IN THE SUPREME COURT OF NEW ZEALAND SC 72/2010

[2011] NZSC Trans 8

BETWEEN	**GRAEME JOHN INGRAM** **ELIZABETH KNEE** First Appellants
AND	**KIP INVESTMENTS LIMITED** Second Appellant
AND	**PATCROFT PROPERTIES LIMITED** First Respondent

Hearing:	22 March 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	D W Grove for the Appellants D G Collecutt for the Respondent

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CIVIL APPEAL

MR GROVE:

May it please, your Honour, Mr Grove for the appellants.

ELIAS CJ:

Thank you.

MR COLLECUTT:

And Collecutt for the respondent.

ELIAS CJ:

Thank you, Mr Collecutt. Yes, Mr Grove.

MR GROVE:

Thank you, your Honours. This case is in its third round and thankfully the issues have been distilled significantly, the numerous bundles at trial have been cut down to three relatively slim volumes and as far as the evidence volume is concerned, that's been put in as a matter of precaution but I don't think there'll be any need to refer to it at all. That's principally because all of the factual issues are as set out in the judgment from his Honour Justice Allan. There is no challenge to any of those findings.

Dealing briefly with the key facts and we're dealing with a very short period of time here, basically from the 14th of June to a few days after where the relevant events took place, the rent allegedly due or outstanding matters before the 1st of June 2005. That's not an issue here because it was conceded at trial that the only default that would have entitled any re-entry was for the June outstanding rent.

TIPPING J:

So it's not an issue that the landlords moved one day too soon?

MR GROVE:

No, there is also that concession which is the biggest issue, that they did enter one day too soon and that's conceded so, prima facie, the actions on the 14th of June, that was a repudiatory breach. That is conceded.

On the 14th of June the landlord arrived with security guards, served and attached to the premises a notice of distraint, a notice of re-entry and a trespass order.

McGRATH J:

And of termination.

MR GROVE:

Yes, the notice of re-entry being the notice of termination.

Importantly, at 10 o'clock, approximately 10 o'clock that day, a facsimile was sent from plaintiffs, sorry, from the landlords' solicitors to the appellants' solicitors and if I

could just take your Honours to that document because it's not referred to in the Court of Appeal judgment but in my submission it is extremely important. It's located at volume 3, page number 45 and the page numbers are at the top right-hand corner. That's a letter from Shean Singh and Foy & Halse and your Honours will see it's dated the 14th of June, 10.15 am, so after the re-entry had taken place. The first line reads, "My client has today re-entered and terminated the lease between your clients and mine." So the positive assertion, the lease is at an end. And the second to last paragraph, again in my submission is critically important, "Any attempt to seek relief against forfeiture will be defended." Nothing happened for the rest of the day and in fact it was only in correspondence afterwards there was the allegation made that the re-entry was unlawful. That wasn't accepted by the landlord. It wasn't accepted then. A year later, when the letter of demand was issued, again this is in volume 3, right at the back of it, page number 63, heading on it, "Demand for you to pay damages as a result of lawful re-entry." And indeed it was –

TIPPING J:

Lawful re-entry?

MR GROVE:

Just before trial where my learned friend, Mr Collecutt, was instructed that the concession was made that the lawful – that the entry was in fact unlawful, before the time the litigation had been conducted by Mr Singh, the gentleman solicitor who prepared the notices that were served on the 14th.

The next key issue, in my submission, is the finding by his Honour Justice Allan that as at the 14th of June, the tenants were ready, willing and able to pay the outstanding rent but were prohibited from doing so because of the actions taken, namely the unlawful re-entry.

YOUNG J:

Is this para 76 of the Judge's judgment?

MR GROVE:

That's correct, your Honour.

McGRATH J:

So which, paragraph 36 did you say?

YOUNG J:

Seventy-six.

MR GROVE:

Seventy-six of the judgment, there was a suggestion made by counsel for the landlord that an inference should have been taken that the re-entry was inevitable because the tenants didn't have the funds, paragraph 76, "I'm not prepared to draw that inference. Mr Ingram gave evidence that if need be his sister, who was a successful businesswoman residing in Australia, would be able to provide the funds at a few hours' notice. She had done so in the past." He also said he intended, on the 14th of June, to bring the rental payments up to date.

YOUNG J:

But what was to stop him paying the rent?

MR GROVE:

Because to pay the rent on that day would have had no result whatsoever. That is –

YOUNG J:

Well it might have. It would have put an end to the, any suggestion that the lease was cancelled the next day.

MR GROVE:

It would have put an end to the lease but I've taken your Honour to the facsimile of the 14th. Paying the rent itself would have done nothing. What they had to do –

YOUNG J:

It would have meant that your client was no longer in default.

MR GROVE:

It would have – well, no longer in default but to regain position they would also have had to litigate –

YOUNG J:

Oh, I agree. I agree with that.

MR GROVE:

Yes.

YOUNG J:

But there was nothing to stop them. I suppose what you're saying is well we, if we'd paid the rent we wouldn't have been let back in.

MR GROVE:

We wouldn't have been let back in, we would have had to litigate an application for relief against forfeiture. We would have given the landlord money where it had repudiated the lease.

ELIAS CJ:

But if the lease was to be on foot, you'd have to pay the rental. Why not tender? I'm just wondering really whether it all becomes very speculative if you don't have a clear obligation to tender payment.

TIPPING J:

You could have tendered on terms.

MR GROVE:

You could have tendered on terms but again, the tenants were faced with the, not the prospect but having to make an application for relief against forfeiture and that is the next finding.

TIPPING J:

Not if your terms were accepted. The terms would obviously have included acknowledgement of premature termination and letting you back in because you had until the next day to pay the rent.

MR GROVE:

Well indeed but that is speculation. What we do know is that the landlord was stating uncategorically the lease was terminated. If you apply for relief against forfeiture, we will litigate it. And that's the next difficulty for ...

TIPPING J:

But if you had tendered the rent, you wouldn't have needed relief against forfeiture, would you?

MR GROVE:

Well indeed we have been served with notice of cancellation.

TIPPING J:

It was an invalid cancellation, clearly, on its face.

MR GROVE:

Unlawful and invalid, yes.

TIPPING J:

I'm not necessarily against you –

MR GROVE:

No, no, I –

TIPPING J:

– I'm just saying it seems odd that you didn't do what seemed like a very obvious and sensible thing to do.

MR GROVE:

In that regard, and it's considered in his Honour Justice Allan's decision, these parties had had an extensive –

TIPPING J:

Yes they hated each other's…

MR GROVE:

Hated each other's guts but more importantly had had an extensive history of litigation. Mr Ingram gave evidence that they were having to spend $30-$40,000 a year on legal costs. There had been a previous application for relief or forfeiture, successful. The matter went to arbitration. The landlord appealed that. The landlord then sought leave to appeal it to the Court of Appeal and what, again this is not

contested, what his Honour Justice Allan held was that there was no obligation to take that step, namely apply for relief against forfeiture to mitigate his loss.

ELIAS CJ:

Just to return to the question that was asked you by Justice Young. Is 76 the statement that you rely on to say that there was a finding that your client was ready, willing and able to pay?

MR GROVE:

Yes because – that was the evidence that Mr Ingram gave, ready, willing and able to pay and would have paid.

McGRATH J:

But the finding doesn't go quite that far, does it? Doesn't the reference to 14 June qualify intended rather than the action of bringing the rental payments down?

MR GROVE:

Sorry your Honour?

McGRATH J:

Well if you look at that sentence in 76 where he also said in evidence, "He had intended on 14 June to bring the rental payments down." Is – are you saying that that is accepting that the intention was to pay the rent on the 14th of June or was it just a more general – I'm suggesting it could rather be just a more general intention to pay the rent shortly?

MR GROVE:

No, no. Mr Ingram's evidence was that –

McGRATH J:

That's the evidence that was accepted?

MR GROVE:

That's the evidence that was accepted and his –

TIPPING J:

I thought the Judge somewhere had made a more direct finding but was it – that finding just attributed to him in the Court of Appeal?

MR GROVE:

Well that is –

TIPPING J:

That is it, is it?

MR GROVE:

That is it.

McGRATH J:

Just give us the page reference for the evidence. You don't have to…

MR GROVE:

Page 12 of bundle 2, paragraph 37.

McGRATH J:

Paragraph?

MR GROVE:

Paragraph 37.

McGRATH J:

"This could and would have been paid."

MR GROVE:

"This could and would have been paid."

McGRATH J:

Was there cross-examination on that?

MR GROVE:

Minimal. It was never put to Mr Ingram, your statement is wrong, you didn't have the funds. Mr Pearce who was also the director, he also said we had the funds, but no direct cross-examination to challenge that statement.

So the next issue, in my submission, the only available course of action, if the tenants wanted to get back into the property, was to file an application for relief against forfeiture and that has, to say otherwise the money could have been tendered, tendered on terms, in my submission that is speculation –

YOUNG J:

Well they could have sought an injunction, just challenged the legality of the re-entry, couldn't they, for an injunction to require the landlord to withdraw?

MR GROVE:

Indeed and –

YOUNG J:

And it's not relief against forfeiture.

MR GROVE:

That's not relief against forfeiture but what that is, is further litigation when you are faced with prima facie, an unlawful and uncompromising position taken by, what I would describe in these circumstances, the wrongdoer, and again, and this is by reference to the *Governors Ltd v Anderson* CA94/04 16 August 2005 case, there is no obligation, as far as litigation is concerned, for the innocent party to enter into litigation. There's just no obligation to do that. And his Honour Justice Allan carefully considers the case law in his judgment regarding the duty to litigate and it just finds there was not and could not have been an obligation to do so.

YOUNG J:

Yes, I'm not really challenging that. I'm just simply saying, challenging the proposition that the only alternative was an application for relief against forfeiture.

MR GROVE:

I accept what your Honour says. The other could have been for – seeking a mandatory injunction requiring the landlord to give back possession but again I say there that, when faced with a wrongdoing such as this –

TIPPING J:

Certainly when you're faced with such apparent intransigence to require you to litigate in order to mitigate would be a most unusual view for the law to take. It's not an absolute, I don't think, but it's certainly the normal rule that you don't have to litigate in order to mitigate.

MR GROVE:

Indeed and particularly I would stress in these circumstances where the litigation had been constant throughout this –

TIPPING J:

Well I think your best point is that there was total apparent intransigence. You were going to be – in the face of that letter that you referred to.

MR GROVE:

Indeed, indeed. And that continued afterwards and there is correspondence where KIP, who have the sub-lease, the sub-lease being denied by the landlord, which was wrong, trying to negotiate to get back downstairs and the response was, you've got to pay us 60 grand plus five grand key money, even though there was a rent review just before and Mr Pearce gave evidence that he was whacking up the rent so high, demanding key money, it was just not a possibility.

McGRATH J:

Just, by the way, that was a sub-lease, was it? It wasn't some sort of assignment?

MR GROVE:

No it was a sub-lease that was consented to –

McGRATH J:

It reflected the terms of the head-lease?

MR GROVE:

Indeed.

BLANCHARD J:

I thought it was suggested that in fact it operated as an assignment because it was on exactly the same terms as the head-lease?

MR GROVE:

Your Honour is probably right. I haven't focused on –

BLANCHARD J:

Well I haven't looked at it but under the old rules, which no longer apply, but applied at the term, if the terms are identical, if the term was identical it would operate as an assignment.

TIPPING J:

Would anything turn on it? As to whether it was an assignment or a sub-lease in this –

BLANCHARD J:

Well possibly not but it would then be an example of the lessee of part of the property attempting to get back in by negotiation and failing –

TIPPING J:

Right.

BLANCHARD J:

– which would be pretty good evidence, and maybe good evidence anyway, of what the landlord's attitude would have been if Ingram and Knee had tried to do the same.

TIPPING J:

It didn't look promising, at least on the face of it.

MR GROVE:

If I can take your Honours to volume 3, page 1 – sorry page 52, that's a letter from the second respondent's solicitor, the last paragraph, "To progress that we can confirm our client's discussions with you that our client purchases the shares in KIP and enters into a new lease arrangement and give us immediate access so that we can start that off," and the – page 57 is the response, "Our client will not consider confirming the sub-lease which automatically terminated as a result of your client's re-entry under head-lease." My client's, I should say. "Will consider a new lease. The initial rent is to be $60,000 plus GST. Opex etc and a one-off fee to secure the lease of $5000. And Mr Pearce's evidence was that demand was just inflating the

rent. There had been a rent review. It was so much higher he couldn't even consider it.

TIPPING J:

So your clients' case is effectively this, is it, that you were wrongly terminated against and these are the damages that you suffered?

MR GROVE:

Indeed, indeed. And the issue that has come up is section 8 of the Contractual Remedies Act, we didn't communicate acceptance on the 14th and therefore –

TIPPING J:

To get damages you don't have to cancel, or is that part of the issue?

MR GROVE:

Well the argument by the landlord is that because we hadn't cancelled, the lease remained on foot until the 15th. On the 15th the rent was outstanding and, therefore, they, we repudiated, they cancelled and therefore we are not entitled to damages.

TIPPING J:

But you say that is just a cloud against a very simple horizon?

MR GROVE:

Very simple case and the re-entry conceded, the letter saying you can't come back in will defend relief against forfeiture. The finding that our clients were ready, willing and able to pay on the 14th, in my submission, deals with this case.

TIPPING J:

If you have someone terminating against you, unlawfully, what I am asking myself really is do you have to accept the repudiation before you can claim damages. Is that what in a sense, or in part anyway, what it comes down to?

MR GROVE:

It does because the respondent's case is because, as required by the strict wording of section 8, we didn't communicate by some overt action, acceptance of the

repudiation, the contract was still on foot, therefore, we can't claim damages because it was, as the respondent admits, lawfully terminated the following day.

YOUNG J:

Your problem, I mean, theoretically you don't need to accept and cancel, accept repudiation and cancel to pay damages because you claimed damages for trespass. The problem you face is that the trespass will only be for so long as the lease is on foot.

MR GROVE:

Indeed.

YOUNG J:

So if it is the case that the lease was cancelled, should be treated as cancelled the next day, then your claim for damages isn't much good?

MR GROVE:

Well it's for the 14th.

YOUNG J:

Yes.

TIPPING J:

The real issue then is whether or not the land, validly terminated the next day?

MR GROVE:

Indeed.

TIPPING J:

That seems to be what it turns on in the end, do you agree?

MR GROVE:

I do, your Honour.

BLANCHARD J:

But did the landlord do anything the next day that could constitute termination on that day, other than simply maintaining the stance that it unlawfully had taken the day before?

MR GROVE:

Your Honour has summarised my submission on that point. Certainly on that point, is his Honour Justice Priestley's view, namely not only was nothing positive done, all that was done was the landlord maintained what his Honour Justice Priestley described as – putting it charitably, high handed conduct and if the landlord's argument is correct, his Honour Justice Priestley described it as being unpalatable, it would need to rely on the *Schmidt v Holland* [1982] 2 NZLR 406 decision which the Law Commission described as leading to – and this is at page 81 of the authorities, tab number 8. "The rigidity of the new statute rule can have an effect which is unacceptably harsh" and there is a reference to the *Schmidt v Holland* decision, that my learned friend relies upon. What the Law Commission recommended and this is at page 82, was that, at the bottom, paragraph 1.69, section 8(1)(b) of the Contractual Remedies Act should be amended by putting in: "Or where the other party may, by his or her conduct, be deemed to have dispensed with the need for communication" and in my submission, that would have solved this case.

TIPPING J:

This is communication of the acceptance of the repudiation, is it?

MR GROVE:

Yes, it is all dealing with communications' acceptance. Regretfully, that suggested amendment wasn't carried forward and if your Honour could turn to tab number 1 of that bundle, the insertion section 8(1)(b)(ii) was "That the other party cannot reasonably expect to receive notice of cancellation because of that party's conduct in relation to the contract." Now my principal argument was, well that covers us here, the conduct, kicking us out, terminating e, but both in the High Court and the Court of Appeal, by reverting back to (b) the beginning "Before the time at which the party cancelling the contract, evinces by some overt means, reasonable in circumstances," so there was no overt action taken on the 14th. So the amendment, in my submission, that was required, to get over the harshness, undue harshness of *Schmidt v Holland* hasn't actually come through. If, as I say, the recommended amendment had been enacted, we wouldn't be here in my submission.

TIPPING J:

So you cannot reasonably expect to receive notices conditional on there having being some overt step and that's where you fell out?

MR GROVE:

Yes, the two clauses are contradictory. One says you don't need to do anything but before you don't do anything, you have to do something, so it is just – and that, as I say, because of the introduction.

TIPPING J:

You have got to do something overt that is other than giving notice of the cancellation, and you would have thought the doing something overt, had at least to be of that ilk?

MR GROVE:

Indeed and that is why I have fallen out, fallen over, in the Courts below and I mean the amendment in my submission didn't do what it was meant to do.

BLANCHARD J:

Isn't there a logically prior point though, which is in your favour and that is the lessor on the 15th couldn't just say, "We are now cancelling again because you haven't paid the rent and we undoubtedly have the right to cancel now". The lessor couldn't do that without clearly withdrawing from its repudiatory stance?

MR GROVE:

Indeed.

BLANCHARD J:

Because the tenant was faced with the situation where it was being asked, if indeed it was being asked, on the 15th, to pay the rent yet it was still shut out in the street. It was faced with an unlawful prior attempt to terminate its lease and an unlawful seizure of its chattels.

MR GROVE:

And your Honour that takes me nicely on to your Honour's judgment in the *Hirst v Vousden* (2004) 6 NZCPR 135 decision which was upheld in the Privy Council, and if I could refer your Honours to tab number 5, page 44, paragraph 15. This was a case

where the trial Judge held there was an agreement to lease, reached, but the landlords refused to accept that that agreement was in place, the contract was there, and rented. The tenants sued maintaining an application for possession right up until trial but what the Privy Council said, the main issue before the board has been whether the Vousden's non-payment of rent after April 2000 entitled the Hirsts to serve a notice to quit and to enter the premises. Mr Koppens did not seek to rely on equitable set-off but instead supported the judgment of the Court of Appeal as expressed in the following passage from the judgment of his Honour Justice Blanchard. "The Hirsts were disentitled from taking the point against the Vousdens because they themselves were denying the existence of any continuing contract and thereby repudiating it. How can it be said that lessees are obliged to keep making rental payments, *pursuant to a contract* … when the lessors are refusing to acknowledge the existence of the lease contract? And how can a purported cancellation of the lease on that ground then be valid? Thus, even if the Vousdens were not entitled to assert a setoff or to seek a rent reduction or to cease rental payments, the Hirsts had disentitled themselves from relying on that point. The eviction was therefore unlawful."

In Their Lordships' view this reason and conclusion cannot be faulted. The Hirsts had repudiated the contract by their unequivocal refusal to grant a lease on the terms which had been agreed. And here it's not refusing to grant the lease. Here it is terminating the contract, it said you're out and you can't – we won't let you back in. this was a repudiation going beyond a mere bona fide difference, is the point of construction on the contract. The Vousdens had, by the time of trial at latest, accepted the repudiation. Their amended statement of claim contained an alternative claim from forfeiture and the grant of a new lease but by then that was hardly a realistic possibility. So –

TIPPING J:

Well there's a clue there. The acceptance of the repudiation can apparently, according to this, take place as late as the time of the trial.

MR GROVE:

Indeed and that is what his Honour Justice Allan found although the other way around it is to say there's no communication but you're faced with circumstances where there has been a conduct such as this case. You have, for a period of time, a right to apply for relief against forfeiture, but over time that remedy, simply because

of the effluxion of time, goes away and at that time you haven't taken that overt step and therefore the lease – the repudiation is accepted. And that –

ELIAS CJ:

When do you say repudiation was accepted here?

MR GROVE:

It was – possibility two times. The first when time had moved on so far that an application for relief against forfeiture had been delayed too long, or when the proceedings were issued.

TIPPING J:

The proceedings simply sought damages, did they?

MR GROVE:

Only damages.

TIPPING J:

Yes.

BLANCHARD J:

If you didn't need an application for relief against forfeiture for the reason given by Justice Young, that first point wouldn't exist?

MR GROVE:

No but I suppose in those circumstances it would have been when there was no application for a mandatory injunction to –

BLANCHARD J:

So when you wouldn't have got an injunction?

MR GROVE:

For possession.

TIPPING J:

There are authorities, aren't there, that say that the acceptance date, or the acceptance can, at least for some purposes, and I'm struggling here, relate back to

the date of the repudiation. Now the dissonance in time, if you like, then won't matter.

ELIAS CJ:

If the premises were destroyed for example?

TIPPING J:

Yes. I mean I'm grasping because I'm not on top of this but I think there are – does that resonate with anyone? I mean in a sense it must because there's always going to be some interval and it would be very odd if you could have a clear repudiatory breach accepted a week later and there are some contractual obligations inuring during that week. Whether that matters that it's so long, assuming that it is the date of commencement or proceedings, as the Privy Council seems to apply was possible.

MR GROVE:

Yes and the *Chatfield v Jones* [1990] 3 NZLR 285 case, and I'm just trying to find a reference for your Honour, this is at page 25 of the bundle of authorities at tab 3, on the right-hand side, at the very bottom referring to section 8(b).

TIPPING J:

Sorry, what page are you on?

MR GROVE:

Page 25, your Honour, which is, it's tab number –

TIPPING J:

Page 25 of the casebook?

MR GROVE:

Page number, yes, sorry.

TIPPING J:

297 of the case?

MR GROVE:

297, yes, right down the bottom, line 50, "While in the usual case the words or conduct evincing the cancellation will constitute the necessary notification of it. The section contemplates that there may be a lapse of time between one and the other. The contract will be cancelled. The other party will not be affected by the cancellation." And –

TIPPING J:

What in context, do you know, did the Judge mean by the last, "the other party will not be affected." That rather suggests that there is contractual relationship. In other words it doesn't relate back.

MR GROVE:

That it, I'm sorry your Honour, it doesn't?

TIPPING J:

Yes, that rather suggests to me that the acceptance doesn't relate back to the date of repudiation.

BLANCHARD J:

An unaccepted repudiation is a thing writ in water.

TIPPING J:

Indeed. But once it's accepted then the question is, what's the state of affairs in the interval?

BLANCHARD J:

Well the cancellation, I would have thought, would have been at the date of the cancellation. The fact that there was an interval may have some impact on the rights of the – or the consequential claims of the party, but I don't know that it's necessary to backdate the cancellation artificially. Here, for example, if the lessor had said, all right well you're cancelling a year later, I want a year's rent, there would have been an answer, well you can't have it because we've got a, at least a countervailing claim through not having access to the premises in the interim. So it tends to come out in the wash.

TIPPING J:

Well that is direct *Vousden* isn't it?

MR GROVE:

Yes. So in support of the legal side of my submissions, given what I say are agreed facts, I rely on the *Hirst v Vousden* case, namely how can you say that somebody has to pay the rent when the other side is saying there's no contract.

TIPPING J:

But you – *Hirst v Vousden* doesn't get you over, of itself doesn't get you over the validly terminated the next day point, does it?

MR GROVE:

Well, in my submission, yes it does because what it says, if the landlord was denying the existence of the contract, the lease in this case, and that case, you don't have to pay the rent.

TIPPING J:

You're saying that if he's denying the existence of a contract, there's no contract for him validly to terminate the next day, is that the argument?

MR GROVE:

Two points, your Honour. Firstly, as his Honour Justice Blanchard said, if the landlord is denying the existence of a contract, there is no obligation on the tenant to pay the rent.

TIPPING J:

Yes I accept that.

MR GROVE:

And the second point that must follow, if there's no obligation to pay rent logically how can the landlord the following day say, I'm terminating because you haven't paid the rent, even though you've got no obligation to pay.

McGRATH J:

If he's denying the existence of the contract so there's no obligation to pay the rent, does that apply to arrears?

MR GROVE:

No.

McGRATH J:

That seems to me to be a difference between this case and *Hirst v Vousden*.

MR GROVE:

Well as far as the arrears were concerned, and I'm not sure whether your Honour is mentioning the arrears that would have entitled re-entry or the arrears for the rent review of about $1200.

YOUNG J:

I think probably the money that was owed, as at the 14th of June, but hadn't been owed for more than 14 days.

MR GROVE:

Well –

YOUNG J:

It's about 25,000.

MR GROVE:

– that's dealt with in the judgment and when there is the wash-up at the end, the – and probably the date is wrong, but what his Honour Justice Allan said was that in relation to the rent due up to the 14th, when there was possession, we have to pay that portion of it. After the 14th, we didn't have to pay anything. And that's where, in his Honour's judgment he says we have to pay 1430, thirtieth of whatever was due.

YOUNG J:

But also the money that was due as at the 1st of June less what had been paid a few days later?

MR GROVE:

Well, no. What his Honour Justice Allan said is that for the due rent, you have position for 14 days.

YOUNG J:

So the rent is payable in advance?

MR GROVE:

Indeed, yes.

BLANCHARD J:

If the landlord is denying the existence of the lease, the landlord, it would seem to me, cannot rely on the no set-off clause, which is something hinted at, in my judgment, in the Court of Appeal in *Hirst v Vousden.*

MR GROVE:

Yes. Well the no – I argued the no, that the no set-off clause wasn't applicable because in this case we had a credit and they admitted credit.

BLANCHARD J:

Well the no set-off clause was against you at the point where the landlord was not denying the existence of the lease. But once the landlord denied the existence of the lease, it seems to me all bets were off on that because the landlord can't on the one hand say there's no lease anymore and on the other say, well I'm entitled to take the point that you can't set-off.

MR GROVE:

I wish, your Honour, that was argument that I had run in the High Court and the Court of Appeal.

YOUNG J:

Well you accept that there is authority that the cancellation doesn't always –

BLANCHARD J:

It doesn't –

YOUNG J:

– so some clauses will survive cancellation?

BLANCHARD J:

It doesn't but I very much doubt this one would survive a repudiation. It's not a cancellation.

ELIAS CJ:

It's quite – I mean it's essential, is it, that this was rental payable in advance so that there wasn't an existing debt?

MR GROVE:

No there wasn't existing, no, there was existing debt.

BLANCHARD J:

Well there was an existing debt in *Hirst v Vousden* as well and I think there was a set-off, a no set-off clause there.

MR GROVE:

There was, your Honour.

BLANCHARD J:

So I'm not sure there's a difference.

TIPPING J:

Is the point that you cannot claim rent under a lease while denying the lease other than rent that is actually accrued.

MR GROVE:

Well I –

TIPPING J:

Actually accrued at the date the lease was terminated.

MR GROVE:

I think *Hirst v Vousden* goes further than that because there was rent accrued that Vousden has always admitted that they had a liability to pay rent but the argument that succeeded was that in the face of repudiation the landlord couldn't claim that – sorry, a landlord who was repudiating the existence of a lease, was not entitled to take that point.

McGRATH J:

Isn't it the case in *Hirst v Vousden* they'd actually paid monies into a solicitor's trust account to cover arrears of rent if it turned out any were owed?

YOUNG J:

Or offered to.

BLANCHARD J:

I don't know that they'd actually done it but I – you could be right.

MR GROVE:

No, they had, they had offered to do that but it, in my submission there's no difference here because we were ready, willing and able to pay the rent.

ELIAS CJ:

I'm probably lagging on this but I'm not so sure that I agree that all bets can be off when there are accrued liabilities.

BLANCHARD J:

I was referring to the set-off clause.

ELIAS CJ:

Yes.

BLANCHARD J:

In other words, it would be quite unreasonable for a set-off clause to apply when the landlord was saying there's no lease anymore. I mean at that point everything has to come out in the wash anyway. There would have to be a taking of accounts. The set-off clause could not prevent that.

MR GROVE:

And that's exactly what happened at the end of the judgment given by –

ELIAS CJ:

Yes.

MR GROVE:

– his Honour Justice Allan. And as far as the June rent is concerned, the total sum due for the rent, four-thirteenths of that equals whatever it was, less the payments that had been made and there was a $1200 difference so a credit was given to the landlord for the $1200 which was the portion of the rent up to the date of repudiation. The balance of the rent wasn't awarded. Credits were given for the overpayment of the lease, sorry, the lift maintenance and the like.

And now, in my submission, giving more support for the proposition is the concept that a party must be ready, willing and able to form a contract before it can cancel the agreement and I've referred your Honours to the decision in *Noble Investments Limited v Keenan* [2006] NZAR 594. This is at paragraph 27 of my submissions. "A party could be seen as benefiting from its own wrong if it seeks, by cancellation, to deprive the other party of the benefit of the contract in circumstances where the other party's breach is a direct result of the breach admitted by the party seeking to cancel the contract." Now that's taken from the judgment which is at tab 6, page 77 of the authorities. Two sentences later, which I think is probably more applicable to her, Her Honour Justice Glazebrook said, "A party could also be –

ELIAS CJ:

Sorry, what page are you at?

MR GROVE:

Sorry, your Honour, page 77 –

ELIAS CJ:

Thank you.

MR GROVE:

– which is at ...

ELIAS CJ:

Yes, I've got that.

MR GROVE:

Paragraph 47: "A party could also be seen as benefiting from its own wrong where it is unable or unwilling to perform its own obligations under a contract and seeks to

avoid liability for its own breach by cancelling the contract on the basis of the other party's breach." And so that's why I say that's more applicable here. The landlord breaches, causing us not to pay the rent because we don't have possession and thereafter relies on our breach, even though it was caused by the landlord's breach.

Unless your Honours have any further questions, those are my submissions.

ELIAS CJ:

Thank you, Mr Grove. Mr Collecutt.

MR COLLECUTT:

Just by way of an opening remark, in my submission, in essence this is actually a very simple case. We have, on the 1st of June the first default being by the tenant, who fails to pay the rent. At that point in time, up until the 14th, the party in breach is the tenant, not the landlord. We get to the 14th and for the purposes of this appeal I have to accept there was a breach by the landlord, had no right to re-enter on the 14th. So we've got a breach by both parties and my submission, on the 14th, the contract, in law, is still on foot. The landlord had no right to terminate on the 14th. Come the 15th though, the tenant still had not remedied the very first breach. As a result of that very first breach, come the 15th the renter is 14 days in arrears, therefore, the landlord under the working of the lease had the right to terminate, pursuant to a contractual right. We're dealing where with a termination which isn't under section 7 and 8 of the Contractual Remedies Act, we're dealing with a separate contractual right specified in the contract to bring the contract to an end, if the lease was 14 days in arrears. In my submission, therefore, the lease came to an end on the 15th. The tenant, notionally on the 14th, had two opportunities. The tenant could have tendered the arrears and preserved its rights or the tenant on the 14th, at that stage, could have elected to cancel this lease for repudiation by the landlord but the tenant didn't exercise either of those options. Therefore, when we get to the 15th, the landlord has a contractual right to terminate this lease.

Now, critically, on this point, I take your Honours to the lease itself and that's in volume 3 of the case on appeal at page 17 and that – we have there at the introduction, "If at any time during the occupation of the premises by the lessee any rent or other monies payable by the lessee are in arrears for the space of 14 days," etc, and then we turn over the page to page 18.

TIPPING J:

But on the 15th, the tenant wasn't in occupation.

MR COLLECUTT:

During the occupation – in that case we would revert to – sorry, I'm thinking on the fly here – in that case we'd revert to the implied right of re-entry under the Property Law Act, as I recall. There's a provision in Property Law Act, which gives a landlord a right of re-entry under the Act if the – and I'm working off the top of my head here.

TIPPING J:

But wouldn't the express provision prevail over – this is not my immediate field and my brother Blanchard may ...

BLANCHARD J:

It would seem to me you couldn't read "during the occupation of the premises" literally because what if the lessee had purported to abandon them? Is the lessor to be deprived of the ability to rely on clause 26 in those circumstances?

TIPPING J:

Well one would have hoped not.

BLANCHARD J:

It's not very happily worded but I'm not sure I'd read it literally.

ELIAS CJ:

But it can't apply where the landlord has taken the occupation of the premises.

TIPPING J:

Well, yes, surely not, yes.

MR COLLECUTT:

Well perhaps if I can deal with that –

ELIAS CJ:

Because that, it's as between landlord and ...

TIPPING J:

Yes, contractually it could hardly apply –

ELIAS CJ:

Yes.

TIPPING J:

– when you've actually denied the tenant the occupation.

MR COLLECUTT:

Yes, sir. Perhaps if I take your Honours then directly to the English Court of Appeal decision.

TIPPING J:

But what are you relying on? Just before you do, Mr Collecutt, can you actually specify whether you are relying on a contractual right to re-enter, a statutory right to re-enter or what you're relying on for this supposed re-entry on the 15th.

MR COLLECUTT:

On 15th, I'm relying, first and foremost on clause 26 under the contract.

TIPPING J:

But let us assume for the moment that you may have difficulties there.

MR COLLECUTT:

Yes. Assuming we have difficulties in that area, secondly I'm relying on the implied term under the Property Law Act. I'm sorry, this issue wasn't targeted in any of the Courts below so I haven't come prepared with that authority.

ELIAS CJ:

Well what did the Courts below say? They didn't, do they, I can't remember now, did they rely on clause ...

MR COLLECUTT:

They relied on this clause 26, essentially that this clause, when the rent was in arrears for 14 days, gave the landlord the right to terminate the lease.

ELIAS CJ:

Can you just take us to the passage in the Court of Appeal decision on that?

MR COLLECUTT:

If you refer to...

BLANCHARD J:

Paragraph 55, I think. Is that in the *Jardine?*

MR COLLECUTT:

Yes, we have, at page 89 of the Court of Appeal's decision, paragraph 22, citing the right of re-entry.

BLANCHARD J:

There's a reference in paragraph 55 to termination by virtue of clause 26.

TIPPING J:

That's the crunch of the Court of Appeal's reasoning, isn't it? That they deemed the continuation and possession by the landlord to be a re-entry.

ELIAS CJ:

But they're not considering whether the conditions of application of clause 26 at present.

MR COLLECUTT:

The – in essence, Sir, I mean neither in our High Court or our Court of Appeal was there any argument that the, that that first condition, the start of clause 26. There was no discussion at all as to whether or not the lessee had to be in possession or notionally in possession for clause 26 to apply. It was assumed, in both the High Court and the Court of Appeal ...

ELIAS CJ:

That the lessee was in possession.

MR COLLECUTT:

There was just no discussion or argument on the issue. It was just assuming.

TIPPING J:

There wasn't factually; you'd been kicked out.

MR COLLECUTT:

Yes. The essence of the argument though that the Court was dealing with was, was the rental 14 days in arrears as at the 15th of June and it was assumed that if the rental was 15 days in arrears, then assuming that there'd been no sort of waiver or estoppel etc type issues, then the landlord would have the right to re-enter pursuant to clause 26.

ELIAS CJ:

It may be because you haven't had a chance to consider this that it may be that something more could be said about whether, in the context of the contract, the occupation of the premises means the right to occupy the premises pursuant to the contract.

MR COLLECUTT:

Yes, obviously –

ELIAS CJ:

We're treating it as a question of fact but in discussion I'm just not sure whether that is necessarily right.

BLANCHARD J:

I'd be inclined to read, "During the occupation of the premises" as the equivalent of "during the term".

MR COLLECUTT:

Otherwise we would end up as his Honour Justice ...

ELIAS CJ:

Although clause 26 is prospective. It says the rights the lessee can exercise. If you've already exercised though, how can you then exercise clause 21? It's the same thing really.

MR COLLECUTT:

Perhaps if I take your Honours to the only case that I've provided in my supplementary bundle, the Court of Appeal's decision *London and County Limited v Sportsman Limited* [1971] 1 Charge 764. And that was a situation –

TIPPING J:

I don't think I ever got that.

MR COLLECUTT:

Oh, it is attached?

BLANCHARD J:

It's attached.

MR COLLECUTT:

Oh, sorry, yes, okay. It's a very commendably thin bundle of authorities. Yes, that, in essence –

ELIAS CJ:

This is the one that Justice Allan says –

ELIAS CJ:

– is a completely different case?

MR COLLECUTT:

Yes, but –

ELIAS CJ:

Yes.

MR COLLECUTT:

Yes but, it does in substance. This is a situation where a party commenced its occupation of the illegally and then obtained ownership of the reversion and the English Court of Appeal held that that party was not required to take the artificial step in vacating the premises, saying that the rental was overdue and then come in and re-entered.

BLANCHARD J:

But as Justice Allen says, that wasn't a case where a lessor had kicked a lessee out, it was a case where there had been, as he puts it, a voluntary surrender of possession of the premises and the litigating parties didn't include that party anyway.

MR COLLECUTT:

Yes effectually, I accept the point that there is an effectual distinction between the case.

BLANCHARD J:

Well that is why in that case, it would have been an idle ceremony to acquire that there be some kind of restoration to the premises and then removal of them again. But it is a quite different case than this.

MR COLLECUTT:

In my submission though, here we have a situation where the rental was 13 days in arrears on the 14th, the landlord made a very simple mistake. He missed his days, his calculations by one day. The tenant, itself, knew that the landlord would have had the right to re-enter the following day. I cross-examined specifically on that point and got the concession out of the tenant that he knew, he had to pay, come up with the rental and if he didn't come up with the rental, and remedy his breach, the landlord could re-enter the following day. Now in that situation, in my submission, the Court has to step back and look and balance the scales. Here, you have got a tenant who is basically ignoring the obligation to pay the rent on the 1st of the month when it is due. There is a long history of aggravation with these parties. The landlord makes one mistake of one day, and then the tenant still doesn't pay the rental arrears. Now the point was made to my friend in submissions. We could have avoided whole lot of speculation here, if the tenant, on the 14th, had just did what he said he was intending to do, tender the rent arrears, even on terms, the tenant didn't. Then for the landlord, the following day, the rental was 14 days in arrears. Now let's assume that the landlord had actually realised on the 15th, oops, I've got my calculations – sorry I shouldn't use colloquial terms, I have got my calculations wrong, what should I do and in that situation, in my submission, of course with hindsight, the one option for the landlord was to say to the tenant, you are still in arrears, pay the rental immediately. If you pay the rental immediately, I will let you back into the premises.

BLANCHARD J:

But the landlord didn't say –

MR COLLECUTT:

But the landlord didn't say that, but what I'm saying though, the landlord though, clearly on the 15th was essentially maintaining a position, you still owe me the rent and I'm not going to let you back into the premises.

BLANCHARD J:

No the landlord was maintaining the position, this lease is over.

MR COLLECUTT:

Yes.

BLANCHARD J:

The landlord was not giving any indication that payment of the rent was going to change anything.

MR COLLECUTT:

Yes and thereby the landlord, at that point in time, intrinsically is saying, the rent was 14 days in arrears on the 15th and I am going to continue in possession. So the landlord implicitly is saying "I have the right to re-enter and by staying in possession, I am exercising that right". Now I am conscious of your Honours' decision in the *Vousden* case. I believe that probably is what is troubling the Court here, in the *Vousden* case, you have a situation where a landlord is on first impressions, claiming that it has got the right to re-enter pursuant to a lease that is claiming is in existence. In my submission though, the *Vousden* case, the key element was that the tenant there had – there was originally a lease which came to an end, and then you have a period of time where there was this argument as to whether there is going to be a renewal of the lease and there were arguments as to – at the time that the new lease was due to commence, you have the landlord saying, no there is not going to be a new lease, and you have the tenant saying, yes there should be and there is arguments as to what rental should be, etc.

Now, his Honour Justice Blanchard has referred to there being rental arrears at the time of re-entry. My reading of the case was that the only notional rental arrears, related to the entire period of time when the landlord was saying, there isn't a

renewal of the lease here. We have a demarcation at the end, I think it was March of the relevant year, where the tenant is notionally up to date or arguably up to date and then we have an argument about a new lease, from April onwards. So if we start at the time of that argument, notionally there is no rental arrears at that point in time and the landlord is saying to the tenant, you have got no right, no lease, therefore there is no accruing rental arrears, on the position taken by the landlord. We are not dealing with a situation where the landlord is saying, at a period of time when everybody agreed there was a lease on foot, the tenant failed to pay any rental and in my submission that is the key distinction as far as this case is concerned.

Here we have a situation where everybody agreed and we have got a High Court decision holding that the tenant, as at the 14th of June, owed money for rental arrears and in my submission the correct way to interpret the *Vousden*'s decision, is it is only dealing with a situation where a landlord has effectively said to a tenant, "You have no lease and therefore from the time I say that there is no lease, you don't have to pay accruing rental." It is not a case where the Court is saying, "I have represented to the tenant that there is no lease, therefore you no longer have to pay me the previous rental arrears."

TIPPING J:

So in *Vousden* you are saying the landlord was claiming rent, when there was no privity, whereas here the rent accrued during the period where there clearly was privity in the sense of an existing and valid relationship. Am I understanding correctly, I have used the word privity in the sense of an actual contractual relationship.

MR COLLECUTT:

Yes that is the key –

BLANCHARD J:

Well it was held in *Vousden* that there was a contractual relationship.

TIPPING J:

But counsel is saying that the alleged rental arrears in *Vousden* –

BLANCHARD J:

Related only to the period where the landlord was actually repudiating because the landlord had started repudiating a long time before. The landlord had said, you haven't a lease and you never have had a lease.

TIPPING J:

But here the repudiation was only from the 14th onwards.

MR COLLECUTT:

Yes.

TIPPING J:

Whereas the rent accrued from the 1st to the 14th?

MR COLLECUTT:

Yes.

BLANCHARD J:

Yes that is the point that is being made but I come back to the point that I was making. Why should the tenant pay the arrears, accrued or otherwise, on the 15th when the landlord was not changing its stance on the existence of a lease at that point.

MR COLLECUTT:

The answer to that is the rental obligation had accrued on the 1st of the month and the law is clear and the judgment in the High Court which hasn't been appealed, clearly holds that the obligation to pay the arrears of rental survives any cancellation of the lease.

BLANCHARD J:

So do other accrued obligations and there were accrued obligations going the other way.

MR COLLECUTT:

Yes. Now I'll deal with your Honour's point in relation to no set-off clause secondly. The first point that I'd make in that area is if we actually go to the decision in the High Court. Now assume, for the purposes of this argument I'm going to assume that the tenant would have a right of set-off and then if we – so if we go to the case on

appeal, volume 1 and if we turn to page 79 to begin with. Now at paragraph 168 we have a summary of the High Court judgment for the landlord against the tenant. So we have 60,000 owed for costs for removal of creeper vine, costs on arbitration, repair and maintenance of light well, balance of unpaid rental and operating expenses, unpaid portion of rent, for a total of $84,906. So if we're on one side of a wash-up of what was owed to who, what was the net amount owed, we have $84906 owed by the tenant.

Then if we turn over to the next page, page 80, at paragraph 173, we have the amounts payable to the tenant. And here we have 100,000 which is on the assumption that the lease would continue on, and then we have 36,597 for lift maintenance and overpayments. Now the argument that I'm running here is if we exclude the amounts which relate to events after the 15th of June, which is the 100,000 for future losses, the net position is that the tenant owed the landlord 84,500 less $36,000, an amount just shy of 50 –

ELIAS CJ:

Can you exclude the business losses because –

MR COLLECUTT:

The argument that I'm seeking to run is that if it was a situation of the parties at that point in time saying okay, the rental should have been paid but there's a right of set-off and we need to take, we need to be dealing with the accrued obligations of the party with the history. At that point in time the net position is that the tenant owed approximately $50,000 to the landlord.

BLANCHARD J:

But it's just lost its business.

ELIAS CJ:

Yes.

BLANCHARD J:

It's been kicked out and its chattels have been seized. How can it be expected to pay rent in those circumstances where it's contemplating the loss of its business and it is saying, and quite rightly, that's a loss that's been unlawfully caused to us if the –

ELIAS CJ:

Doesn't –

BLANCHARD J:

Sorry.

ELIAS CJ:

Go on.

BLANCHARD J:

If the landlord had changed its stance and said, you pay the rent, I'll let you back in, then the question of the loss of the business wouldn't exist but the landlord never changed its stance.

MR COLLECUTT:

Yes, and the – in the same scenario, the tenant never changed its stance.

BLANCHARD J:

Well it didn't have to.

MR COLLECUTT:

Well in my submission the tenant had an obligation to pay $84,000, the rental and the creeper vine damage etc. The landlord, yes, the landlord committed a wrongful act on the 14th but it was the tenant's breach which caused the landlord to make the mistake that it made.

ELIAS CJ:

Doesn't it all turn on whether the landlord validly cancelled and I had understood you to be relying on the landlord being entitled to exercise, on the 15th, its remedies under clause 26. If you're not entitled to rely on that, don't you have to show that the landlord validly cancelled in terms of section 7?

MR COLLECUTT:

Oh sorry, the – I'm seeking to rely – when we're dealing with these, the clause 26 termination clause –

ELIAS CJ:

Yes.

MR COLLECUTT:

– that's a regime which sits to the side of section 7 and 8 of the transfer.

ELIAS CJ:

I understand that but if you're not within clause 26, don't you have to cancel?

MR COLLECUTT:

Yes.

ELIAS CJ:

And isn't then the issue whether you have cancelled –

TIPPING J:

Whether you've communicated it.

ELIAS CJ:

– whether you've communicated the section 8 argument?

TIPPING J:

Sauce for the goose sort of argument.

MR COLLECUTT:

Yes. Well, in terms of communication, in my submission, clearly we have communicated because by remaining in occupation and writing to the tenant after that date –

ELIAS CJ:

Well you would say that your remaining in possession or your being in possession is the overt means, reasonable in the circumstances, do you?

MR COLLECUTT:

I'd also back that up if we turn to volume 3 of the case on appeal, page 50. We have a letter on the 16th of June from Mr Singh where he is reiterating that the lease is at an end. So he says, "Both of you will be aware that the obligation to pay rent and

outgoings does not cease for your clients until the remainder of the term, subject to have caused a mitigation of any loss my client undertakes. The current lease expires on 30 March," etc, "For my client to mitigate its loss effectively, your clients need to assist by agreeing to transfer the telephone number, inform various suppliers and agreeing to co-operate with my client generally. So far this has not occurred."

BLANCHARD J:

But that's clearly all referable to what Mr Singh believes to be a valid termination on the 14th of June?

MR COLLECUTT:

Yes, but equally, it is maintaining a position that the lease is at an end and, of course, in terms of notification and cancellation under the Contractual Remedies Act it's – there's no precise form of wording that needs to be used. All that needs to be communicated is that the landlord has elected to bring the lease to an end.

TIPPING J:

But it's not a further step, it's just a reference, as my brother says, to a step already taken. He doesn't say, well we got it wrong last time but make no error we're doing it right this time.

MR COLLECUTT:

It's –

TIPPING J:

And even if he had, he wouldn't have given them any opportunity of making the payment unclouded by a repudiation which says your lease is lost forever.

MR COLLECUTT:

That said, it still is, the tenant receiving that letter on the 16th, clearly understood that the landlord –

BLANCHARD J:

Had kicked him out on the 14th.

MR COLLECUTT:

That the landlord was saying, on the 16th, this lease no longer exists. So in that situation, no tenant in that situation would be saying that the landlord, at that point in time, was saying that the lease was still on foot. The landlord, at least by the 16th, was saying to the tenant, this lease does not exist anymore.

McGRATH J:

He's really saying that on the 14th of course.

MR COLLECUTT:

Yes, he said it on the 14th and the key point that I'm arguing – I'm just dealing here with the question, was there a communication of cancellation –

McGRATH J:

On the 16th.

MR COLLECUTT:

– on the 16th. The point that I'm making is yes, there was a communication of cancellation on the 16th.

TIPPING J:

Well I think you've got two problems. One, was there a cancellation on the 16th and if so, was it communicated as such. I think you have to demonstrate two such steps because as a matter of policy we can't have contractual and property rights affected by sort of loose waffly conduct like this. That's what's going through my mind.

ELIAS CJ:

Well it's error maintained but I mean –

TIPPING J:

Well, to the extent that it is a further cancellation or purported further cancellation, I have to say it's pretty elusive and I wouldn't, myself, want to give credence to the idea that you can make a terrible mistake and then come and clean it up by such an elusive method as this because then people are just not going to know where they stand.

YOUNG J:

The area where your client's merits are perhaps a bit limited is that after the re-entry its stance was, yes, pay us the rent and yes, pay us the costs for which we're not entitled because we went in ahead but we're not going to let you in anyway. So given that that's its stance, is it really right that it can rely on a continuing failure to pay rent?

MR COLLECUTT:

The contra argument that I'd run there is – and I am conscious of the policy concerns here, but we also have a policy concern about the tenant coming with clean hands and there's a thread through all of the cases that –

TIPPING J:

This is not equity. This is common law.

MR COLLECUTT:

Yes. But as a matter of practicality, as I understand it, the argument that's being run here is that the, on a strict interpretation of the Contractual Remedies Act, the – sorry, on a strict interpretation of the landlord's right to re-enter, it should be restricted by equity on an argument that the landlord, on the 14th, acted inequitably, therefore, on the 15th it's not entitled to –

YOUNG J:

What I'm suggesting is something different.

TIPPING J:

Sorry, what's it got to do with equity?

ELIAS CJ:

But the landlord didn't have the contractual right to re-enter.

YOUNG J:

I mean if you make it clear to someone that you won't accept tender, then you waive the tender. Is it the case that by the 14th of June your client was making it absolutely clear to the tenant that it would not accept a tender of the rent on the basis that the tenant was entitled to tender it, namely that the re-entry would be abandoned, there would be no demand for costs and that the tenants could get back into the property?

So if they're saying, don't even think about it, then can they then complain that the money wasn't tendered?

MR COLLECUTT:

The response here is that the, there's no actual evidence of the landlord saying, don't bother paying the rental arrears, I'm not going to let you back into possession. Yes, we have, on the 16th, a letter from the solicitor, at that stage maintaining a position it's all over, but by that stage, of course, we're passed the 15th. Probably the best point that I can make in this area is if we turn to the actual right of re-entry clause in volume at page 80, we actually have the phrase, before talking about the right, then, "Notwithstanding any prior waiver or failure to take action by the lessor or indulgence granted by the lessor to the lessee in respect of any such matter, all default, whether past or continuant, shall be lawful for the lessor or any other person duly authorised by it to re-enter," etc. So the argument that I'm running here is that in this clause here, it recognises that the landlord may actually take some steps which cause it problems in relation to exercising a power of re-entry.

BLANCHARD J:

But that's simply not related to this kind of situation. That kind of language is designed to ensure that the lessee can't say, hang on a minute, you can't do this because when a similar situation arose some time before, you didn't do it then. It's got nothing to do with the kind of thing that happened here.

TIPPING J:

I think an inevitable inference is that if they had tendered openly, without insisting on the tender being conditional on resurrection, if you like, of the lease, that the landlord would have pocketed it and said goodbye.

ELIAS CJ:

No, and we'll have more.

TIPPING J:

And as to what the outcome of a tender on terms would have been, which was rather more I think my brother Young's point, then I think it's distinctly arguable that that would have not been accepted either, because of the intransigence and dogmatic, if you like, stance in that letter. So I was wondering earlier on, in thinking about this case, about the question of tender and it may be the tenant should have tendered but

I think there is a good argument for saying that he didn't have to in these circumstances because of the signals that the landlord was putting out.

MR COLLECUTT:

Except from the perspective of – and I know I'm going around in circles a bit here, there is a pre – we are dealing with arrears. The tenant did have an obligation to pay them, to pay the rental and in my submission, that distinguishes this case from a number of the tender cases where there's no contractual obligation to do a tender which is conditional upon a landlord or a vendor tendering performance on their side.

BLANCHARD J:

Why was the lessee under a continuing obligation to pay the rent in circumstances where it had been unlawfully deprived on its business by an unlawful termination of the lease?

MR COLLECUTT:

My argument there is that that obligation already existed.

BLANCHARD J:

And would have to be taken into account at some point, but surely if you've been kicked out of the premises unlawfully, you do not have to make an immediate payment of the arrears of rent.

MR COLLECUTT:

Conversely, as a matter of practicality, in innumerable cases where a tenant has filed to pay the arrears and a landlord attempts to re-enter, a tenant says, sorry I didn't pay the arrears, I'll pay it immediately. The tenant didn't in this situation. So –

BLANCHARD J:

But it wasn't just an attempt to remove the tenant. The landlord re-entered, excluded the tenant from the premises and never changed its stance on that.

MR COLLECUTT:

Yes, and the – sorry, I'm going backwards and forwards. Of course the tenant, really where I'm getting to here is the tenant's action happened first and if the tenant, at any point in time, up to the 14th, had remedied its breach, we wouldn't be here.

ELIAS CJ:

But isn't the point that clause 26, it seems to me, there's no foundation for your position at all, that your client had to cancel. And as we've explored, you might be right. The high water mark of your case may be that the landlord could have cancelled the contract on the 15th but as we've explored, he didn't do so.

MR COLLECUTT:

I don't want to repeat the submission I've already made. Really on that, the primary response is that the landlord intrinsically –

ELIAS CJ:

Yes, I understand.

TIPPING J:

The argument has to be he did so.

MR COLLECUTT:

Yes, that he did so.

ELIAS CJ:

Yes, that he did so by staying put.

MR COLLECUTT:

And sending, and his letter.

TIPPING J:

And sending that letter.

MR COLLECUTT:

– sending the letter of the 16th.

ELIAS CJ:

Yes.

TIPPING J:

It all turns on staying put and that letter.

MR COLLECUTT:

Yes, and where I, I suppose where I really want – probably the best authority for me to refer your Honours to, which has dealt with these sorts of –

ELIAS CJ:

Would it be sensible to take the adjournment now?

MR COLLECUTT:

Oh, sorry.

ELIAS CJ:

Is that convenient, or did you want to wrap up?

MR COLLECUTT:

I'm probably going to be more than a –

ELIAS CJ:

Yes, that's fine.

MR COLLECUTT:

– a few minutes.

ELIAS CJ:

We'll take the adjournment now, thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.51 AM

MR COLLECUTT:

Just before the break we were dealing with the question of the applicability of clause 26 of the lease. I just want to make one point in relation to the wording of that clause before moving on. So the clause is at volume 3, page 17 and 18 and the key passage to which I wish to refer your Honours to is on page 18, so on the previous page we have the condition in relation to the 14 days. Then we have the paragraph beginning "Then" and then I will take your Honours to the fourth line of that clause, the phrase "It shall be lawful for the lessor or any other person duly authorised by it to re-enter" etc, and the argument that I am running there, is that the landlord falls

within that wording. So we have on a previous page, the rental being 14 days in arrears and then on this page, we have the condition being met, "Therefore it shall be lawful for the lessor or any other person duly authorised by it to re-enter upon the premises" etc. So I am running a literal interpretation argument on that clause, that just on the plain meaning. We have the condition –

TIPPING J:

If you are being literal, how can you re-enter when you are already in?

MR COLLECUTT:

I will run the argument there that in one sense, we leave the premises for the night, locked up, the next morning we come in, literally we re-enter the next morning. Sir, also in terms of the purpose of this clause, I would be running the ancillary argument that from the landlord's perspective, the purpose of this clause is to ensure that if the rental hasn't been paid, there comes a point in time when the landlord can re-enter. So I am really trying to run a literal and purposive interpretation that so long as the rental is 14 days in arrears, the landlord can re-take possession of the premises and end the tenant's tenancy. Now I don't – unless your Honours wish to ask any more questions in relation to the interpretation of that clause, I intend to move on to other points. I think I have taken that matter as far as I can today.

ELIAS CJ:

Thank you.

MR COLLECUTT:

Now of course we are dealing here with a situation where, as far as the tenant is concerned, the tenant intrinsically was saying, well maintaining the position, that the lease was still on foot on the 15th of June and if I take your Honours to the appellant's bundle of authorities, tab 1, page 1. We have s 8 of the Contractual Remedies Act as set out and, of course, that section provides that the cancellation of a contract by a party, i.e. the tenant, shall not take effect and we are not talking about paragraph (a), we are talking about paragraph (b) before the time at which the party cancelling the contract, evinces by some overt means, reasonable under the circumstances an intention to cancel the contract etc. Now the phrase, I am drawing your Honours' attention to, is in that paragraph (b). In this case, in my submission, it is clear and I believe my friend concedes, the tenant did not evince by some overt means reasonable in the circumstances, an intention to cancel the contract in June.

So in going back to the start of that clause. The Act provides the cancellation of the contract does not take affect, effectively in June. So following that through, logically it follows that as at the 15th of June, this lease was on foot.

BLANCHARD J:

I don't think that is in dispute is it?

MR COLLECUTT:

Well this comes to your Honour's argument that a landlord no longer had the benefit of the no-set off clause in the contract on the 15th of June. The point I am arguing there is that by the express wording of the statute, this contract remained on foot, the landlord had a no-set off clause in the contract and therefore the landlord was able to say, on the 15th, the rental still hasn't been paid, it is in arrears for 14 days and you have got no excuse, not just on the 1st, 2nd, 3rd etc, through to the 14th day of June. You've got no excuse in that period of time for not paying the rent, come the 15th, you still have no excuse for not paying the rent and so in my submission, it then flows through that we meet the conditions in clause 26, therefore, the land had the right of re-entry. And also coming back to your Honours have posed the hypothetical about the possibility of a later cancellation being effectively backdated.

TIPPING J:

Oh it was me and I have gone off that.

MR COLLECUTT:

Oh all right. I just wanted to provide your Honours with some authority.

BLANCHARD J:

Personally I don't think we need it, it is in those words that you just read.

TIPPING J:

It is clear enough on the statute that there is no backdating.

MR COLLECUTT:

Yes, so that really just brings me to what I submit is the correct analysis of the law applicable to this case and in my submission this case, in some respects, is very similar to the Court of Appeal's decision in *Chatfield v Jones* which is at tab 3 of my friend's bundle of authorities. Now I will just give your Honours a brief overview of

the factual background to that case. That is a situation where Mr Jones and Mr Tozer were involved in a business in Fiji. They had entered into an agreement to sell that business to party, Chatfield and various other parties. What then happened was that Chatfield and the other parties repudiated that agreement, and said we are not going to settle the purchase, then having repudiated it, Jones issued proceedings for specific performance, seeking specific performances or damages in lieu. That was held to be an election to form the contract. Then after that point in time, Jones went and sold the business without first communicating, through to Chatfield, that Jones had accepted Chatfield's continuing repudiation of the agreement and the Court of Appeal, in that case, in effect, held that by entering into the agreement to resell the agreement, there was a manifestation of intention to cancel the agreement and then some time later when there was an amended pleading, that was the communication of that cancellation through to the purchaser, bringing the contract to an end.

The argument that was run by the purchasers that at the time of sale, that sale constituted – sorry, at the time of the sale the agreement was still on foot and that sale itself constituted a breach by the vendors because they had a continuing obligation to keep themselves ready, willing and able to settle. The Court of Appeal has essentially held that yes, the agreement was on foot at the time of the sale but no actionable damage, damages of note, arose to the purchaser because they had repudiated and they hadn't withdrawn their repudiation before they'd been notified of the cancellation.

So in one way of analysing it, and this, of course, the analysis in the High Court, the purchasers, by repudiating, effectively said to the vendor, you don't have to maintain yourself in a position of being able to immediately settle and in reliance upon that, they'd put themselves out of position of being immediately able to settle and had communicated their cancellation before the purchaser had changed their position. The key passage I wish to take your Honours to is at page 24 of the bundle which is page 294 of the Court of Appeal's decision. The Court of Appeal had just been through sections 7 and 8 of the Contractual Remedies Act and then they go on, "The appellant's case is that the sale of the assets –

ELIAS CJ:

Whose judgment are you referring to there?

YOUNG J:

Justice Somers is it?

ELIAS CJ:

At 294 is it?

MR COLLECUTT:

Yes, at page 294.

ELIAS CJ:

And what line?

MR COLLECUTT:

We start at, just above line, let's call it line 9. "The appellant's case is that the sale of the assets of Acorn Fiji was not itself a cancellation for it was not accompanied or preceded by notice to the defendants. It was, it was said, a repudiation by the sellers. It seems to me unarguable that the sale of the assets evinced an intention on the part of the sellers to cancel the contract. But the cancellation did not take affect under section 8 until that intention was made known to the defendants. The plaintiff's pleading sufficiently made the cancellation known to the defendants. It may be noticed that the common law had no difficulty with the situation, thus in *Holland v Wiltshire* (1954) 90 CLR 409 Dixon CJ held that the vendor's election to treat the contract as discharged by the purchaser's breach was sufficiently manifested by his proceeding to advertise the property and by his selling it. The principal speech in *Fercometal SARL v Mediterranean Shipping* [1989] AC 788, delivered by Lord Ackner, is to the same effect. In *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 Lord Denning MR said, '… a contract is repudiated by a party and the other has a right to elect whether to accept it or not, any unequivocal act clearly evincing his election is sufficient'. It is not necessary in this case to decide how far, if at all, section 8 departs from the common law for here the cancellation was made known to the defendant buyers. It was suggested that had they tendered the purchase money between the date of the sale and the notice of cancellation given by the sellers in their pleading the sellers would have been in breach. Had that occurred the rejection of the contract by the buyers may have been treated as a rejection of their interest in the property so that they could not later complain when the sellers were found to have acted upon it. They may have been taken to have waived notice or to be stopped from complaining of its absence."

Now the key points. There's two ways of applying this case here. Point number 1 is here we have a situation where the tenant had the right to cancel on the 14th and I – there's no dispute here that there was no objective evincing of an intention to cancel on the 14th or on the 15th by the defendant. Now in my submission the question of tender of the rent arrears, ties into the, by analogy, the hypothetical situation in *Chatfield v Jones* of a – the purchaser there withdrawing their repudiation, which – and saying, okay, we're prepared to the purchase this property.

ELIAS CJ:

But here the landlords have said, don't bother.

MR COLLECUTT:

What I'm saying – my argument here is that I'm saying that the landlord never said, don't bother paying your rental arrears. My key argument is I'm saying consistently the landlord has always sent, you have failed to pay your rental arrears. There is a lease on foot on the 1st of June. You breached it. And both before the 14th and after the 15th, the landlord has been 100% consistent saying the tenant is in breach, they've failed to pay the rental arrears. And the – I suppose I can take an analogy with the case law where an innocent party is seeking to cancel a contract and in the first instance they advance ground A and it turns out that ground A had absolutely no justification. The case law says that if there's a ground B which gives the innocent party the right to cancel, the innocent party can use ground B.

BLANCHARD J:

That's where both grounds exist at the same time.

MR COLLECUTT:

Yes, I – I accept the point that you can distinguish those where they exist at different times but if we look at the rationale in those cases and I'm sorry I haven't included these in the bundle, my understanding is the rationale is that the Courts will not let a guilty party take advantage of their breach. So in this situation we have a tenant who failed to pay the rental and in my submission, if the landlord, on the 15th of June is not entitled to rely on the tenant's failure to pay the rental on the 1st, then the tenant is taking advantage of the consequences of its breach. I accept that –

TIPPING J:

He's not really doing that. He's taking advantage, if he's taking advantage of anything, of the landlord's breach.

MR COLLECUTT:

Yes, he's taking advantage of – he's indirectly taking advantage of his breach because his breach was the cause of the landlord's over-reaction.

TIPPING J:

That's a –

MR COLLECUTT:

Well just from pure logic –

TIPPING J:

Provoked into –

ELIAS CJ:

You might be better to drop the "over".

MR COLLECUTT:

Well perhaps I can put it this way. But for the non-payment of the rental on the 1st of June, the landlord wouldn't have taken any action on the 14th of June.

TIPPING J:

Well that's like saying if there hadn't been a lease. I mean, with great respect, this is pushing it a bit hard.

MR COLLECUTT:

But at the end of the day, if I can liken this to a schoolyard fight, the landlord is saying the tenant started it.

McGRATH J:

You've got problems with the remoteness of the consequences here.

MR COLLECUTT:

Oh, I accept there's an argument about remoteness but we are dealing with a situation where it's not a simple case where we've got a completely innocent tenant here that a landlord has, without any arguable basis at all, has said, I know that I've got no legal right to do this, I'm just throwing you out of the premises. This is the situation where there has been a breach by a tenant. The landlord obviously has made a mistake in relation to its rights. And in my submission we do have to balance the interests of both parties from a policy perspective and as far as the Court being concerned that if this is a situation where a landlord has miscalculated and we don't want precedent to be set there that if a landlord miscalculates they may be able to fix up their miscalculation. That is mitigated here by the aspect that the tenant was in breach originally and we have a specific clause of the contract that in my submission, on its literal reading ...

MCGRATH J:

If you want to policy what's wrong with saying the landlord must put his breach right and then move immediately in relation to the tenant's breach.

MR COLLECUTT:

If the tenant – what is wrong with that here is that I'm saying exactly the same with the tenant. The tenant should have put its breach right and remedied its breach, paid the arrears and we have a lease which clearly says payment of rents is essential. It is my written submissions, so I haven't referred to it orally. But at the landlord's end, this is a lease which has a number of clauses emphasising the importance to the landlord, that the rental is paid and paid on due date and here we have a situation where a tenant, over an extended period of time, simply has ignored its obligations. And in my submission, in interpreting the right of re-entry we should place that clause in its context where the tenant was obliged to pay the rental and the lease specifically said, payment on due date is essential.

It is not a trivial matter as far as the landlord is concerned and we all know that landlords have mortgages to pay and in a scenario where a tenant consistently pays its rental late and we get through to the 15th of June and it still hasn't paid its rent, in my submission it is open for the landlord to say, on the 15th, the rental is in arrears, it is lawful in terms of clause 26, for me to re-enter and take possession of the lease. I can justify my actions on the 15th and of course we are dealing with the situation where the tenant, on the 14th, knew if the rental wasn't paid on that day, the landlord

would have the right to re-enter the following day. So it is not as though this is a tenant who, on the 14th, was thinking, oh I only have to pay the rental today, it is not going to be that important.

This is a case where the tenant knew, the landlord was complaining about it, you have got a lease where it was essential that they got paid on due date. The tenant just ignored those obligations. The landlord, yes, made a mistake and if the tenant had cancelled on the 14th, the landlord would have been in a very difficult situation but if we compare this to the analysis in the Court of Appeal in *Chatfield v Jones*, this is the same scenario where at the time where Jones had sold the business without communication, through to Chatfield, that the contract was at an end. Notionally, that was a material breach in repudiation of Jones' obligations to Chatfield, under that agreement. But the Court of Appeal held that as Chatfield took no action between the time of the sale, which I take an analogy between the sale and *Chatfield v Jones* and the re-entry here, because the purchaser in *Chatfield v Jones*, did not say "I've changed my mind, I am going to settle with this purchase."

In this case the tenant didn't come along on the 14th and say here is your rental arrears. Because that didn't happen, we get to the later point in time, in *Chatfield v Jones*, Jones gave their notice cancelling and in this case we get through to the 15th, the rental was 14 days in arrears, the landlord continues in occupation, therefore, the landlord has terminated the lease. Also in this case I want to point to the potential artificiality that we are dealing with here. Because we have events happening in June, then we have an extensive period of time passing, where the tenant is taking no action at all, the landlord is carrying on treating the property as its own, to hold that the lease was effectively still on foot on the 15th of June, when the tenant has done nothing and the tenant is taking no steps for several months, to claim possession of the premises, creates a total artificial situation.

In my written submissions, I run the argument that I point to the scenario that it is inappropriate to say that the lease was on foot for the purposes of keeping alive an application for an injunction or for an application for leave against forfeiture. But on the other hand saying that the lease came to an end, on the 14th or 15th of June for the purposes of damages claimed by the tenant. This is a situation when we get to, let's say a period three months after June. At that point in time you have got three months of inaction by the tenant, you have got three months of the landlord asserting that this lease had been terminated, that the landlord was entitled to possession of

the premises and in my submission it would just be artificial and it would go against the provisions of s 8 of the Contractual Remedies Act to say that, no this lease had been cancelled in June.

Now from my perspective those are the key points that I wish to make unless there are any other questions from the Bench?

ELIAS CJ:

No thank you Mr Collecutt.

MR COLLECUTT:

As your Honours please.

ELIAS CJ:

Mr Grove we have to adjourn at 12.30 today. Will your time be complete?

MR GROVE:

I am going to be very short. The first point my learned friend has made is that the tenant was in breach from the 1st of June in that the rent hadn't been paid in full on that date. The small bundle of correspondence, which has been produced, shows that payments were being made but the critical point and the point this case is about is that, even if that was a breach of the lease, it didn't become a repudiatory breach until the 14 days had expired and that is the point there. Not until we got to the 15th, even if nothing had been paid, not until the 15th could the landlord have exercised this contractual right and the other point I have already made is that we have got a finding, that on the 14th the tenants were ready, willing and able and were intending to pay the sum due. My friend refers to, but for that failure the landlord wouldn't have unlawfully re-entered. That is not right. It is, "But for the landlord unlawfully re-entering", that the rent wasn't paid. My friend referred to the *London and County* case that, in my submission, and as his Honour Justice Allan determined, is completely different. The facts of it is, where there is a sub-leases down but the plaintiff/appellant in that case is a financier who had granted a mortgage over a lease to the bottom sub-tenant, The bottom sub-tenant had vacated voluntarily and not paid any rent and as his Honour Justice Allan found, the case is completely different. My friend referred to the fact that Mr Ingram accepted that if he hadn't paid the rent on the 14th, re-entry could have taken place on the 15th. Well that's, I mean he's not

a lawyer but of course that makes sense, but his position was that he would have paid on the 14th, if we had possession.

I discussed and referred your Honours to the *Vousden* case where the Privy Council accepted that acceptance of the cancellation was given when the proceedings were issued. I also, and I rely upon the *Chatfield v Jones* case. I won't take your Honours to the case itself but if I give you the references: page 209, line 42; 294, line 12; 296, line 44; and 297, line 54 and that's where the Court says, well there wasn't any communication of acceptance until the proceedings were issued which, that support my submission is what the case is here. It's what his Honour Justice Allan held.

Finally, section 8. Section 8 led to *Schmidt* and *Jones,* the case which was described by the Law Commission as unacceptably harsh. The *Chatfield v Jones* waiver estoppel argument gets my clients around that problem. In my submission, the *Vousden* case gets my clients around that position. And the case law stating that a party must be ready, willing and able to complete its contract or it can cancel and in my written submissions I've referred to the case law also gets me around that hiccup. And finally, I'll just repeat the comment from his Honour Justice Priestley, if that was the reason that the tenants in this case lost the case, the decision would be unpalatable.

Unless your Honours have any questions, those are my submissions in reply.

ELIAS CJ:

Thank you, Mr Grove. Thank you counsel for your submissions in this matter. We will consider our decision.

COURT ADJOURNS:12.23 PM