely it's more than an observation, it's what's being assigned. On the first page, page 116, you've got 'the assignor assigns to the assignee all the assignor's estate, right, title and interest in the premises and the lease, all as set out in the First Schedule' and what's being assigned, and here we're talking about benefits being assigned, is the lease which is to expire on the 31 October and the new lease which is contemplated will be granted.

Curry Well in my submission what's crucial to determine what is assigned is the words relating to the lease as set out in the First Schedule and the lease as the expiry date and the term 'lease' is used, the expiry date is on the 31 October 2002, so that's what is being assigned and that's all that's being assigned. There's certainly a reference to a new lease being granted.

Tipping J Are you saying that the assignee couldn't call for the new lease?

Curry Yes I am saying that.

Blanchard Really!

Tipping J Really!

Curry Yes I am.

Tipping J I thought your argument was that he could call for it but he wasn't bound to take it.

Curry There's the distinction and I mention it in the notes between benefit and burden. The benefit can be assigned but the burden can only be assigned if there's a covenant or a novation.

Blanchard J Well was the benefit assigned, that's the question Justice Tipping's putting to you? The benefit of the new lease.

Curry Well the benefit was certainly capable of being assigned. In my submission however it's not assigned by this terminology.

Blanchard J That makes Sub Sublease very difficult to explain.

Curry Well it goes back to essentially looking at the assignor having received the purchase price assigns to the assignee the estate and title and interest and premises and the lease all as set out in the First Schedule, and the First Schedule distinguishes between 'lease' and 'new lease'.

- Blanchard J Why would they bother if neither the benefit nor the burden was being assigned?
- Curry Well because it's.
- Blanchard J I think you're making your argument rather more difficult than it needs to be.
- Tipping J You're standing on a hill higher than you need to, to sustain your argument.
- Curry Yes I accept that but I was asked whether that was what was being assigned and in my submission it wasn't, but if that is wrong what is being assigned is the benefit but not the burden.
- Tipping J Well you could hardly argue could you that the assignor had no interest in the premises or indeed under the lease in relation to the new lease. The assignor has got a clear contractual interest. They've severed the term by this trust device for reasons that we know, but an agreement to lease which is what this is short of all the trimmings clearly creates surely an interest in the premises and the lease as a composite expression. I mean if you think it's essential for your argument to maintain this then of course you must maintain it, but it seems almost impossible to argue.
- Curry Well it's simply based on in my submission the plain meaning of the words and the distinction that I've already explained. If that is not accepted then it's certainly my submission that what was assigned was a benefit but not burden.
- Tipping J So there's two alternative propositions. One it didn't assign anything, vis a vis the new lease, and the second alternative is that it assigned the benefit of the right call for the new lease, well not the benefit of the right call, it was actually an obligation, well this is where it starts getting tricky doesn't it?
- Tipping J It does, yes.
- Thomas J That's the problem I have, how can what is quite clearly an obligation under the Deed of Lease become a benefit that can be taken or not as the assignee chooses.
- Blanchard J Well it's both benefit and burden.
- Thomas J Well that would then mean that the assignor is bound to take the lease. What we're dealing with here is not something that's suddenly converted from an obligation into just a pure benefit. That's a leap that I have difficulty making.

Curry Well there is clearly an obligation to both assign and to accept the assignment as between the contracting parties to the Sublease and so in terms of that it's clear that as between Gibbons and GUS Properties, both were assigned. Sorry, there was a contractual commitment entered relating to both the giving and the taking of a new lease.

Thomas J Well let me put it to you this way, if your argument is right then the obligation to take the lease or the new lease falls on Gibbons contractually.

Curry Yes it does Sir.

Thomas J Well if that obligation falls on Gibbons how can the assignee here obtain a benefit when someone else has an obligation to take the lease?

Curry Well that comes back to the first part of my answer in my submission.

Thomas J Yes, you really do have to hold your position at the top of the hill don't you?

Curry Well it's the top of the hill but it's the plain meaning of the language in my submission.

Tipping J I wonder if you get any assistance Mr Curry, and I'm sorry, we're darting all over the place here and it must be very difficult for you, I wonder if you get any assistance from page 5 of the Deed of Lease which in the copy I'm looking at I haven't got a page 4 but I'm pretty sure I know what comes before the top of page 5, and here's it's talking about the landlord's consent to assignments and not being arbitrarily and reasonably withheld and so forth.

Elias CJ Sorry, what page is the?

Tipping J Page 5.

Anderson J 103.

Elias CJ Thank you, oh yes.

Tipping J And it creates the entitlement of the landlord to call for a direct covenant from the assignee. Are you with me?

Curry Yes I am Sir.

Tipping J Direct covenant from the assignee that the assignee will duly and punctually pay the rent and perform and observe all the covenants agreements on the part of the lessee herein and contained or implied during the residue of the term of years hereby created".

Curry Yes Sir.

Tipping J Are you going to make something of that.

Curry Well, yes Sir and indeed I've made something of that in the fuller written submissions, but it all links together because it's dealing with a particular term which comes to a close and then following that there are alternative and separate arrangements put in place which do not extend to WDL.

Tipping J And then lower down the clause, dropping down about halfway of what remains there is references to renewals, extensions and renewed leases.

Curry Yes, that's right Sir.

Tipping J Now do you make any point of the fact that there is no reference, this is a standard clause of course, so perhaps not too much should be read into it but there is no specific reference to the new lease?

Curry No there's not in this document.

Tipping J Or not in this clause.

Curry Not in this clause. The language is one of renewed lease. When we get into the Sublease and the Deed of Assignment it becomes new lease.

Tipping J But I signal for myself, I need more help from you on this concept of the alternative, that is to say that you can assign the benefit if you like but not the burden because in a sense it's not a benefit that's being assigned, it's an obligation arguably. I hear what my brother says about it's both in a similar sense but I would need some more help myself on that, not necessarily now but at some stage during your argument.

Curry Well if it's an obligation as well as a benefit it can't be assigned unless there is a covenant or a novation.

Tipping J Yes.

Curry And there's no.

Blanchard J Well that's under the Law of Contract but under Land Law the burden as well as the benefit of covenants touching and concerning the land passes to the person who becomes the lessee as a matter of law, and it's provided for in the Property Law Act and that would happen without any specific reference.

Curry But WDL hasn't become the lessee for that period, it's become the lessee for a term that concludes at 2002. When the parties are looking

beyond that they're looking at a new lease and a new term, and new arrangements and those arrangements have been negotiated as between Gibbons and GUS but when it comes to the assignment it's restricted to the term that finishes at 2002 and the language of referring to lease or this lease as opposed to new lease and has been pointed out, that the renewed lease and the Head Lease, all of those distinctions confirm in my submission what is the plain meaning, and the plain meaning is an assignment of a term which finishes in 2002.

Blanchard J There's the additional point too until one gets to the covenant with the lessor that the burden which falls upon the assignee as lessee is removed again if the assignee further assigns, privity of estate ceases. There is I think a danger in looking at this problem only in terms of contract, it has to be seen against the Land Law background as well.

Curry Yes indeed it does need to be seen against the Land Law background and critical to that in my submission is the concept of a lease. It's an estate, it's an existing estate in land. It's not something that is created in the future.

Blanchard J Well you might be helped in this by a case which hasn't been referred to calls Friends Provident where the English Court of Appeal in 1995 has I think greatly clarified the position. It seemed to me that before that there was some doubt about when you had a new grant and when you didn't and they seem to have made it clear in that case that you have a new grant, therefore an entirely new estate in the land but once you have any extension going beyond the original term, be it by way of extension or be it by way of renewal or something that is genuinely new.

Curry Yes, and I've referred to a New Zealand case on that same point Sir.

Blanchard J Yes, that's Sina Holdings.

Curry Yes, well there's Wagner referring to what's meant by 'this lease' and there's also Sina.

Blanchard J Yes, well the English case is on my reading of them until Friends Provident were a bit equivocal.

Tipping J I don't see how you can be bound in privity of estate beyond the 30 October 2002, so for what it's worth that's my contribution to the point. It may be that Mr Wilson can show otherwise and insofar as the assignor was assigning to the assignee the assignor's estate, never mind right title of interest and so on, then I don't think you could reasonably argue that the estate was assigned beyond the 30 October 2002 so outside contract I think prima facie anyway you're safe after that time.

- Blanchard J Yes that was really my point. There is no estate going beyond the original expiry date and any new estate arising after that time is a completely new estate.
- Curry Yes indeed Sir.
- Blanchard J Different leasehold interest.
- Curry Yes, and as I mentioned in the summary I haven't quite yet got to it but certainly I think it's at page 2 of these notes. Page 2 F, 'the assignment states current term etc the First Schedule states it expires 2002, reference to the new lease does not change the plain statement of when the current term expires. There is one lease and one agreement to lease. The current lease expires on the 30 October 2002' and I refer that the bold references are to the written submissions that were filed and I can take you through those but essentially what I've sort to summarise there encapsulates it. Now if I could just go back to the outline of counsel's notes, under the heading 'plain meaning' we've traversed a number of points that are here, (a) the demise of land for a certain time, (b) Court of Appeal and Wagner, (c) the demise of the sublease and what it sets out in the Schedule, (d) not a reference in the Sublease of a 20-year term contrary is 12 years, but we haven't particularly touched on clause 14(a).
- Tipping J Just before you leave your point (b), would it not at least tend to defeat the whole purpose of this two-step with an intermediate trust relationship exercise if one construed the document as in effect meaning a term of 20 years, because you'd have then done exactly what exactly what you're trying to avoid doing.
- Curry Precisely.
- Blanchard J Well it's a legal impossibility.
- Elias CJ What's the reason?
- Blanchard J You just can't, you can't do it, not at least until we have a new Property Law Act.
- Curry Now If I could go to 14(a), the submission on this is at page 2 in point E, clause 14(a) of the Sublease is crucial because the only reason for clause 4 of the Assignment was to fulfil the requirement of 14(a). That requires a direct covenant for the residue of the term of years hereby created, and this is a point that has been brought up. That was plainly 12 years less than one day and I just observed that Gibbons barely addresses this in its submissions. If the assignment states the current term, I've dealt with that, reference to new lease. As to (g), the documents make a crucial distinction and I've referred to that consistent throughout and it's my submission, and this links to what Your Honour has just said. Gibbons cannot avoid the substantive

consequences of the structure. The new lease is a separate demise, applying Sina Holdings the two separate leases cannot be compressed as one term. There is no reliable evidence and admissible extrinsic evidence as to what the parties to the assignment intended lease to mean and the definition of lease in the First Schedule is Deed of Lease dated 10 July 1991 on which my friend heavily relies does not in my submission assist Gibbons. The term of the lease granted set out in the Schedule to the sub-lease was plainly 12 years less one day. The parties used a Deed of Assignment of Lease.

Blanchard J Is there significance here in the terms of Port Nelson Limited's consent which appears on page 115?

Curry Yes Sir I certainly refer to that and you will see that consent, and as I say, this is spelt out in more detail in the written submission, but it does draw a distinction between the term of the lease and it also contemplates a new lease and if a new lease is to be granted then it will consent and this will be a consent, but its limitation is clearly to the term of the existing lease.

Blanchard J Because presumably they didn't want the Head Lease effectively in law being assigned.

Curry No they didn't, in fact they definitely wanted to avoid that.

Anderson J Mr Curry could we turn to page 117 for a moment? The words appearing after the heading 'lease' in particular I'm looking at.

Curry 117. The words appearing after, whereabouts Sir?

Anderson J Deed of Lease dated 10 July.

Curry Yes Sir.

Anderson J Your argument requires the words 'deed of lease dated 10 July 1991' could be read 'the leasehold estate demised by the Deed of Lease dated 10 July 1991'.

Curry Well it's my submission that that is what it's referring to.

Anderson J Yes that's your argument and if that meaning is adopted your position is unanswerable isn't it?

Curry Well with respect Sir I would have thought so.

Anderson J The mootness arises out of given this argument that more than the leasehold estate has been assigned as being an assignment of everything incorporated in that lease which is perhaps a strange meaning for lease in normal parlance.

Curry Indeed it is, and what's crucial in that respect Sir is the demise. What a lease does is demise and what it does is demises certain premises for a certain period of time and when that is all considered and taken into account you get to the position where it is referring to something that concludes in 2002.

Tipping J Is any assistance to be gained, this may be fragile, that will pay the rent provided for in the lease? There wasn't really any rent provided for as such in the new lease. It's inherent there would be but it wasn't exactly provided for. Does that help in reading lease as my brother Anderson has suggested or is it just too fragile Mr Curry.

Elias CJ Well it was to be reviewed after the date.

Tipping J No, but the point is what is meant in clause 4 of the Second Schedule by the words 'the lease'?

Curry Yes Sir.

Anderson J If you read it the same way then you get a less strained meaning in a term of a deed. So you'd read it during the remainder of the term of the leasehold estate demised by the Deed of Lease dated 10 etc, etc.

Curry Certainly Sir you would expect any obligation to pay to be in the context of an existing lease not a contemplated future lease.

Tipping J You see crucially it's the obligation to pay isn't it that sought to be enforced against you in a sense? They want the money.

Curry Yes they want the money Sir, yes.

Tipping J This is what the case is all about, so I don't want to sound facetious but therefore it just struck me that you have to have covenanted to pay the rent in the new lease.

Curry Well there's no such covenant.

Tipping J That's what they have to argue against you.

Curry Yes, yes Sir.

Tipping J And you're saying no you haven't a covenant.

Curry Indeed that's what I am saying Sir.

Anderson J It seems to my mind rather awkward to talk about the Deed of Lease having a term. I mean the Deed of Lease creates four states – a leasehold interest, a trust, a day when the parties have no relationship whatever with each other and the 1 November 2002 and thereafter an agreement to lease which would be enforceable. Now there's no term

to the Deed of Lease at all, so 'term' can only be given a meaning if one adopts that expanded meaning that I suggested a moment ago. Can one talk of the Deed of Lease having a term?

Curry No, it's the demise that has a term and the demise is contained within a Deed of Lease.

Anderson J It doesn't say this Deed shall be operative from the 1 November 1980 to the whatever it is, the 30 October 2010 and thereafter shall have no effect whatever.

Curry No it doesn't say that Sir.

Thomas J You focus in the recent exchanges on the estate. What meaning do you give to the words in the Assignment, the additional words, right, title and interest in the premises and the land?

Curry Well it essentially comes down to the right and title relating to the arrangements emerging from the Head Lease.

Tipping J Is that not simply there to delineate that not only is the estate in Land Law terms being assigned but also all rights, titles and interests that go with the estate qua lessee? Is it any more complicated than that?

Anderson J The incidents of the estate.

Curry Yes it's the, yes indeed Sir, which essentially turns on what is the estate, you go back to the Head Lease and your assigning a certain amount of that estate and the rights and title pursuant to it.

Thomas J So when you get to the clause 7 and the landlord consents to the assignment but without prejudice to the landlord's rights, powers and remedies, they also have to be limited to the estate and the right title and interest arising out of the estate.

Curry Well the landlord's rights and remedies, those under the Head Lease.

Elias CJ But they include the right to require renewal.

Curry Yes they do, that's vis a vis as I say as between Southways and the Head Lease. What's included there are the rights that arise from the head lease between Nelson Harbour Board and Gibbons and essentially Gibbons is preserving all its rights, powers and remedies under the Head Lease, so it's preserving its rights and those rights as arises between the parties to that Head Lease but WDL is not one of those parties.

Elias CJ Yes I understand that. There wouldn't be any need to preserve the rights against the Head Lessor would there if what was assigned didn't include the interest in the new lease?

Curry Well it may well be belt and braces but essentially the Head Lessor is being cautious both in terms of what it preserves there and then when it comes to the consent to the assignment there is the distinction that we've already discussed, that's the distinction based on the differing terms and it's the term of the lease that ends in 2002 that is specifically consented to and a distinction is made between that and what might be a new lease to be entered into the future and on what basis that would be consented to if certain conditions were met.

Tipping J Is the simplest possible way of expressing this from your point of view that you covenanted to pay the rent only during the remainder of the term of the lease and that is a term of art in a sense in that it's referring to the term of years created by the Deed of Lease and no more.

Curry Yes Sir.

Tipping J It's as simple as that from your point of view really?

Curry It is Sir, its.

Tipping J And nothing really can extricate the respondent from that simple analysis.

Curry In my respectful submission that's absolutely correct in the term stated to be a period of time, 12 years less a day, and there's a commencement date and that's it.

Tipping J And how did the majority in the Court of Appeal overcome that elegant simplicity?

Curry Well the majority appeared to consider a commercial purpose and it looked at the commercial purpose of the total arrangement without really taking fully into account that WDL was not a party to that total arrangement. It looked at the 20-year relationship which is divided up, I'd previously described it as a lease, a trust period and a new lease. His Honour Justice Anderson has pointed out, well look there's another day to be taken account of.

Anderson J The commercial purpose has given this lease its manifest. It's the form of the document against the background of trying to avoid an assignment.

Curry Yes indeed Sir.

Anderson J But more crucial is what's the commercial purpose of the assignment? That's what we're dealing with here and it's not as obvious on its face.

Curry Yes, yes Sir. Well it may not be as obvious but in my submission when you apply terms like 'lease' and 'this lease' and the 'termination

date' and the distinction with 'new lease' that it does become clear. So going to my notes again, page 3, para.7, 'the Court may consider the commercial purpose of a contract or a provision thereof, and I refer to the submissions on that, however there are important constraints to ensure an objective interpretation, including subjective intentions are irrelevant and the purpose must be able to be identified with reasonable certainty, creative interpretation is another thing altogether'. Those latter words are from Lord Lloyd, he was dissenting in the ICS case but nevertheless in my submission they express the law. In para.8 Gibbons has searched that the parties commercial purpose was to transfer to WDL all the rights and obligations of Southways, including the right and obligation to take a new lease. It relies upon inadmissible statements with subjective intention by employees of Gibbons and Southways. The assumption not apparent from the documents is also relied on and that assumption is that Southways intended to assign, and WDL intended to take the benefit of the new lease and consequently 'lease' must be read as including the new lease throughout the assignment document. There is no evidence in support of that assumption. Moreover in the context of a business take-over in industry rationalisation it is just as likely that the purchaser will want to rationalise tenancies than to retain them. There is no evidence that the Nelson premises were a key strategic asset and Southways could not have.

Tipping J Why do you put that phrase in inverted commas?

Curry Oh that's from my friend's submission Sir.

Tipping J Oh right, thank you.

Curry And Southways could not assign its obligations. It was always going to remain liable to take the new lease whether WDL also assumed that obligation or not, and it's our submission that His Honour Justice Chambers got it right. The party's commercial purpose in 1997 is uncertain. The majority glossed over the arrangements and re-wrote the words by reference to an assumed commercial purpose. No such purpose arises from the documents or the evidence. The sole purpose of the covenant in clause 4 was to comply with clause 14 (a) of the Sub Lease. It required a direct covenant until the expiry of the initial lease only. In seeking to interpret clause 4 by reference to an assumed commercial purpose Gibbon seeks to benefit which it was never entitled to. Certainly WDL had no reason to confer or give this benefit and on subsequent conduct Gibbon's relies on WDL's subsequent conduct, the majority of the Court of Appeal correctly held that such evidence did not offer any legitimate assistance. Subsequent conduct evidence is inadmissible. The Court of Appeal has indicated that the issue may be open, and I refer to Drew, however the traditional rule in my submission is basically sound. If subsequent conduct were admissible only reliable evidence ought to be admitted. The evidence upon which Gibbons seeks to rely is not reliable evidence of the

parties' intentions in 1997. Different personnel were involved subsequently and they did not seek legal advice on the assignment or consider it in detail.

- Elias What about the term of the sub sub-lease?
- Curry That was the lease to.
- Tipping Infogate.
- Curry Infogate.
- Blanchard J TNL Group.
- Thomas J You've got the two things, you've got the TNL sublease and then the assignment to Infogate.
- Curry Well dealing with them in that order, the first one is simply purporting to assign something that it doesn't have, it's essentially taking as it were a punt on what will happen in the future.
- Elias CJ Sorry, where is it in the documents, what page?
- Curry It's under volume, I think it's tab 17.
- Elias CJ Thank you.
- Blanchard J At that point.
- Curry Oh no that's Infogate at 17, sorry.
- Tipping J It's 16.
- Curry 16.
- Blanchard J At that point in April 1999 was GUS still in existence?
- Curry I'm not sure about that, could I just pause. I don't know when it was struck off. I can't answer that right now.
- Blanchard J There's no evidence on that? GUS, am I correct in thinking GUS became a subsidiary of Wholesale Distributors?
- Curry No well I don't think it did Sir.
- Tipping J It didn't.
- Curry No, it didn't.

Blanchard J It didn't, right, so Wholesale Distributors didn't have control of what GUS might do?

Curry No it didn't Sir.

Blanchard J Right, thank you.

Thomas J Could we just go back to your earlier answer which I think went something along the lines that the company purported to have signed something it did not have and took a punt on what might happen in the future. Could you be a little more exact in what you mean?

Curry Well essentially Sir what was occurring here is that there was a Deed entered into and the term of it was 3 years 8 months and 29 days, the expiry initially was 29 October of 2002 and then it went on to renewal dates beyond that period and so essentially what it was purporting to do was to create a relationship with the TNL Group which extended out to those additional periods, so that if for example Wholesale Distributors were unable to, if all things had continued and that somehow had not taken the new lease well then they had a problem.

Tipping J Well they had the option of trying to fill up their title. If they could all would be well, if they couldn't they would be sued.

Curry That's right Sir, indeed.

Thomas J It doesn't sound very commercial.

Curry Well it's not very commercial Sir.

Elias CJ Well it's only explicable on the basis that they believed at the time they could deliver.

Thomas J Surely.

Curry Well this was entered in much further down the track, I'm just trying to get the date of this, 7 April of 1999 and I've referred you to the evidence relating to that.

Elias CJ That it was done without legal advice, is that what you were saying? It seems a fairly elaborate assignment, better than the standard form we've got for the other one.

Curry Yes it is. If I could go to the evidence that I was referring to, this is the evidence of Adrian Walker.

Elias CJ Sorry just let's stick with the document for the moment. I'm just looking at page 126 about the premises held on trust, the renewal terms not being deemed granted till 2 November 2002. It's a fairly elaborate assumption of the Head Lease entitlements isn't it?

Curry Well, its, its.

Elias CJ I mean it's not just a mistake as to the term of the entitlement, it's explicitly invoking the Head Lease on this crucial point isn't it?

Curry Well it's certainly referring to the Head Lease.

Anderson J Well the only inference one can take is that at the time this was executed the sub-lessor all thought it stood in the shoes.

Elias CJ Yes, yes.

Tipping J Well it may, it's speculation, but it may have thought it had a right to call for the New Lease. That would explain that but subsequently on the balance of economics if you like, it decided it wouldn't and put itself into breach of contract with its sub sub-lessee.

Curry That would have been the position it would have been in Sir.

Thomas J Do you really adopt that Mr Curry, what my brother Justice Tipping has said?

Curry Well that's the consequence of what flows from this document. Essentially there was this deed of sublease entered; it was entered in a way that it was dealing with a term that it did not have and if it was caught short as I said in the future it would have had to pay the penalty.

Anderson J From a commercial viewpoint even if it was a risk it was a very small risk and as it happened in the event there was no risk at all because the subsequent assignee or sub sub-lessee wasn't in a position to complain.

Curry Yes, absolutely, that's absolutely right Sir.

Anderson J Now whether one can extrapolate from the intention of corporation two years after an event the same intention two years previously is a bit more difficult.

Curry Well certainly the Courts below didn't think that was the case Sir.

Elias CJ Well your submission is that post-contractual conduct is not admissible to assist but we were exploring whether this deed of sub sublease is consistent with the interpretation that the respondent contends for on the assumption that it is admissible to throw light on what, and it is, it seems to me. Well it seems to me to be totally consistent with respondent's interpretation, now you still maintain the argument that you can't look at this subsequent conduct, but that's a separate point.

Curry Well there has been recognition in Drew that there may be a need for reconsideration. There has been the observation per Lord Lloyd in the

House of Lords that if there is subsequent, no he was talking about a purpose of interpretation, but if there is to be such a consideration of purpose, and I'm just drawing an analogy here, it has to be based on reliable evidence.

Elias CJ Yes, indeed.

Curry And it's my submission that this is not reliable evidence.

Elias CJ Well it's not opinion evidence. I can understand you saying that subsequent opinion evidence, but it's pretty uncontroversial evidence. You may make the point that they may have misunderstood what their obligations were and that is one of the risks with post contractual aids to interpretation, but you can't really dismiss this as un-objective evidence.

Curry Well it depends what it's evidence for. If it's evidence for what they agreed at that particular time clearly it's objective. If however the transition is made to say this is evidence of what the parties' intentions were back in 1997 well then in my submission.

Elias CJ Well I understand that submission, yes.

Tipping J Is there anything in this document which covenants as between the parties your client and TNL that your client will take up the new lease, which is what one would expect if one was as it were if the parties had that issue directly in their minds?

Curry Well there's no such covenants.

Tipping J In other words it's not uncommon if you need to fill up your title in order to comply with the instrument you are now entering into will fill up your title.

Curry Yes you do Sir.

Tipping J But perhaps this is all getting quite fragile.

Thomas J Could I just raise a point with you on this and it may well be that your submission is quite sound in this regard. Reverting back to commercial purpose, it just seems to me to be artificial for the Court not to endeavour at least to ascertain the commercial purpose of a document, of a contract and that's the assignment and as I understand your submission there's not enough evidence to indicate what the commercial purpose of the assignment was. Is that correct?

Curry Well other than the very clear purpose which was to comply with the requirement of 14(a) of the sublease.

- Thomas Well that's to sort of look at commercial purpose as if it were a question of interpretation. I wonder whether when one looks at extrinsic evidence of this sort it may not be valid in helping the Court to appreciate what commercial purpose was, apart from this more narrow question of whether or not you can retrospectively apply the intent.
- Curry Yes Sir, well let's for the sake of argument go back to a larger commercial purpose and that was to ensure that there is this relationship extending over a 20-year period.
- Thomas J That's the original Deed of Lease.
- Curry That's the arrangement that was entered into which was the lease, the odd day, the trust relationship followed by a new lease. Well the purpose of all of that was to avoid the assignment, was to avoid a situation where the full term was assigned.
- Thomas J I grasped that.
- Curry But it's not the sort of purpose that leads to a conclusion that well this purpose was something that WDL when it entered the assignment also shared. From WDL's position all it was doing was wanting to take over some business premises, rationalise its leasing and that was it.
- Thomas J So we're really up in the air on the commercial purpose of the assignment?
- Curry Well, yes Sir, in my submission it was an assumed purpose. Now going back to my notes at para.12 Gibbons has considered it necessary to rely on evidence of subjective intention; that evidence is all irrelevant and inadmissible. WDL has consistently objected to it. WDL's application for directions in respect of that evidence remains on foot and I observe with respect that perhaps the too usual approach is to address admissibility at trial if necessary. The High Court and the Court of Appeal both correctly considered that the evidence did not offer legitimate assistance. Accordingly there was no need formally to determine the application but it remains on foot. Gibbons asserts that Justice Ellen France held that the application must not pursue. The paragraph of her cost judgment on which Gibbons relies was a direct quote from Gibbons' memorandum recording the submission, not her finding. In the next paragraph she concludes simply that no formal findings were made. WDL had no reason to withdraw the application and it did not do so.
- Tipping J Is this any more than saying you argue that (a) it was inadmissible but (b) if it was admissible, it helped no one?
- Curry Yes Sir, essentially that's it.

Tipping J And we'll have to resolve it?

Curry Well it depends on in part I would have thought Sir as to where you get to the plain meaning.

Tipping J Oh yes, assuming we get to the point we'll have to resolve it.

Curry Yes Sir.

Tipping J Now all this business about whether Justice Ellen France did or didn't surely is not very helpful is it?

Curry No it's not Sir it's just that I wanted to make it clear to this Court that.

Tipping J Well you've never resiled from those two propositions that are tenant admissible and if it is it's unhelpful.

Curry That's correct Sir.

Tipping J Right.

Blanchard J Are you arguing that the existence of the sub sublease is inadmissible? In other words are we allowed to look at that document?

Curry Well if it's purported to be evidence of the party's intentions back in 1997, I might have the date wrong, I would say it is inadmissible, but if it's for some other evidential purpose well then it may be admissible.

Tipping J If we let in evidence of subsequent conduct at all surely this is for what it's worth an entirely reliable piece of evidence, the deed of sub sublease.

Curry Well again, reliable for what Sir? In my submission it's not reliable for the parties' intentions at the time they entered.

Tipping J Right, I take that point.

Curry I now move to para.15 and additional points raised by Gibbons. They submit it was required to consent to the assignment and would only have done so on the basis that WDL covenanted to enter the new lease. Quite apart from being a statement of subjective intention this is irrelevant. Gibbons was not entitled to insist on a more extensive covenant than it was entitled to under clause 14(a) of the sublease. Gibbons submits that it consented to the assignment without prejudice to its rights under the sublease. This is also irrelevant because Gibbons retained its rights against Southways. Any rights Gibbons obtained against WDL were an additional benefit. Gibbons repeatedly refers to the assignment to WDL of rights and obligations. This ignores the correct focus on benefit and burden. Southways could have signed benefits but there must be a covenant or novation to assume burdens.

Tipping J That latter isn't quite a correct statement is it Mr Curry, there must be a covenant or novation or privity of estate creating the burden? I think you'd have to include that if one's purporting to put an exhaustive statement up. Do you accept that?

Curry Yes on reflection Sir.

Tipping J You say it doesn't do you any harm but.

Curry No, no. In the circumstances, but yes Sir.

Blanchard J Well perhaps we could just add on to the end of that sentence 'to assume burdens continuing beyond the point at which WDL ceased to be the lessee'.

Curry Yes Sir. Now finally Sir, commercial parties do value certainty. Gibbons submits that they value more greatly that other commercial parties will not be permitted to resile from their bargains. That merely begs the question as to what the bargain interpreted objectively wants.

Thomas J Well let's assume that the parties actually intended that a leasehold interest would go through till 2010, that's there actual intention. Would it not add to certainty more to know that parties can be held to their actual intent than to speculate what might be the presumed intent?

Curry Well if the actual intent is expressed in plain language, there is no problem.

Tipping J No.

Curry But the problem does arise if the plain language does not express the actual intent of the parties and in that case what is required is an application to remedy the situation if there were some form of concern about the document or an agreed amendment.

Tipping J You mean rectification?

Curry Rectification if there were a subsequent dispute that would be the remedy, but if, primarily as Your Honour recognises.

Thomas J Although the cases have now recognised that rectification need not exclude a wider approach to interpretation.

Curry Some of them have Sir, yes.

Thomas J I'm just troubled by this because you know you'll know well that Lord Steyn has said 'the law of contract is about delivering the reasonable expectations of honest men', and that's gained him immense, I think everybody quotes it. But it troubles me that a party can rely on the

actual wording, or the plain wording, in the knowledge perhaps that that was not the actual intention of the parties.

Curry Well that's an assumption and hypothetical. In this circumstance in my submission the party's intention was properly expressed in the plain meaning of the document.

Thomas J Yes, so there's no dishonesty?

Curry No dishonesty, no Sir and just considering the broader aspect is Your Honour in delivering the judgment and both parties recognised as did the Court of Appeal who said that what Lord Hoffman said about 'we don't take lightly, we assume that when people use language they mean what they say, particularly in formal documents' and in my submission that's what is the case here, and if subjective intent does differ, even if it's an agreed from what's in the formal document well then in my submission it's not admissible.

Thomas J I'm not talking about an agreed attempt later in the piece, evidence of it later in the piece. I just assumed there's been exchange of correspondence and in the course of the exchange of correspondence both parties have said when they referred to the lease that is until 2010. It's not negotiating about it or anything, they're just using that phrase because that's what they actually mean, but it's not the wording in the document.

Curry No it's not the wording in the document Sir.

Tipping J Well I think in my brother's hypothetical it would be a clear case for rectification if one strangely found oneself unable to construe it according to the parties actual intentions, but here of course the argument really surrounds the fact that you can't derive anything reliably for intention other than relying on the words they've used.

Curry Indeed Sir.

Tipping J That's it.

Blanchard J Which have a well understood conveyancing meaning.

Curry Yes Sir. Well I had left some space for a summary but I think I've made the points that I wish to make unless I can help the Court further.

Thomas J Has your junior got a spare copy of the Drew judgment of the Court of Appeal?

Curry Yes he has Sir.

Thomas J Not immediately but sometime before the.

Blanchard J There are several judgments, or two anyway.

Thomas J Judgments.

Tipping J Let's have all of them if there are more than one.

Elias CJ I have a question. You haven't really addressed as much on general principles of interpretation. What I had in mind is, is there anything in the fact that the Deed of Assignment of Lease is a standard form and the matters which caused difficulty are all in the additional text inserted by the parties therefore for example reference to the Deed of Lease, new lease being granted? Shouldn't we be looking, shouldn't we be placing rather more emphasis on that language than on for example the headings and so on?

Curry Well Your Honour, yes, and it's for that reason that I submit that clause (u) was critical and the Schedule to the Assignment was critical and certainly looking at what is there.

Elias CJ Sorry, what aspect in the Schedule, I'm only talking about the Deed of Assignment of Lease here and you've referred back to the lease itself, the Deed of Lease.

Curry So you're referring to the sublease?

Elias CJ I'm referring to the Deed of Assignment of Lease.

Curry Oh yes, that's what I was referring to and well no, clause (u) I was referring to the sublease and when I was referring to the Schedule in particular that's the Deed of Assignment.

Elias CJ Sorry, which aspect of the Schedule? I don't want you to repeat but just identify it.

Curry It's the words in the Schedule that fall outside the standard category. For example opposite lease there's the reference to Deed of Lease dated such and such, and then opposite the expiry date of lease.

Elias CJ Oh yes, in the First Schedule, yes.

Curry The words '31 October 2002 with a new lease being granted for a term expiring 31 October 2010'.

Elias CJ Yes, yes. So you accept that those additional insertions need to be given greater weight than the standard form of the Deed of Assignment?

Curry Well the submission is that they're critical to what the parties agreed to but as far as the relationship to the interpretative principles which are in part 4 of our written submissions, it's the same principles.

Tipping J This is a document which is designed to be filled up with the details of the particular transaction and with respect I can't see how you could really make much difference between what was there as a matter of course and what was there because it was necessary to be there to tell you what the transaction was all about. It's the same principle surely.

Curry It is the same principle, that's the point I'm emphasising.

Tipping J That's the point, I know, I'm agreeing with you.

Curry Yes Sir. No I'm pleased Sir.

Tipping J There may be something more subtle that is going to be raised against you but at the moment I can't see it.

Elias CJ Well my point is directed at the heading 'lease' and then the identification of lease as the Deed of Lease dated 10 July 1991, whereas as you were discussing earlier, if one were focused on the Estates and the Land Law principles it would be more accurately the lease comprised in the Deed of Lease or something like that. It's the scooping up of the Deed of Lease dated 10 July 1991 and the doubling up with the reference to the new lease when those two features are so critical to the Deed of Lease of 10 July 1991 that causes the difficulty in this case it seems to me.

Curry Well if it's a difficulty Ma'am it will arise from its words but in my submission when you contemplate Deed of Lease and then you look down at expiry date of lease and it states the expiry date, really the difficulty disappears.

Anderson J I suppose one should assume that lease has the same meaning two lines down from the word lease two lines above it, and if you then interpolate that meaning you've got an expiry date of the Deed of Lease dated 10 July 1991 as 31 October 2002.

Curry That's right Sir.

Elias CJ Which it clearly isn't.

Anderson J Well it is.

Elias CJ In terms of the Deed of Lease of 10 July 1991 the expiry date is 31 October 2010.

Tipping J It can't be.

Curry No it means, what it does is show that when they say Deed of Lease they mean the term of the demise.

Anderson J Expiring on the 30 October.

Elias CJ It may. Alright but there isn't any additional submission you want to direct on this. Who prepared this by the way, do we know that? Was that part of the evidence, who prepared the Deed of Assignment?

Tipping J I was thinking they'll be keeping their heads down at this stage.

Curry No that was Gibbons' solicitors.

Elias CJ Yes.

Anderson J Yes but under clause 14 it would have been someone else wouldn't it?

Curry Under clause 14.

Tipping J The lessor's solicitor.

Curry The lessor's solicitor.

Anderson J The lessor. I've forgotten who the lessor is under this.

Tipping J The lessor is Gibbon.

Anderson J Yes, so it's Gibbon who has prepared it or they would have been obliged to or entitled to.

Curry Yes Sir. So I do rely on the written submissions fully as filed. Thank you Ma'am,

Elias CJ Yes, we'll take the adjournment now thank you.

Adjourned 11.34am

Adjourned 11.54am

Elias CJ Yes thank you Mr Wilson.

Wilson If Your Honours please I start by asking you to note two points of common ground. First that there was a contract between GUS and Gibbons for a term of 20 years and that is made clear first by the written submissions of my friend for the appellant at para.3.9, where they submit 'the contract was structured with two leases separated by a relationship of trustee and beneficiary'. Your Honours I add the submission, well with respect supporting that submission, that the contract must have been embodied in the Deed of Lease because there was no other relevant document between GUS and Gibbons and if I could therefore seek to summarise that relationship in four words it is

'one contract, two leases'. My learned friends make the same point absolutely clear at para.19 of their written submissions when they make the submission at para.5.17 Your Honours. There is an acute distinction between the term of the contract and the term of the sublease and they're referring there of course to the first lease. Pursuant to clause (u) Gibbons and Southways agreed to a relationship for a 20-year term but they did not agree to a sublease for the 20-year term. Because it's our submission that there's a contract with a 20-year term and the two leases together made up that 20 years. Your Honours it follows in our submission that the only issue which you have to decide is whether under the Deed of Assignment from GUS to the appellant there was assigned all the interest of GUS under its contract with Gibbons or only its interest under the First Lease. It comes down to that.

Tipping J So you could say was the whole contract assigned or only the first part of it so to speak?

Wilson Precisely.

Tipping J Is that a fair way of?

Wilson Yes indeed, that's the issue. And relevant to the answer to that issue is the second point of common ground to which I refer, namely that the assignment occurred in the context of the sale of a business and that's confirmed by the affidavits of Mr Cottam of GUS and Mr Walker of the appellant. Mr Cottam's affidavit is to be found Your Honours from page 237 of the case and I ask you to note firstly para.4 on page 238 where Mr Cottam deposed to page 238 Your Honours 'GUS had occupied the land and warehouse subject to the sublease since 1968. In 1991 GUS and Gibbons decided to renegotiate the terms of that occupation because the premises had become a strategic site for GUS as a distribution centre for its upper South Island activities' and then over the page 239 in para.9 'Mr Cottam was part of the management team involved in negotiating the transaction between GUS and the now appellant'. In broad terms the purpose of the transaction was for the appellant to take over certain of GUS's key warehouse distribution centres. The premises and the sublease in question were identified as one of those key centres. I'll come back to this sentence later. Now the intention was that the appellant would take over the key centres on the terms and conditions that GUS held them at that time.

Tipping J That is presumably a reference to the deponent's intention is it?

Wilson Yes indeed, well in fact yes the deponent's intention, in fact there is, yes indeed, well it's expressed as more than that, he can only really speak of his own knowledge.

Elias CJ He was General Manager at the time?

Wilson He was indeed.

Elias CJ Yes.

Wilson CJ Of GUS. But Your Honours the point I make is really an introductory submission to an examination of the assignment is that in the nature of things it was unlikely that when the appellant was taking over the business it would take over only the First Lease and not the contract. I don't suggest this is decisive at all but in the world of commercial reality it was likely that when taking over the business the appellant would take over the contract.

Elias CJ You said you were going to refer us to Mr Walker's affidavit too.

Wilson I'm sorry, I can just give you the reference there. It's page 253 of the case, para.14. I don't need to take you to it unless you wish me to but he confirms there that.

Elias CJ And what was his position at the time?

Wilson He was a General Manager of property for the appellant and again his reference in para.14 was that the assignment was in his words 'part of the larger transaction, namely the sale of the business'.

Anderson J Sorry, what page is that?

Wilson That Sir was on page 253 of the case, para.14.

Anderson J 253, thank you.

Wilson 'Part of the larger transaction, the sale of the business'.

Thomas J Does this lead to a possible ascertainment of a commercial purpose?

Wilson Indeed, indeed. I put it though the argument Your Honour rather in terms of that was the context in which the assignment was entered. It's a contextual matter.

Thomas J Well it could be, yes I agree with that. Context is probably the best word to use but it could also be said that the commercial purpose was to transfer the business together with such rights.

Wilson Yes indeed, and as I've said it's not decisive but it's more likely when you're taking over a business, you take over the existing contracts, particularly contracts of such significance as the lease arrangements over key premises. And perhaps as I relate a point I don't place too much strength on that, but in terms of general commercial practice if the intention was that the appellant would take over something less than the rights of GUS under its lease, a sublease would have been the usual vehicle rather than a complete assignment of the interest.

Another short contextual point. Your Honours that brings me to an examination of the Deed of Assignment that's obviously a crucial document and let me make it quite clear at this point in my argument that although I will be seeking to rely on subsequent conduct and indeed mutual subjective intent I'm not seeking to do so as a make-way for the basis for getting around the plain words of the Assignment. To the contrary as I will seek to persuade Your Honours over the next few minutes the relevant terms of the Deed of Assignment read as a whole sensibly admitted only one interpretation namely that and unsurprisingly what was being assigned was the interests of GUS under the contract and not just its interests under the first lease.

Tipping J Is there a difference Mr Wilson, a potential difference anyway, between what was being assigned between assignor and assignee and what assignee was contemplating to do vis a vis lessor?

Wilson Theoretically but unlikely.

Tipping J I'm not sure about, anyway you'll develop that I'm sure.

Wilson I'm about to develop that and I know it's trite to submit to a Court like this and I'm going to have to look at a document as a whole in construing it and not just some references but it's perhaps it's worth emphasising the point that in the Boat Park adoption of the Investors' Compensation Principles which we've set out for convenience at para.10 of our written submissions, both the, really all three principles there refer to the document and not just particular words or terms of the document. First the meaning to be ascertained was that which the document would have conveyed. Secondly the reference in the fourth line to the language of the document and thirdly the reference to the meaning of a document, so at the risk of being trite it's necessary to look at the document as a whole. I now invite Your Honours therefore to turn to the Deed of Assignment starting at page 116 on the case on appeal. In my submission there are a number of provisions of that document which are relevant to the issue which I've identified, namely whether it was an assignment of the interest of GUS under the contract or only its contract under the First Lease. The first and the operative key provision on page 116 in clause 1, 'the assignor' and for convenience I will refer to it as GUS, it's changed its name to Southways. 'GUS having received the purchase price assigned to the assignee, the appellant, all the assignor's estate, right, title and interest in the premises and I emphasise the conjunctive 'and' the lease all as set out in the First Schedule. So this was in its terms a comprehensive assignment of all the interest of GUS in both the premises and the lease. Then Your Honours if you would like to come back to page 116, but if you'd turn please to the following page and this has already been the subject of attention during the course of my friend's argument, the definition of Deed of Lease dated 10 July 1991 and of course the short submission I make is that's the reference to the contract embodied in the Deed of Lease and not just to the First Lease. With respect I

support the point Your Honour The Chief Justice put to my friend just before the adjournment as I understood the point that if the intention was simply to refer to the First Lease, the reference would have been to something like just the lease commencing a certain date and finishing a certain date but it's a comprehensive reference to the Deed of Lease, namely the contract.

Tipping J Isn't the openness simply referring to the instrument in which you will find the lease?

Wilson Yes the instrument within which you will find both the lease and the agreement to lease.

Tipping J But for present purposes where you will find the lease.

Wilson No with respect Sir for present purposes you will find both the leases, both the First Lease and the agreement to lease and both are being assigned – the interest under both as being assigned.

Tipping J Yes, I think I'm with you for the point that they are being professionally assigned into those parties.

Wilson There are a number of provisions which I hope will assist Your Honour and again but because the parties chose to define lease here, any general authorities on what constitute a lease are in my submission not of assistance. My submission stands on the proposition that the reference to the Deed of Lease is to the contract and that's supported in my submission by further provisions. If Your Honours would turn back please to page 116, I'm afraid the document is somewhat confusing because of the number of parties in the way in which additional words have been typed in but if Your Honours would just focus now please on the printed material following the typed clause 9 the words 'whenever words or phrases appear in this Deed and in the Second, Third, Fourth and Fifth Schedules, that also appear in the First Schedule then those words or phrases should also mean and include the details supplied after them in the First Schedule, and the consequence of that in my submission is that wherever the word lease appears, either on page 116 or in any of the Schedules, it is a reference to the Deed of Lease. Then next I would ask Your Honours.

Thomas J Wait just one moment. Why do you say that I'm sorry?

Wilson Because in my submission the effect of those words in the sentence starting 'whenever words or phrases appear in this deed and in the Second, Third, Fourth and Fifth Schedules, but also appear in the First Schedule then those words or phrases shall mean and include the details supplied after them in the First Schedule. In the First Schedule the word 'lease' has after it the definition Deed of Lease dated 10 July 1991, and that's therefore in my submission the meaning to be

attributed to the word lease wherever the word appears in the document.

Thomas J Well that really doesn't take your previous argument any further does it?

Wilson Not in itself but it leads into a subsequent argument I will be making.

Thomas J Yes ok, ok.

Wilson And really the first of these further points at page 116, clause 7 there, the landlord, and that of course is Gibbons, consents to the assignment but without prejudice to the landlord's rights, powers and remedies under the lease. Your Honour, clearly in my submission among the rights, powers and remedies of Gibbons under the Deed of Lease was the right to have the premises leased for the further period through to 2010.

Anderson J A right as against GUS?

Wilson A right as against GUS and in my submission that given the foreseeable possibility as in fact occurred that GUS might go out of business, Gibbons' position was being prejudiced by the assignment if the appellant was not under the terms of the assignment required to enter to a further lease.

Anderson J But GUS could go out of business any time whether it assigned or not. That was a future risk.

Wilson Yes it could but it was more likely to go out of business if it ceased to carry on business in my submission and this really comes back to the point that Your Honours' explored with my friend as to whether it was his position that neither benefit nor burden was assigned and I admit to be a little uncertain at the end of that discussion as to what my friend's position was, but if it was as I apprehend it was, neither benefit nor burden was being assigned. It would have been surprising in my submission if Gibbons which had contracted under clause (s) to enter into a new lease from the Port Company whereas exposing itself to not having the right to have a matching sublease of the premises.

Tipping J I have to confess Mr Wilson I'm left rather struggling to see what you're trying to take out of this clause 7. I would read it as simply saying that in spite of having agreed to the assignment we are preserving all our rights against the assignor. I can't see it as really conveying any more than that, but you've obviously not got your point through to me.

Wilson Well that's undoubtedly my fault Your Honour.

Tipping J Well no, not necessarily.

Wilson Because if I can endeavour to put it better this way, among Gibbons rights under the lease was the right that the lessee would enter the new lease.

Tipping J You mean whoever that lessee may happen to be?

Wilson Whoever the lessee happened to be.

Tipping J Well you see that's where we differ because I would read that as simply being the remedies, rights and powers under the lease are a reference to the remedies, rights and powers, vis a vis, GUS.

Wilson GUS, well look Your Honour it's not a big point and I probably shouldn't have even wasted time on it but I.

Tipping J No, no alright, ok, I see the difference between the way your.

Wilson Yes, yes, with respect I maintain the position, but my argument's not going to stand or fall on this.

Tipping J Well I now understand it thank you.

Wilson A far more significant and I should have dealt with these points earlier is that going back to the First Schedule on page 117 and to the statement of the expiry date of the lease and of course attention was focused on this during my friend's argument, '31 October 2002 with a new lease being granted for a term expiring 31 October 2010' and in my submission, and I do place considerable reliance on this point, there was no possible reason to refer to the new lease unless the intention of the assignment were to assign all the interest of GUS under the contract and not just its interest under the first lease. Then Your Honours moving to the Second Schedule, clause 1 of the Second Schedule is.

Elias CJ Was there any, just looking at the purchase price for the consideration agreed to in agreement date of 1996. Presumably that's the agreement for sale and purchase of the business, was the a value ascribed to the lease a separate one?

Wilson Well we certainly weren't aware of it and my recollection is there was no such document discovered.

Elias CJ Right, so you didn't ever sight the agreement dated 1996.

Wilson Correct. I must say in recent days it's a thought that has occurred to me but in fact it wasn't pursued.

Elias CJ Because it's actually referred to in the Deed of Assignment of Lease and one would have thought that it was to be read really with it.

- Wilson Yes indeed and it's something that we should have pursued on discovery but we didn't. Your Honours just focusing then on clause 1 of the Second Schedule, 'the assignee effectively now the appellant covenanting with the assignor GUS from the date of assignment to pay the rent in accordance with the provisions and lease and to observe and perform all and singular the covenant's conditions and provisions in the lease contained or implied and on the part of the tenant thereunder to be observed or performed' and in my submission those words plainly encompass the obligation of the appellant to enter the new lease in the Deed of Lease. And then related to that is the.
- Elias CJ That's not a different point though is it, because that's so if the lease is defined as you would have it in terms of the contract then your argument is based on that, if it's not however it flounders?
- Wilson Yes indeed, I accept the logic of that point Your Honour but in my submission let's put it this way, it's easy enough to see the relevance of the commitment to enter the new lease in this context because it's again venturing into the area of a commercial purpose but as I understand from my friend's argument it's accepted that GUS was liable to enter to enter the new lease both prior to and following this assignment and it's unlikely that when GUS had that obligation, it was no longer occupying the premises itself, it was going to leave itself exposed to liability for Gibbons in respect of the Second Lease.
- Tipping J Well it could never shift that liability other than by a complete release.
- Wilson Well quite but what it did in my submission Your Honour is first to obtain the covenant in clause 1 and then secondly obtain the indemnity in clause 2, namely obtain an indemnity from the appellant from and against all claims etc arising out of any default being made by the assignee in payment of rent or in the observance of performance of the covenants conditions and provisions in the lease as from the date of assignment and while I don't resile from my acceptance of the Chief Justice's point that in a formal sense this comes back to the definition, the interpretation of lease whether it's the contract or the First Lease.
- Elias CJ A covenant really doesn't have much sense unless it's tied back to the contractual covenants.
- Wilson Quite, quite, Your Honour puts it much better than I was about to.
- Elias CJ Oh no, I don't know that I do because I don't understand these things. I think I was told that earlier. Go on.
- Wilson I expect Your Honour that's exactly the point that I was about to try and make that although in a sense it comes back to the same point, in terms of the commercial context, in order to give practical effect to clauses 1 and 2 it's much more likely that the word 'lease' in that context extends to the contract and not just the First Lease and again

theoretically it might have a different meaning but that's unlikely particularly since the parties have agreed on the same meaning throughout, so for that reason it is a pointer to the interpretation which I'm putting to the Court. And then clause 4 is of course the covenant from the appellant to the respondent.

Tipping J Do you accept Mr Wilson, sorry to interpose so promptly, but do you accept that this is the only, no-one's pleading the Contracts Privoty Act as I understand it, this is the only covenant under which your client can seek to get the rent from Mr Curry's client.

Wilson Yes, indeed I accept that and therefore it comes back to what's the meaning of the word 'lease', whether it's the contract or the First Lease and Your Honour having put that question to me, can I deal I hope once and for all with any suggestion that somehow in the alternative arguing on a land law principle - this has been a straw-man argument that's been raised against us in every Court in this litigation. We've sought to make it clear throughout that we stand or fall in our argument in contract.

Tipping J And you stand or fall on condition Second Schedule, clause 4 properly construed?

Wilson Properly construed, and I go on to make the submission that I don't accept that I'm asking the Court to strain the interpretation in any way and it comes back to my point so I can derive support from context and subsequent conduct and so on but I emphasise as strongly as I can that's an alternative argument and in my submission it's not necessary to strain the wording of the assignment at all, it's possible to on the plain words to interpret lease as the contract and not just the First Lease as I'm asking the court to do.

Tipping J Wouldn't, and this may sound semantic to some, but if it means what your client contends, wouldn't it say during the remainder of the terms of the lease, because there's undoubtedly two terms here.

Elias CJ Plural includes singular under the Fifth Schedule.

Wilson And even if that wasn't there I would seek to adopt them to the point the Chief Justice raised, namely this is a printed document and it would normally be directed to there being one term.

Blanchard J I was wondering why lease had a small 'l' but given it's a printed document that probably has no significance at all.

Wilson I suspect that's the case and this is an ADLS document and whether it's never been picked up.

Tipping J You can't expect perfection from the Auckland District Law Society.

Elias CJ What's wrong with the small 'l'?

Tipping J Well it's contra-distinction to a big 'L' later in.

Elias CJ Oh I see, I see, it's inconsistency.

Wilson It's a big 'L' everywhere else but if need be I'd make the submission that that on the First Schedule.

Thomas J I have to interpolate that this argument's lost on me. Big 'L's and little 'l's, does it really matter?

Wilson Well it doesn't, particularly since lease on the First Schedule is all in capitals.

Anderson J I think since email systems don't draw any distinction I don't think I will be inclined to either.

Wilson So Your Honour, those are the.

Thomas Wait, before you leave this topic could I just clarify something and it may be very obvious but on the Deed of Assignment 116 there's that asterisk which says 'Head Leases rights, powers and remedies under the Head Lease and that goes back to something where the heading's been crossed out, shareholders crossed out. What's the point of having this in there?

Elias CJ Doesn't it relate back to 'without prejudice to the' and then it's the insertion after that?

Anderson J They've just put the asterisk in the wrong clause, they've put it after the first sentence in 7 but the asterisk part relates to the.

Thomas J That's asterisk to clause 7 rather than up above.

Anderson J It relates to 9.

Thomas J Yeah, ok.

Blanchard J Well it looks as though it could have been in there to have something to do with some words that have been taken out under the heading 'shareholder' which is also taken out, but it makes no sense at all.

Thomas J It makes no sense up there does it?

Blanchard J Well if we knew what this mysterious clause 10 was it might have made sense but that's something that's gone by the look of it.

Thomas J Yeah.

Anderson J If you annex it to 7 you read ‘the landlord consents to be the assignor but without prejudice to the Landlord’s rights, powers and remedies under the lease, Head Lessors rights, powers and remedies under the Head Lease. The asterisk’s in the wrong place. Oh yes, there’s more than one asterisk too, there’s one at the end of lease in clause 7.

Wilson So in summary Your Honour I make the submission that looked at as a whole and in the context of the acquisition of the business of GUS by the respondent the appropriate interpretation and the presumed intention of the parties was that all the interest of GUS under the contract was being assigned and not just its interest under the First Lease. So that’s the primary argument for the respondent and unless Your Honours have any further question at this point I’ll move to the alternative argument which is that extrinsic evidence can and should be taken into account and that evidence supports the respondent’s interpretation and the extrinsic evidence is in two categories – first evidence of post-contract conduct and secondly evidence of what in my submission was a common subjective contention. Dealing with the actual evidence first of post-contract conduct, let me immediately acknowledge the limits which I accept must be placed on the use of such evidence. First it must be reliable evidence, secondly it’s no more than evidence to be put on the scales along with any other evidence and thirdly it must be evidence which illuminates the intention of the parties at the time of the contract and I don’t seek to go beyond those limitations.

Blanchard J Illuminate common intention?

Wilson Yes.

Thomas J You may not want to put it this way but I suppose you could say that the argument you’ve made before based on the wording of the Deed of Assignment in the First Schedule, if not accepted in itself, is sufficient to create an ambiguity to support reference to the extrinsic evidence.

Wilson Yes indeed, and indeed I was proposing to mention later, particularly some evidence of the subjective understanding of the appellant as to what it was taking on the assignment can and should be used to resolve any ambiguity if contrary to my primary submission the Court were to find that there was an ambiguity in the Deed of Assignment read as a whole. Your Honours can I deal with it first and again this of course has been already addressed in the course of my friend’s submissions, but the sublease, sub sublease to TNL, doesn’t my submission provide a very graphic example of the value of post-contract conduct in resolving any ambiguity which might otherwise exist in a contract? And as the Court’s aware it’s quite clear on the evidence that following the assignment which we’ve just been looking at and prior to the expiry of the First Lease, the appellant subleased to TNL for a period which

extended in to the term of the Second Lease. In my submission the actions of the appellant in that respect were manifestly inconsistent with it not having the right and hence the obligation to lease through to 2010.

Tipping J How does this become relevant evidence of common intention between?

Wilson Because the intention of, certainly the intention of the respondent was and it's and I acknowledge that the subject of evidence was to, was that that the assignment should

Tipping J I can understand that if contracting parties later behaved between those parties on a particular premise, that can be quite powerful and you get this evidence let in rectification suites but to illuminate the intention or understanding of one party, even though your client now says of course we shared that, it would, I just thought it seems to me to be a little awkward Mr Wilson.

Elias CJ Well there is the consent I suppose isn't there?

Wilson Yes indeed, I was just about to make that point. Gibbons consented to this lease to TNL.

Tipping J Yes I know, I appreciate that but does it show what the common intention was at the time of the original instrument? I'm just being the devil's advocate Mr Wilson, I understand the force of this document in the broadest of senses but if we're going to let in subsequent conduct it's got to be carefully controlled.

Wilson Precisely and again the respondent wasn't a stranger to this sublease to TNL extending into the second term, it had to consent to it and I'm saying therefore that the sublease is evidence of the understanding, if I can put it that way for the moment, of both the appellant and respondent that at the time of the sublease there was a right of an obligation on the part of the appellant to lease beyond 2002. Now.

Blanchard J Well at least it shows a common understanding of a right to have the new lease in order to be able to give it to TNL. Query whether it chose an understanding of an obligation to take it.

Wilson Well I certainly understand the point Your Honour puts to me but in my submission when one looks at the wording of the Head Lease it certainly seems to be expressed as a mutual obligation, an obligation on the part of the respondent to grant on lease and a corresponding obligation on the part of the appellant to take on lease for the further period so as a matter of contract, I see different considerations might arise as a matter of land law but as a matter of contract it's a mutual obligation in my submission and therefore unlikely that there would be a right to take the lease without a correlative obligation to do so.

Elias CJ Wouldn't that always be the case though, I mean?

Wilson Well certainly as a matter of contract one would expect it.

Elias Yes but that isn't the law in relation to leasehold interests is it?

Wilson As a matter of land law.

Elias Yes, yes, whereas your argument would overcome that in all cases.

Wilson Yes, yes it would. My friend of course sought to deal with this point when Your Honours raised it with him by saying that his client was taking a punt. Well that's apart from being, to put it colloquially, in my submission from being inherently unlikely that a major corporate would take a punt in such matters. It's difficult to reconcile with the evidence of Mr Reid of TNL which is to be found in the case starting at page 200, his affidavit starting at page 200. He's the Managing Director of TNL and can I ask Your Honours to note first what Mr Reid has to say at paragraph 9 of his affidavit at page 202 of the case after referring to the possibility of the lease. I wanted to see the lease between Gibbons and Ratrays, and Ratrays is of course effectively the appellant, as I wanted to be sure that the appellant had the capacity to grant the sub sublease. I had been told by Mr O'Connell, who also worked at TNL who also provided an affidavit that the term of the sublease Gibbons to the appellant was 20 years but I wanted to see it and I asked for a copy to be available. In para.10 the sublease dated 10 July 1991 was faxed to TNL by the appellant on 22 September 1998, the document came to me for checking, the written date 22/9/98 in the top righthand corner of page 1 of the lease is in my handwriting denoting that I considered it on the day it was received from the appellant. I looked at the lease and saw it was for a term of 12 years less one day and it had within it what I understood to be a locked-in arrangement for renewals containing clause (u). I therefore satisfied myself the appellant's period of lease ran through to 2010 so on this evidence it was unchallenged. It wasn't so much a matter of taking a punt but the appellant putting forward its lease as establishing that it had the capacity to lease beyond 2002.

Tipping J Was there any evidence from the WDL camp touching upon this matter? I mean if we're going to let in this sort of evidence of what TNL thought about it, is there some evidence illuminating it as to whether they were in fact taking a punt as Mr Curry suggests or.

Wilson I'm sorry I can't answer that question immediately. Mr Walker of the appellant did put in a pretty detailed affidavit and I fear I won't be able to finish prior to the adjournment so I will check that over the adjournment and then let Your Honours know.

- Tipping J Well you see it seems to me that it will be at least open to an inference that they thought at the time they would be taking up this new lease but subsequently may have changed their minds on coming to the view that they weren't obliged to if that was the view they came to. I mean there are all sorts of possibilities open on this and this is where this evidence of post contract conduct can be a bit elusive.
- Wilson Well I accept that there might be difficulties but in my submission here we're getting at least close to the high point of reliable and useful evidence and could I just ask Your Honours to note also para.14 of Mr Reid's affidavit.
- Tipping J See I can understand Mr Wilson that if the very fact of them having entered into this sub sublease was sort of determinative that could be power for post contract conduct but there are all sorts of possible explanations for this apparent inconsistency and I'm not sure where it actually takes us, but if WDL has said something that helps you then it would be important to take it into account.
- Wilson Well it did Sir and Mr Reid dealt with this at para.14, page 203.
- Tipping J This is WDL I'm talking about, not TNL?
- Wilson No but I just asked Your Honours to note what Mr Reid of TNL says in para.14 'can be seen that the term of the sub sublease, including yours goes out to 1 November 2008, TNL took that sub sublease on the basis of the sub sublease for that term. TNL was told by Progressive that it did have that capacity and my perusal of the sublease confirmed in my mind that such was the case.
- Tipping J It undoubtedly on one view had the capacity but did it have the obligation? You would say it did implicitly accept an obligation by binding itself in contract with TNL to do so?
- Wilson Yes indeed and Miss Radich has just drawn to my attention a copy of the letter attached to Mr Walker's affidavit that's to be found at page 353 of the case, Mr Tait of the appellant to Mr O'Connell 'to follow on from our telephone conversation presumably Progressive accepts your offer as per your letter dated 15 September with only one variation as discussed in relation to the term. Our Solicitors have advised us that the first term should expire on the 29 October 2002 and commence the second period on 2 November 2002, the premises to be held in trust" and obviously reflecting the other lease. This is the first term of four years plus the option of two further three terms, rent reviews subject to approval".
- Blanchard J Why does it say plus the option?
- Wilson There were rights of renewal.

Blanchard J I thought it was supposed to be a commitment not just an option.

Wilson No, it was a commitment on the part of the appellant to lease through to 2008 if TNL.

Blanchard J No no, but isn't this addressing the position vis a vis Gibbons? It may not be, it may be just ambiguous.

Wilson Yes I think it is an ambiguity Sir. It's interesting that.

Tipping J I think they're referring here, I think there's a break at the end of the first sentence before, a consensual break, I think they've changed their minds their focus from the sublease to the sub sublease. I think it's the sub sublease. It's the sub sublease that gives the four years plus two further terms of three, but

Wilson I maintain in my submission Your Honours that obviously the appellant had legal advice as to its position and in the light of that advice saw itself in a position to, saw itself in a position to commit to leasing to TNL through to 2008 if that was required, if TNL so required and then I can now thanks to Miss Radich answer the question that Your Honour Justice Tipping as to the evidence for the appellant on this point is to be found in Mr Walker's affidavit starting at page 254 of the case in para.20 of his affidavit. "A deed of sub sublease between TNL and our appellant dated 7 April 1999 and the appellant sublet part of the premises which it leased from Gibbons to TNL. TNL's sublease commenced on 1 February 1999 and expired on 28 October 2002. TNL had two rights of renewal with further terms of three years each with renewal dates of 2 November 2002 and 2 November 2005. Initially TNL offered to sublet the premises for a five-year term with one five-year right of renewal.

Blanchard J Mr Wilson isn't that, if one were properly able to look at this, evidence from Mr Walker that they regarded themselves as having the right of renewal?

Wilson Yes, so that would be consistent with taking the benefit but not the burden.

Blanchard J Yes, yes.

Wilson Yes, I couldn't say that this was, I'm sorry.

Tipping J Where does this right of renewal come in, I'm sorry I'm not

Blanchard J At para.20 on page 254, that's if we're looking at the material.

Elias CJ Some person is.

Tipping J Well I am. We're talking here about the sub sublease aren't we? We're not talking in ways about the instrument that in contention now?

Wilson Well not directly.

Tipping J No not directly, no.

Wilson At para.21 initially TNL offered to sublet the premises for a five-year terms with one five-year right of renewal and we wish to ensure that the term of the sub sublease should expire on 29 October 2002 was to ensure that the arrangement with TNL took effect as a sublease and not as an assignment because at the same point of course it's given rise to this whole situation. So there's no.

Tipping J Well there's nothing in this evidence really on the key point is there?

Wilson No, no, and there's no challenge to the evidence of Mr Reid as to what TNL were told, and as far as I'm aware there is no other evidence from TNL.

Elias CJ Just remind me, because there was an application for admission of this evidence, it was never actually received was it?

Wilson I think it was more, there was an application never determined to strike it out.

Elias CJ Oh right.

Wilson We filed it and it would be fair to say we thought that the prospects of it being taken into account in the Court's below was fairly remote but we wanted to guard against the situation of reaching this Court.

Elis CJ How far-sighted.

Wilson The other area of post-contract conduct that we seek to point to is the subsequent assignment from the appellant to Infogate which is to be found in the case on appeal at pages 178 and 179 of 300 pages. Starting at page 178 where it can be seen on this occasion it wasn't a standard form used for the assignment but a one-off document prepared by my friend's firm.

Anderson J It might still have been a standard form.

Wilson I'm sure a modest fee was charged for tailoring it to the particular situation here Sir. Let me state that to a degree the same issue arises as to whether the reference to lease is to the contract or the First Lease but in my submission when this assignment is looked at as a whole it certainly, it is more consistent with there being an assignment of the contract and.

- Tipping J Was that this was an assignment of the whole subject to the sub sublease was it?
- Wilson Yes, well but my friend would say I assume an assignment only of the interest of the appellant under the First Lease which
- Tipping J But by whole I meant whole premises.
- Wilson The whole premises, certainly, indeed and subject to that. By deed of the sublease dated 10 July 1991 and so the words are in in brackets and quotes and bold, so the lease is defined as the deed dated the 10 July 1991, referring to the lease of the premises on the provisions contained in the lease, second recital the assignor has agreed to assign to the assignee or the assignor's estate an interest in the lease and the assignee has agreed to accept such assignment, then thirdly the lessor has agreed to that assignment without prejudice to the lessor Gibbons' rights, remedies and power under the lease and in my submission one of those rights, and a very important right of Gibbons under the lease was to have the premises leased for the period from 2002 to 2010 in a situation where Gibbons had committed to renew its own lease from the Port Company beyond 2002. And the assignment in the operative provisions, para.2 a nominal payment the assignor has signed to the assignee all the assignor's estate and interest in the lease for the remainder of the term of years created by the lease but subject to the assignee paying the rent payable under the lease in complying with the obligations imposed on the lessee under the lease, and in my submission one of the obligations imposed on the lessee under the lease was to enter into the second term of the lease. Then over the page 7, assignor's covenants with the lessor, that the covenants of the assignee and its deed shall not reduce or vary the assignor's liability to the lessor well that's acceptable, that just turns on obligations there. The lessor's consent in 12. The lessor consents to the assignment of the assignor's estate and interest in the lease to the assignee without prejudice to the lessor's rights, remedies and powers under the lease and again, I emphasise again, I accept that to a degree this raises the same question but in my submission looked at as a whole the document is more consistent with the lease being the contract and not just the first of the two leases in the contract. Your Honours just as to the law as to taking into account post contract conduct, can I just hand up, and I won't go through them in detail, two articles which Your Honours may find of assistance on the law. The first is the printing in the Law Quarterly Review last year of a speech of Lord Nichols. I think the Chancery Bar Association where his Lordship addressed a number of issues of the Law of Contract, including this use of post contract conduct. Madam Registrar!
- Thomas J He does touch on post contract conduct but mostly his remarks are directed at pre-contractual negotiations.
- Wilson And I'm not putting this forward as a.

Thomas J Its Lord Steyn's article that was more directed to subsequent conduct.

Wilson Yes but this is perhaps a more recent exposition on the subject. It's not the most recent, I'll hand it up in a minute but I certainly should point out to any of Your Honours who haven't had the opportunity to read this article, what with respect are the appropriate accolades which Lord Nichols extends to Your Honour Justice Thomas and to.

Thomas J It could be the kiss of death Mr Wilson.

Tipping J Is that the key point Mr Wilson?

Wilson No Sir, no Sir, it is a collateral point.

Thomas J You would have been wise to black that out in heavy black ink. Too late now.

Wilson Quite. So Professor McLaughlan referred to

Thomas J I would have thought you would have appended Professor McLaughlan's article to your written submission. That was of course prepared for publication in Australia. I would have thought that there were better articles by the same Professor.

Wilson I'm about to hand one up.

Thomas J Ok.

Wilson Not even quite published yet I think so it really isn't not even hot off the press. It's about to come off the press but can I ask Your Honours just to note in relation to Lord Nichols speech at pages 588 and 589? He does address the question of post contract conduct.

Thomas J Well it might have been misleading for me to say that his remarks are directed to pre-contractual negotiations. What he says under that heading is also relevant to these two pages of where he deals with post contract conduct.

Wilson Yes he does but I'm not proposing to take the Court's time but can I just ask you to note those references at pages 588 and 589 and in particular to his Lordship's conclusion at page 589 in the paragraph prior to the subheading 'statutes', where in the second sentence in that paragraph he had this to say "even so but surely in time the law will recognise what we all recognise in our everyday lives that the parties' subsequent conduct, that is their conduct after they had reached agreement may be a useful guide to the meaning they intended to convey by the words of the contract" and that's the argument.

Tipping J His Lordship's reference in almost the same breath to estoppel by convention does tend to suggest what His Lordship had in mind by the concept of persuasive post contract conduct. The tests for that may give some guidance to the way forward.

Wilson Yes Sir I accept the analogy. In the final paragraph on page 591 the conclusion where His Lordship suggested that what he referred to as the modest developments he'd mentioned are overdue wouldn't improve the law in this field and again without taking the Court's time, I can see that we've just about reached the time for the adjournment, I also hand up this article of Professor McLaughlan which is actually a response to an article by a Mr J. Lowe, arguing against the post contract conduct. In this article Professor McLaughlan addresses and in my submission answers very effectively the various arguments against any proposition that post contract conduct should never be taken into account and just before I conclude this part of the submissions I should apologise to the Court and the Professor for the fact that for some reason I can't understand in para.14 of our written submissions Professor McLaughlan's name was spelt wrong and somewhere between the final draft and document it got wrong, it should of course be McLauchlan. Your Honours would this be an appropriate time to adjourn? I haven't got very much more to debate.

Thomas J The other article which is referred to in footnote 45 of Professor McLauchlan's article that you've attached by Lord Steyn. He doesn't go into it in any great detail but his opinion is quite emphatic and there would be from your point of view some worthwhile quotes from that article. You might like to put that to the Court as well.

Wilson Thank you Your Honour, I'll ensure that's done over the

Thomas J Because what he does address is post contract conduct.

Wilson Yes, yes, there's always the problem of not to burden the Court with too much material when there is so much writing on the area and I had sought to focus on what seemed to be the most recent authority.

Thomas J Yes, well may be but with all respect I would have thought that the first article to refer to would have been Lord Nichols' article in the Law Quarterly Review rather than Professor McLauchlan's article written for Australia.

Wilson Obviously I don't wish to debate with Your Honour but including references to this country too, Sir.

Elias CJ Alright thank you Mr Wilson, we'll take the adjournment.

Adjourned 1.01pm

Adjourned 2.15pm

Elias CJ Thank you. Yes Mr Wilson.

Wilson Your Honours please over the adjournment Miss Radich has obtained copies of the text of the speech of Lord Steyn which is noted at footnote 45 of Professor McLauchlan's Queensland article, so can we hand these up.

Elias Thank you.

Wilson I apprehend in particular the passage to which Your Honour Justice Thomas may have been referring is that which appears in the top part of page 10 where Lord Steyn referred to the Investors' Compensation judgment as raising questions about two sacred cows of English law, namely that the Court is not permitted to use evidence of pre-contractual negotiations of the parties or two of their subsequent conduct in aid of the construction of written contracts even if the material throws light on subjective intentions of the parties. One view is that these rules follow from the principle that the task of the Court is simply to ascertain the objectively ascertained contextual meaning of the language of the contract. The other view is that the restrictive rules are imposed as a matter of legal policy to achieve certainty and His Lordship referred to some international conventions as the principle permitting such evidence to be taken into account and no doubt this liberality is due to the subjective approach of the Civil Law system and then he went on to say 'possibly we are swimming against the tide. In England the rule about prior negotiations may for the moment be relatively safe but I'm less confident about the life expectancy of the rule excluding subsequent conduct. Business people, and for that matter, ordinary people simply do not understand a rule which excludes from consideration how the parties have in the course of performance interpreted their contract. The law must not be allowed to drift too far from the intuitive reactions of the justice of men and women of good sense. The rule about subsequent conduct may have to be re-examined. Because this speech was made before Lord Nichol's speech last year. Your Honours could I ask you to turn now to page 156 of the case on appeal where you'll see a copy of a letter dated the 2 October 1990 from Mr Muollo of Gibbons to GUS, and in this letter Mr Muollo confirmed the agreement reached between Mr Cottam of GUS and Mr Gibbons at their meeting a few days previously and among the points agreed was a new lease to be prepared and the lease term will be 20 years from the 1 November 1990 and then down at point 7, the fact that the land is leased from the local Harbour Board creates the need for a minor alteration in respect of the term. The land

is subject to a 21-year term to 1 November 2002 with perpetual renewals, a lease with yourselves will have to acknowledge this, therefore our lease will be broken down into a term of 12-years as to 2002 and a further term of eight years with both parties bound to exercise the extended term and in my submission that demonstrates that as between the original contracting parties, Gibbons and GUS, what they were contracting for was a 20-year lease term which for technical legal reasons had to be broken down into the two periods and also it's perfectly clear, as indeed it is from the lease that was then signed was that GUS were required to enter the lease, enter the second lease and reciprocally Gibbons were required to make the premises available for that further lease and that in my submission is relevant because my further submission there is no reason why when it came to the assignment Gibbons would not likewise have required the appellant to take on the right and the obligation under the contract to enter the second lease. And on the evidence that's exactly what the parties thought they were doing. In para.15 of our written submissions we set out the evidence. I'll come back to the question of inadmissibility shortly but there's the affidavit evidence of both Mr Muollo of Gibbons and Mr Cottam of GUS that those parties upon the assignment believed that the appellant was bound through to 2010.

Tipping J Is that evidence of the individual belief of those individual components?

Wilson Yes indeed, indeed. And just to anticipate the submission I will be coming to I certainly would not and do not content that differing subjective intentions of the parties can possibly be of any relevance to interpretation questions, but what I will be submitting is that a common subjective intention can and should be taken into account and here in the case of Gibbons and GUS, two of the three parties to the what was a triparte document, the Assignment, was that that was their belief.

Tipping J This isn't in any way an issue really is it, I mean clearly GUS was the first sub lessee was bound to take the new lease, I mean no one can possibly argue that?

Wilson Well quite, I'm pleased to hear that.

Tipping J Well I don't think even Mr Curry would go so far as to take a mountain that high.

Wilson Yes well he'll be pleased to hear that. Doesn't it in my submission make it surprising that Gibbons having that right against the party he'd sold the business and was departing from the premises, didn't insist on having a similar right against the party who was buying the business and coming in and occupying the premises. It doesn't make sense, and

indeed the internal documentation of the appellant obtained on discovery makes clear that that was undoubtedly their understanding as well if I can invite Your Honours to turn to page 194 of the case on appeal which is a form of request to the Company Secretary of the appellant to append the Company Seal to the Assignment to Infogate. Interesting under point 2 the reference there assignment of lease Nelson following sale of business to Infogate, just confirming again we're talking about the sale of a business here and then the term of lease expires 31 October 2010, that's what they understood the term of the lease to be and also interesting to note further down that professional/legal approach had been obtained. It certainly suggests that they got the legal advice and that was the advice. Then at two pages over Your Honours at page 196 there's a memorandum from Mr Thomas, the Finance Manager to Head Office in Perth, addressing this question of lease commitments. Our contingent liabilities for the six Rattrays branch leases and one of them was the lease we're concerned with here which will be assigning to the purchaser are as noted below. Each of these is guaranteed by the appellant and the assignment doesn't get the appellant off the hook until the current lease term expires and then the last of the leases there referred to, Nelson expiry date 31 October 2010. So far from rationalising leases as my friend Mr Curry raised as a possibility, it's quite apparent that the appellant well knew that they were required to lease until 2010 and it's also significant in my submission that this is a memorandum from Mr Thomas who was one of the appellant's signatories to the assignment to Infogate at page 181. So in my submission it defies belief to say that Mr Thomas when he signed the assignment to Infogate didn't believe what was being assigned included an obligation of the appellant to lease through to 2010, because that's exactly what he said in his report to Head Office, and just going back to my earlier submissions about the fall of the assignment to Infogate, it follows in turn, it's further confirmation that the reference to the lease there must have been to the deed of lease because of course it was the second lease that extended the obligation through to 2010. I also make the point that Mr Walker claimed in his affidavit well they may have got in wrong in law but in my submission that's beside the point. What we're looking at here is the actual intention of the appellant and that was clearly in my submission that they were leasing through to 2010. And the evidence of the sublease to TNL in my submission is further evidence also in this context of what their belief was. Your Honours I rarely accept that evidence of common or indeed tripartite subjective intent is pushing the boundaries in terms of interpretation, but in my submission at the very least to going back to a question Your Honour Justice Thomas put to me, at the very least to resolve any ambiguities if Your Honours contrary to my submission concluded there is an ambiguity in the first deed of assignment such evidence can and should be resorted to for that purpose. And without taking Your Honours time to go through it can I just invite you to note four passages in Professor McLauchlan's articles that we put in with the written submissions. Firstly at page 488 if Your Honours have it, there is a heading on that page 'ramification to the

contract interpretation' and a little over halfway through that long paragraph at the top of that page there is a passage as follows 'if as presumably few would deny the primary purpose of the Law of Contract is to give effect to the reasonable expectations of the parties to an agreement. It is nonsensical to enforce an agreement in accordance with the meaning which reliable evidence may show was contrary to the actual intentions of the parties. The Court should wherever possible seek to give effect to the meaning intended by both parties or the meaning intended by one party where that party reasonably believed that the other party accepted this meaning only in the event that neither can be established should the focus of the inquiry be on the presumed intention of the parties. Next, over the page, 489.

Elias This is where Justice Mason as I think Nichols puts it, lets the cat out of the bag.

Wilson Yes indeed, absolutely yes as the Professor says and just before that their actual intention if clearly proven surely ought to prevail regardless of the formal manner in which that intention happens to be manifested. Then the article goes on to refer to the judgment Mr Justice Kerr in the Karen Oltman, it's not directly relevant to the argument today but Your Honours may be interested to know that within the last month the Court of Appeal of England has followed Mr Justice Kerr in the Karen Oltman case, possibly encouraged by Lord Nichols' observation that it's a case that hadn't received sufficient authority and was a quite different sort of case, a summary judgment case, but if Your Honours were interested I have copies of that judgment. Then just to round off these references at page 490 Professor referred to a judgment of Justice Nicholson and BP Australia and in the part of the passage sighted on page 490 just before the footnotes Your Honours will see the two sentences 'that is evidence of the mutual subjective intention of the parties to a contract may be part of the objective framework of facts within which the contract came into existence. It is the mutuality which makes the evidence admissible' and then finally over at page 496, the point that Profesor McLauclan's made in previous articles, the point he makes at the end of the penultimate paragraph before the footnote is on 496. 'Since the evidence of the actual mutual intention of the parties is relevant and admissible when the existence of a contract is an issue evidence of their actual intention concerning the meaning of the contracts shall also be relevant and therefore admissible when it comes to the interpretation of an admitted contract', and with respect would support the submission. There's no reason to distinguish in principle between formation of a contract and interpretation of a contract. Your Honours I now wish to conclude my submissions by just speaking to the point that we made in the final paragraph of our written submissions, namely the consequences if the appellant's submission is correct. The point we make is the first bullet point under para.25 'come 2002 when the first lease came to an end, on the appellant's approach the effect of the deed was to be that GUS could be required by Gibbons to enter a new lease

of premises which it had left more than five years previously after selling its business but the appellant, the current occupier and proprietor of the business could not and in my submission that would be a surprising outcome. Next bullet point at the top of page 13 is the submission and this of course has to be subject to the qualification that unless it were the position that the appellant took the benefit but not the burden and for the reasons I've submitted earlier as a matter of contract it's difficult to see how that could be the case. The appellant could be required by Gibbons to vacate the premises which they'd acquired from GUS because they were a strategic asset for its business. And I'll come back to that.

Tipping J When you say 'because' is it truly because or is it in spite of the fact that.

Blanchard J That's the reason they acquired them.

Wilson Yes, they acquired them because they were a key distribution centre.

Tipping J I see, thank you.

Wilson I'll come back to the third point because that's a little more complex now but the fourth one Gibbons was required to renew its lease from the Harbour Board under clause S because it mightn't have a tenant for its premises. And I just want to develop briefly that third bullet point and in order to do so can I ask Your Honours to go back finally and briefly to the first deed of assignment at page 118 of the case.

Tipping J This is the triangle, not straight-line approach?

Wilson I've developed the point by saying that in the Court of Appeal it was certainly accepted for the present appellant that following the assignment, if the appellant was under an obligation to GUS to enter the new lease as a provision in the Deed of Lease and likewise accepted that under clause 2 of the Second Schedule the appellant was required to indemnify GUS against any claim against GUS based on the failure to enter the Second Lease and why Your Honours I recall it very clearly is that it lead to a discussion between Bench and Bar in the Court of Appeal that as I understood it was accepted for the present appellant in the Court below that if Gibbons were ultimately to be unsuccessful in this litigation we could sue GUS because of its failure to enter the Second Lease. That would require getting GUS put back on the register because its off the register now, get it put back on the register, establish a claim by Gibbons against GUS and immediately get GUS to invoke the indemnity in clause 2 and bring the liability back to the appellant in that way. It was accepted that that could be done but our submission was that's really a nonsense of the law if we have to do that. Now I'm not certain from my friend's argument whether he still accepts that course, although to be fair, he wasn't counsel in the Court of Appeal, whether his client still accepts that that

could be the position but if so that is the position it just demonstrates the lack of any commercial sense in the position being taken for the appellant.

Elias CJ Well I don't really follow that Mr Wilson because that may well be the position but that's true in all third party claim cases isn't it, you don't square the circle, or you don't.

Wilson With respect Your Honour you don't normally have in the third party case a provision corresponding to clause 4 of the Second Schedule which enables on our argument the same result could be achieved directly.

Tipping J Well isn't that the way the contractual provisions are designed to work?

Wilson Not in my submission. But it's an alternative, well let me put it this way, either the reference in both clauses 1 and 2 of the Second Schedule to the provisions in the lease, that is the Deed of lease, has to be interpreted as excluding the reciprocal commitment to enter the Second Lease as part of the Deed of Lease or alternatively the present respondent could recover from the present appellant but that would require us to go through the circuitous route of getting GUS put back on the register.

Anderson J I don't know how you get to that point with respect because if the Second Schedule, and we're talking about page 118, the Second Schedule in clauses 1 and 2 contains a covenant by the assignee, which is the present appellant, and to perform a covenant and the indemnity is in respect of default by the assignee, now if the assignee has no obligation where is the right to.

Wilson I'm sorry Your Honour I didn't make it clear but I accept if there is no obligation the point doesn't run, but I'm saying to conclude that there is no obligation requires interpreting the phrase 'the provisions in the lease', mainly the provisions ie, the provisions in the Deed of Lease as excluding the reciprocal commitment to enter the new lease.

Tipping J But the difference is that 2 has got no time limit, 4 has got during the remainder of the term.

Wilson Ah yes, yes, that's why I accept that there is that difference which is why we're here I suspect.

Tipping J Well I suspect that's probably right.

Wilson If 4 was in materially the same wording as 1 and 2, I doubt if we would be here and that just reinforces the point in my submission that 1 and 2 do encompass the provision in the Deed of Lease requiring the parties

to enter the new lease and that's the point. And those Your Honours are the submissions for the respondent.

Elias CJ Thank you Mr Wilson. Mr Curry, do you want to be heard in reply? Yes?

Curry Very briefly Ma'am. May it please the Court, turning to my friend's emphasis on the contractual arrangements that he relies on his submissions have a fundamental flaw. Essentially what is involved is considering the same terminology the lease or lease as to have two different meanings. My friend's submission is that the definition relating in the Second Schedule referring to the Deed of Lease with the date essentially means the lease including the agreement to enter a new lease, and he says well essentially that's what this contract is about, but if you go back to the lease referred to, which is the sublease, the sublease draws a very strong distinction between the lease or this lease as it's sometimes referred to and the new lease, so his contractual hierarchy that he is seeking to raise uses the term 'the lease' in a very different way. Secondly it is my submission that subsequent conduct should not be considered unless it is reliable and what was in the minds of the parties at the time the sublease was entered is uncertain. The closest my friend gets to reliable evidence of common intention going back to the time is based on the sub sublease, but that document was two years after the sublease was entered and it involved different personnel and even if there is to be subsequent admitted as evidence then it's my submission that all it can achieve in these circumstances is that the appellant before you could have been fixed with the benefit of the contract but not the burden, but broadly looking at the evidence there is in my submission no sufficient evidence to constitute reliable evidence of common intention in 1997 that is capable of displacing the plain meaning from the documents, the meaning of lease and the meaning of new lease and the different contractual commitments and land law commitments that flow from that. Unless I can assist the Court further.

Elias CJ No thank you Mr Curry. Thank you counsel for your help. We will consider our decision and reserve it.

Finished 2.44pm