IN THE SUPREME COURT OF NEW ZEALAND SC 39/2013

[2013] NZSC Trans 23

BETWEEN **VICKRAM KUMAR AND NIRUPAMA KUMAR**

First Appellants

ROBERT JAMES SELWYN

Second Appellant

MICHAEL DONALDSON AND
PATRICIA BRONWYN DONALDSON

Third Appellants

AND **STATION PROPERTIES LIMITED (in liquidation)**

Respondent

Hearing:	12 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	R M Kelly, K J Jarvis and S A Eckhoff for the Appellants D J Goddard QC, M J Tingey and S V A East for the Respondent

---

CIVIL APPEAL

MS KELLY:

May it please the Court, I appear for the appellant with my juniors Ms Jarvis and Ms Eckhoff.

ELIAS CJ:

Thank you Ms Kelly, Ms Jarvis, Ms Eckhoff.

MR GODDARD QC:

May it please the Court, I appear for the respondent with Mr Tingey and Ms East.

ELIAS CJ:

Thank you Mr Goddard, Mr Tingey, Ms East. Yes Ms Kelly?

MS KELLY:

Your Honours, the submissions of the appellants were updated to have annotated references to the case on appeal yesterday, I trust you have copies of those?

ELIAS CJ:

Yes.

MS KELLY:

Thank you. Proceeding on the assumption that you've had an opportunity to consider the material in detail, I hadn't intended to take Your Honours through the background of facts unless you would like me to.

ELIAS CJ:

Well I don't think you need to take us to the facts by way of background but certainly my impression is that the facts are going to be quite important in the case so when you develop your argument you'll probably have to take us to them.

MS KELLY:

Yes thank you that's my intention as well. As a preliminary matter may I say this? It appears from my reading of the respondent's submissions that we are not at odds on the principles in general. The one point of difference that stands out is our interpretations of the *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 case and I'll come to that in due course. But in general terms almost every proposition and principle of law that's expounded by the respondents that is which I agree with and the appellants adopt. However, it is the

dislocation of those principles from the facts in this case which give rise to the dispute in essence.

The principal dislocation is the repeated statement by the respondents that the purchasers, I'll call the appellants the purchasers for ease of reference, continued to maintain until the time of Station's cancellation, that they were not obliged to settle. That, with respect, is a misreading of what happened. The facts are that the repudiation relied upon by the Court of Appeal occurred in 2008 and prior to Station's calls for settlement in 2008. Station called three times for settlement in 2008, first on the 14th of August, which was pleaded to be the settlement date. Secondly, in September and thirdly in October of 2008. After that time Station did not formally call for settlement again. It's now conceded by Station that it was not entitled to call for settlement on any of those occasions. What Station relied upon pleaded as repudiation was the call in February 2010 for the purchasers to confirm that they were willing to proceed to settle.

ELIAS CJ:
Sorry the date again?

MS KELLY:
February 2010. Upon the failure of the purchasers to respond to that letter, Station cancelled on the 6th of April 2010. Station did not call for settlement in February 2010, it simply wrote a letter seeking confirmation of the purchaser's intentions. So following the repudiatory conduct relied upon by Station, and of course that repudiatory conduct is denied, but following that allegedly repudiated conduct, Station affirmed the contracts by calling for settlement. It did that on three occasions in August, September and October 2008. There can be no clearer affirmation of a contract by a party facing repudiatory conduct than the call for settlement.

ARNOLD J:
But didn't the Court say in *Regalwood* that calling for settlement was not affirmation, it was just to ascertain whether there was – and then the other side were going to repudiate or settle?

MS KELLY:
The principle upon which we differ about *Regalwood* doesn't relate to that fact. In *Regalwood* what the Court said was having called for settlement the vendor was not

in that circumstance, at that time, in breach, because the obligation of the vendor which was relied upon by the purchaser to resist settlement, did not accrue until settlement. So the call for settlement in *Regalwood* was not itself a breach.

Now what we are arguing here is that the call for settlement was invalidly made because of pre-conditions to the right to call for settlement and those pre-conditions were the arrival of the settlement date, which is now considered has never arrived, and the meeting of the side agreements. The side agreements, the three obligations of management, furniture and the payment of 1% were expressly stated in the contractual documents to the obligations of Station prior to settlement. So this is a distinction between this case and *Regalwood*. In *Regalwood* the obligation of the vendor was at settlement to perform something.

ELIAS CJ:
Can I ask you, I understand your point, that the call for settlement may have been affirmation but do I take it from what you say that if we take the view that the response to the February 2010 letter was repudiation, you're not able to succeed. Are you conceding that –

MS KELLY:
No.

ELIAS CJ:
– that that could constitute repudiatory conduct?

MS KELLY:
No I'm not making that concession for this reason. The purchasers had no obligation to respond to the letter because Station, what Station ought to have done was put itself in a position where it could properly call for settlement. That was what Station needed to do in order to put the purchasers into a position of repudiatory conduct. Simply because the purchasers failed to respond to that letter, and in the absence of a contractual obligation to respond, Station could not rely on that as repudiatory.

WILLIAM YOUNG J:
Well it's one thing to have an entitlement to cancel for non-compliance with a settlement notice which is valid, and as I understand it, it's not suggested that Station

was entitled to do that, it's an entirely different thing, isn't it, to be entitled to cancel if it's clear that the other party isn't prepared to settle come hell or high water?

MS KELLY:
Quite and the words are come hell or high water.

WILLIAM YOUNG J:
Now how do you – you say, you're coming close to suggesting that that can only be established by Station effectively making a tender of everything they have to do under the contract.

MS KELLY:
Unless there is further overt conduct on the part of the purchasers which make it clear, which clearly evinces their intention not to perform.

WILLIAM YOUNG J:
But wasn't it perfectly obvious they wouldn't perform?

MS KELLY:
Well the obviousness arises out of the failure to respond to the settlement notices.

WILLIAM YOUNG J:
But also the context.

MS KELLY:
Sorry?

WILLIAM YOUNG J:
Also the context, there was no way they wanted to perform that.

MS KELLY:
Oh quite and it's not, an issue is not taken with what they wanted and with respect to the Court of Appeal this is the nub of what we say is the error. To ask the purchasers three or four years later in Court what were your feelings, what were you thinking, doesn't go to repudiatory conduct.

ELIAS CJ:

But then does it all come down to how we construe the exchange of correspondence in February 2010?

MS KELLY:

Well there's no exchange so much. In February 2010 there was a letter from the Station solicitors saying, "Please put your cards on the table. Are you going to proceed with this or not." The purchasers didn't respond to that. Now if that constitutes a clear evincing of intention not to perform in the absence of an obligation to perform, well that will be a new benchmark for repudiatory conduct in my submission.

WILLIAM YOUNG J:

But can't it be construed against the background of what had gone before?

MS KELLY:

Well, yes of course it can, as a matter of principle, but as a matter of fact, whether that's a fair construction is something I'll come to now. What the purchasers in fact did in mid-2008 was to express their shock and their protest at what they saw as a re-jigging of the contractual relations between the parties. Now the fact that they were wrong about that, as a matter of law, the fact that they were bound to settle, does not alter the fact that it is unrebutted evidence that they were shocked, that they were being called upon to settle. Now when Mr Justice Toogood ruled inadmissible the evidence as to the purchasers beliefs, he did so at paragraph 85 of the High Court judgment only for the purpose of determining the meaning of the obligation under the contract and he expressly reserved that evidence for the purpose of the extent to which the purchasers had been misled.

So in the context of that having been misled the purchasers rang Station to express the shock and protest and essentially a careful reading of the evidence shows that they had understood there to be two types of contracts, underwrites and outrights. Underwrites were what they thought they had and outright purchasers were what they thought the people who had to settle had.

ELIAS CJ:

You say that that, you acknowledge that they were wrong in law on that so where does it take you?

MS KELLY:

It takes me to this. The context, the factual context of the protest has to be considered in order to determine what the meaning of the conduct was. Whether the conduct really was clearly evincing an intention not to be bound. So the protest is in this context to be contrasted from the protest say of two commercial parties who had agreed to buy and sell property. In that context where it was always understood, there was no doubt about the quality and the nature of the contract and the obligations under it, for one party in that context to say, look I'm not going to settle I don't have to settle, is clearly repudiatory. Now that's to be contrasted with this conduct where these mums and dads purchasers are saying, hang on, I'm an underwriter, I don't have to settle, you've got it mixed up.

ELIAS CJ:

So you're relying on the cases that say if you make a mistake about your obligations you're not evincing repudiatory conduct until your mistake is dissipated?

MS KELLY:

Absolutely. We do rely upon that and of course it's always a question of fact. Now in these peculiar facts it would be to do the purchasers less than justice to ignore the fact that they have been led into this mistake and that they were seeking to correct.

WILLIAM YOUNG J:

What did they think, I mean I haven't really looked at this aspect of the case because it's not on the table, but who did they think the underwrite agreements were going to be looked at by? What was the impact? Did it not occur to them that someone might be lending money on the face of them?

MS KELLY:

Well it was extensively put to them in cross-examination that they must have known that BOSI, the financier, was going to rely on these contracts as each of them said we didn't know BOSI was relying on my contract. There were underwrite contracts and there were purchase contracts. We didn't know which ones BOSI was looking at and how could they. So –

WILLIAM YOUNG J:

What was the point of being asked to sign an underwrite contract unless it was going to be put to use?

MS KELLY:

There's no question that there's a scam at the heart of this dispute and the scam was perpetrated on BOSI and on the purchasers by McEwan. There's no question about that. There can't be a serious argument. BOSI was misled and when it discovered that at the time of settlement, the calls for settlement, BOSI "pushed back hard" as it said. The purchasers were also the subject of the scam because they were told that they didn't have to settle. Now that's unrebutted evidence. Nobody was called on the part of Station to say no that didn't happen. The purchasers all said that it did happen and so coming back to 2008 at the time when they were faced with these re-definition if you like of their obligation in their own mind they rated to protest. Each of them said that they decided rather than having a blue with Station, rather than fight it, that they would try to compromise it. So each of them obtained valuations to see if they could buy and on-sell and extricate themselves from this very costly, lengthy litigation. It was inevitable otherwise. The Court of Appeal relied upon the obtaining of valuations as evidence of repudiation. The Court of Appeal said, in respect of Mr Kumar, the fourth defendant and purchaser, that the making of the offer, based upon the valuation, in a without prejudice context, sorry, the Court of Appeal didn't say that, I said "without prejudice context" in order to compromise the dispute constituted repudiatory conduct.

ELIAS CJ:

Can you just tell me what paragraph you're referring to in the Court of Appeal judgment?

MS KELLY:

Yes I'll just obtain my documents. It's in volume 1, that Court of Appeal decision, at paragraph 50. "By offering instead to buy the apartment at the much reduced figure of 535. In so doing Mr and Mrs Kumar were plainly evincing an intention not to proceed." So there were two limbs to the alleged repudiation of the Kumars. The first limb was the refusal of a recognition of any obligation to settle, and I'll come back to that. And the second was the offer to buy based on the valuation.

ELIAS CJ:

Sorry, what date are we at here? I should pull up your chronology. This is 2010 is it?

MS KELLY:

No, this is in 2008.

ELIAS CJ:
Oh, right.

MS KELLY:
So, can I take you perhaps to the detail of this because this evidence is going to be critical.

ELIAS CJ:
You should probably take us to the letter of February 2010 too.

MS KELLY:
Well that's in volume 5. On page 1025.

McGRATH J:
Sorry, what was the page number?

MS KELLY:
1025.

GLAZEBROOK J:
And the earlier correspondence are just before it?

MS KELLY:
Yes, that's right.

GLAZEBROOK J:
So that letter was - when was the litigation?

MS KELLY:
The litigation commenced in February 2009. Settlement was called for mid-2008. Summary judgment decisions were given in December 2009 and this letter was in February 2010. The sunset clause was the 13th of March 2009 so if Station wasn't – if either party wasn't ready, wiling and able to settle by that point – sorry, if Station wasn't ready, willing and able to settle by 13 March 2009 the purchasers could terminate the contract without obligation.

GLAZEBROOK J:

So what, where do you go from there because your clients were resisting summary judgment in February 2009.

MS KELLY:

Yes I think the notices of opposition were filed in March.

GLAZEBROOK J:

And that was on the basis there was no requirement to settle I'm assuming?

MS KELLY:

The notices –

GLAZEBROOK J:

Are based on the interpretation of the contracts that was being argued in the High Court?

MS KELLY:

That's right, that's right. There were a number of bases argued; one was misleading and deceptive conduct, one was non-obligation to settle, because they were underwrites et cetera.

ELIAS CJ:

And, sorry, don't time to take us to it but can you just give me the reference to, the contracts are in volume 4, are they, at 799, is that right?

MS KELLY:

At tab 20 in volume 4.

GLAZEBROOK J:

Just looking at this letter of February 2010, leaving aside for the moment that it's after the sunset clause, but – actually maybe we need to look at that a bit more as well. But in any event looking at that 2010, if it's in the context of litigation that's challenging whether there's a necessity to settle, doesn't a non-response in that context really indicate that your clients are just continuing their opposition to

settlement, but do you say still on a wrongful legal basis or a misunderstanding of their obligations, is that why you say it's not repudiatory?

MS KELLY:

At this point, the 23rd of February, it wasn't clear that the litigation would proceed although I – sorry, just let me withdraw that while I consider. The 5th of February letter, two pages earlier, really seeks to put forward the proposition that the Fair Trading Act 1986 defence, which had succeeded in resisting a summary judgment, was not likely to prevail at trial. The context of the 5 February letter was to invite a dialogue and invites them to be clear, the last paragraph says, "We invite your clients to proceed with and complete the settlement of the purchases where continued failure to do so will be treated by our client as a repudiation of these agreements." So there then followed discussion and then the 23rd of February letter was the one relied upon by Station in the proceedings as essentially as the repudiatory, the non-response to which was the repudiatory conduct.

ELIAS CJ:

Sorry, which page is that at?

MS KELLY:

1025, that is the letter I've taken you to earlier. Now can I just say a word about what was relied upon at trial and what wasn't. The pleading of Station, as plaintiff, asserted two breaches by the purchasers. One was the failure to settle when called upon to do so and the pleading makes –

GLAZEBROOK J:

And that was in August –

MS KELLY:

Yes August, September and October.

GLAZEBROOK J:

Sorry the 2008 failures to settle, right?

MS KELLY:

That's right. The repudiation was the repudiation in February 2010, the failure to respond to this letter. Can I take you to the pleading because I think it's important

that this be clear because of some misunderstandings that arise out of the respondent's submissions. The pleadings appear in volume 1 at tab 3. Now the first thing to say about the pleading is that they're chronological in respect of each of the purchases. So with respect to the Kumar purchases, if you turn to page 15 you'll see paragraph 16, having done the recitations of contract, that commences the call for settlement.

GLAZEBROOK J:
Sorry, I think I've just missed the page numbers?

MS KELLY:
Page 15, paragraph 16 is headed, "Call for settlement." Now that is the relevant part of the pleading. So it deals with the 7 August call for settlement, the 23 September call, the 9 October call. Now, in respect of the 9 October call, the pleading at paragraph 19 is that the fourth defendants failed to settle on 9 October. Then a settlement notice issues on the 10th of October requiring settlement by the 28th and saying the fourth defendants failed to settle. Then the 23 February 2010 letter is relied upon as failure to confirm that they would proceed. So if one then skips to the relief, forward to page 25, paragraph 58 of the pleading, the failure to confirm –

ELIAS CJ:
Sorry, page?

MS KELLY:
Page 25 at paragraph 58 of the pleading. The failure to confirm must necessarily relate to the February 2010 conduct.

WILLIAM YOUNG J:
Why?

MS KELLY:
Because the only failure to confirm pleaded is the failure to confirm in response to the 23 February letter.

WILLIAM YOUNG J:
Isn't – there's a continuing failure to do so that's pleaded.

MS KELLY:

Well there's certainly a continuing failure on the part of every purchaser, I suspect, to confirm that they're intending to, to proceed with their contractual obligations, but it's when one puts the card on the table and says, "Now, confirm that," and that is pleaded as 23 February 2010, that's what the pleading is referring to.

WILLIAM YOUNG J:

Well wasn't it perfectly obvious from the way the case was run at trial that the whole pattern of events was relied on?

MS KELLY:

No, it certainly was not. It certainly was not. It was not put to any of the witnesses. No purchaser had it put to them that they repudiated in mid-2008. It hadn't been pleaded and it wasn't –

WILLIAM YOUNG J:

But a repudiation that's not accepted is nothing anyway.

MS KELLY:

Well, that's rather my point with the affirmation.

WILLIAM YOUNG J:

But if you've got a whole pattern of events, you look at the whole pattern of events up to the last one that was relied on don't you?

MS KELLY:

The pattern of events consists only of two elements, in my submission. First, the failure to respond to the settlement notices in mid-2008. And secondly, the failure to confirm, in February 2003, that they would proceed. Nothing happened in-between except the proceedings and the summary judgment defence.

WILLIAM YOUNG J:

And a continued, but I mean a statement of defence to summary – to specific performance, could be treated as repudiation so it's not true that nothing happens.

MS KELLY:

Yes, sorry, there was no direct communication between the parties except through the proceedings, between 2008 and 2010, yes, so the failure to –

GLAZEBROOK J:

There, do you rely on a mistaken understanding of obligations up until the time that that was put right by the High Court judgment?

MS KELLY:

Yes, certainly the purchasers statements, made back in 2008, to the effect that they didn't have to settle because they were only underwrites, certainly we rely upon that as being based on the mistaken understanding of legal obligation.

ELIAS CJ:

So when did the mistake lift? With the judgment?

MS KELLY:

Yes. The purchasers maintained through trial that they were not obliged to settle. Now whether they were obliged to settle, having been misled into their point of view, was not actually ever determined because Justice Toogood did not proceed to determine the misleading and deceptive conduct defences because he'd decided on the basis of essentiality of obligations and the non-provision of the practical completion certificate.

ELIAS CJ:

So if it's a misleading or deceptive conduct, a fair trading act, cause of defence, was there also a misrepresentation defence?

MS KELLY:

Yes, yes.

GLAZEBROOK J:

But they haven't been proceeded with after the High Court though?

MS KELLY:

No, that's true, that's true.

ELIAS CJ:

Well they weren't proceeded in, they weren't determined in the High Court –

MS KELLY:
That's right.

ELIAS CJ:
- and they were overtaken.

MS KELLY:
That's right.

GLAZEBROOK J:
But there hasn't been a, there wasn't a revival of those or supporting the judgment on other grounds in the Court of Appeal –

MS KELLY:
No.

GLAZEBROOK J:
– or in the leave to appeal here so what – there are those cases that say you can be mistaken about your obligations but leaving aside the misrepresentation in Fair Trading Act its relatively difficult to see this as if you have signed something that says you're going to settle on a certain date and it's in the format of agreement for sale and purchase of property, it's relatively difficult to have even a skerrick of an argument that it was reasonable, especially given that documents are looked at objectively and not on the basis of subjective views.

MS KELLY:
Yes.

GLAZEBROOK J:
So leaving aside those issues of misrepresentation and being mislead, it's very difficult to say that it was even, that there was even a skerrick of an ability on the face of those contracts to say that they didn't have to settle, wasn't it?

MS KELLY:
Well the trouble –

GLAZEBROOK J:
Leaving aside the –

MS KELLY:
Yes.

GLAZEBROOK J:
– and of course you say you can't leave that aside but –

MS KELLY:
Yes, the trouble with that analysis is, with respect, that the contractual documents are confused as to the obligation to settle the contractual documents held by Justice Toogood, together with the sale and purchase agreement, as constituting the contract, distinguish outright purchases from underwrite purchases and appear to give to the purchaser the option of "going unconditional". Should I take you to those documents?

GLAZEBROOK J:
Well I, yes, possibly.

ELIAS CJ:
I think we do need to go to the contractual documents. When you go to them can you show us the sunset clause?

MS KELLY:
Yes.

GLAZEBROOK J:
So you would say that given – let me just get the submission right then. It's not as if there was an absolutely clear obligation to settle, it was a case where you could, even leaving aside the matters of misrepresentation and Fair Trading Act issues, so that the contractual documents were confused and that the contractual matrix may, even without those causes of action, include those misrepresentations?

MS KELLY:
Yes. Really what I'm saying to you is –

GLAZEBROOK J:

In terms of working out whether there was some reasonable skerrick of a dispute here.

MS KELLY:

There was a glimmer. There was an opportunity for a proper argument to be made before the High Court that there was ambiguity in the contractual documents, because they did not consist solely of the sale and purchase agreement, but also of these other things which distinguished outright purchases from underwrites and secondly gave the option of turning an underwrite into an outright purchase to the purchaser. So those documents meant there was ambiguity and that would have to be resolved. The purchasers said, we thought it meant this because that's what McEwan told us.

McGRATH J:

Do you say the matter was only resolved when Justice Toogood said the underwrite agreement included an obligation to settle?

MS KELLY:

Yes. Justice Toogood looked – sorry, I'll just turn up the contract so I can take you to the details. Now can I take you to volume 4 where the contracts are first at page 778. This is one of three contracts, this is the Donaldson contract, and clause 37 was known between the parties as the gazump clause. Now if one reads 37 the purchasers, and just read it literally –

WILLIAM YOUNG J:

Sorry what page is it?

MS KELLY:

Page 778.

GLAZEBROOK J:

And what's this document?

MS KELLY:

This is the sale and purchase agreement for Donaldson. Now this is one of the special conditions and in the instructions on how to fill out the contract, Station advised the purchasers they couldn't change any of this, but if they wanted to be outright purchasers they were to delete clause 37, the gazump clause. If they were to be underwrite purchasers –

ELIAS CJ:
Is that the vendor's right to cancel?

MS KELLY:
That's right. And if they were to be underwrite purchasers, 37 stayed in, all right? I'll take you to those instructions in a moment but just have a look at the terms of 37, if you would. Now read literally, 37 means the purchaser has no right of specific performance because the vendor can cancel anytime for any reason, without notice, and no right of compensation. The purchaser cannot enforce this contract, if 37 is literally read. So Justice Toogood construed 37 as meaning that the vendor would exercise the right to cancel if the purchasers, if a sale of the development as a whole transpired. And that in the absence of such a sale the purchasers would be bound to settle. Now that's Justice Toogood's construction.

ELIAS CJ:
Paragraph?

MS KELLY:
Sorry, of Justice Toogood, I'll take you to it.

GLAZEBROOK J:
So it wasn't in the absence of the sale of that particular unit?

MS KELLY:
No, it was the sale of the development as a whole and I'll take you to the emails and correspondence which indicates that.

GLAZEBROOK J:
So that's what they were told that clause was for did they or – were they?

MS KELLY:

Well they understood and were led to understand that the underwrite contract was a holding position until the development as a whole could be sold. It was merely a mechanism, an investment mechanism, to get the contract, get the development started. They didn't have a clear understanding of how that would be affected but they were each, they each gave evidence that they were naïve and not experienced investors and they were led to understand that these, these sophisticated means of getting developments underway were the modern thing.

They were further led to understand that the developer and its financier had an understanding, a shared understanding, that this was an appropriate mechanism, that is, to use this contract as a means of getting the development started.

ELIAS CJ:
Sorry, you're telling us a lot of facts. Are these referable to findings that have been made in the High Court?

MS KELLY:
I'll have to just backtrack on my memory exactly what I've said to make sure of that. Certainly there was evidence of each of these things.

ELIAS CJ:
Well perhaps, perhaps you can –

McGRATH J:
It didn't, I thought that the Judge really decided that it was unrealistic of your clients to regard the underwrite option as not carrying an obligation to settle and –

MS KELLY:
Yes, certainly I don't mean to suggest that His Honour accepted that the purchasers were correct in their understanding of their legal obligations. He didn't. He said that they were obliged to settle. He construed 37 in a way which, which made it have some meaning and didn't vitiate the entirety of the contract.

McGRATH J:
And this is all at page 125 and 126, I think, of his judgment.

MS KELLY:

Yes, sorry, I was, I was trying to turn up the…

GLAZEBROOK J:

Well you were really only taking us to that to show that it wasn't a totally unreasonable argument in context weren't you?

MS KELLY:

I was in response to your question.

GLAZEBROOK J:

Yes so you were accepting the findings of Justice Toogood effectively –

MS KELLY:

Yes.

GLAZEBROOK J:

– in respect of that they were obliged to settle under the contractual documentation?

MS KELLY:

Yes, the purchasers did not, did not seek to renew that argument.

GLAZEBROOK J:

Yes.

MS KELLY:

After that point, but I'm saying it wasn't, it wasn't a totally bizarre and out of left field argument because of the circumstances.

1045

1045TML

…because of the circumstances but I think Your Honour asked me where, in Justice Toogood's decision, did he fail to proceed to determine the misleading and deceptive and misrepresentation defences?

ELIAS CJ:

Yes, how he passed it or –

MS KELLY:

Sorry?

ELIAS CJ:
How he dealt with it.

MS KELLY:
Yes. Yes, 133, sorry. That's on page 137, paragraph 133. Yes, so, coming back to the contracts.

ELIAS CJ:
Where is the sunset clause?

MS KELLY:
The sunset clause is clause 26 on page 775. Now the sunset clause was amended by variation in August 2006 to change its terms and the date. The date was amended to become 13 March 2009 and at volume 4, page 880, you will see the terms of that variation. Sorry, volume 5. It's volume 5 at page 880, which substitutes the name date for a time 12 months from the estimated completion date and the evidence was that the estimated completion date was 13 March 2008. So that 13 March 2009 then became the new sunset date.

WILLIAM YOUNG J:
Just a query, why wasn't that specified in this document that it was dated in May 2008? Was there some annexure somewhere about what the estimated completion date was?

MS KELLY:
No, no I don't believe that there was.

WILLIAM YOUNG J:
I don't think there's any doubt about – I mean it's, I think it's common ground what the date was.

MS KELLY:
Yes, it is, it is.

GLAZEBROOK J:

Well maybe that was just the date of the – it's the date of the initial drawdown so – oh, no, I see what you mean, maybe something from the quantity surveyor.

MS KELLY:
Look, the date of the agreement, the date of the S and P agreements was 26 May 2006 and these variations – if you turn to the next page it's a clearer read, 881 is the variation for Selwyn. Names the date of agreement as 26 May 2006 and substitutes for a name date, there's flexibility if you like. And at volume 2, at page 302, the brief of Mr Dawson, the quantity surveyor, at paragraph 14, asserts that the practical completion date, which is his term for the estimated completion date, is 13 March 2008.

ELIAS CJ:
So it's 12 months after.

When you were taking us to the judgment, sorry, I had asked you also to tell me where it is that the Judge decides on the interpretation of clause 37 of the contract.

MS KELLY:
Yes.

ELIAS CJ:
Just give me the reference, you don't need to go to it.

MS KELLY:
Yes that's right, at 125 to 6.

ELIAS CJ:
I'm sorry, you did take us to it I think.

MS KELLY:
It starts at 124, paragraph 76, "What was the effect of the gazump clause."

ELIAS CJ:
Yes.

WILLIAM YOUNG J:

That reference at paragraph 80 to the 50/50 – the extract with the 50/50 split, that's not, of course, referred to in the, in clause 37 itself.

MS KELLY:

No, there's no question that, read literally, the terms of the email, which is sited there in paragraph 80, is inconsistent with clause 37 because of the last paragraph, the last sentence; "When an offer is made," that is an offer for the purchase of the development as a whole, "You," the purchaser –

GLAZEBROOK J:

Or just a particular unit.

MS KELLY:

No –

GLAZEBROOK J:

Well it seems, further up, it's just talking about the particular unit –

WILLIAM YOUNG J:

About the unit.

GLAZEBROOK J:

– which you can understand is you underwrite it until we manage to sell it to someone else and then here they're saying, "And we'll share the profit with you despite the fact we're not obliged to do so under the terms of the contract." And that probably would have become a term of the contract, I would have thought.

MS KELLY:

Well the, the context – I'll take you to the emails. If you turn please to volume 4, at tab 19, the emails and correspondence which, together with the sale and purchase agreement were found by Justice Toogood as constituting a contract.

GLAZEBROOK J:

So these included the side agreements as well?

MS KELLY:

Yes, yes, these are the documents which evidenced the side agreements, that's true.

ELIAS CJ:

Oh, this is the delete 37. Sorry, I thought you had said that the Judge interpreted clause 37 as referable only to sale of the entire development?

MS KELLY:

That was, that was the totality of the evidence and I do think –

ELIAS CJ:

Well hold – where has the Judge said that?

ARNOLD J:

In fact, what the Judge says at 81 is inconsistent with that. It's clearly referable to the unit. "It received an offer from a third party for the same price or a greater price than that contained in the agreement."

ELIAS CJ:

I queried it because it just seemed such a startling interpretation but I don't think he is saying that at all.

MS KELLY:

Look, I hear what you're saying, I read it, that it is referable, where he refers to it in those terms, it is referable only to the unit. Now the context, however, was always put by the purchasers that their understanding derived from the intention –

ELIAS CJ:

Well we can't, we can't in this Court go behind what the Judge determined, surely, and in any event really, as I think is being put to you, it doesn't make much sense as a matter of construction, whatever the parties may have thought.

MS KELLY:

What the evidence that the purchasers gave was, was this: that the underwrite only made sense to them because of the intention of the developer to get the development up and running and then sell it on mass. Now, I can take you to the purchasers evidence about that but –

ELIAS CJ:

Well I'm not sure that it take us anywhere really and given the Judge's finding and given the implausibility of that construction of clause 37, it seems we may be wasting time on it. Is it important to your argument and if so, in what respect?

MS KELLY:

It's only important to my argument today, for this purpose, to explain what the, what the context of the defendants protests was when they were called upon to repudiate, to settle, in mid-2008. They rang the office of Station to say, "Hang on, we're underwrites," so it was arising out of that, that I was explaining why that was a legitimate position for them to put, and the construction of their conduct should not necessarily be that they were repudiating but rather defending their understanding.

ELIAS CJ:

But this point is as to whether they, whether the underwriting was as to their units or whether the underwriting was as to the development as a whole, is that right? I may be misunderstanding.

MS KELLY:

It certainly had not been my appreciation that the, His Honour, merely referred to the sale of one unit, but I, I see what you say and I can't, I can't discern from that.

ELIAS CJ:

Well I don't know that it affects the point you're making, that they were under a misapprehension that their interest was as underwriters and they maintained, whether in connection with the whole development or the individual units, but their disabused of that by the judgment but that's really the point you make is it?

MS KELLY:

That's right, that's right, and so the maintenance of their status, as person who weren't obliged to settle, is, is not necessarily evincing with clarify a refusal to settle. It's a misunderstanding of their lawful obligation.

GLAZEBROOK J:

And in fact as it, as it turns out, at that time they weren't obliged to settle in any event.

MS KELLY:

That's right.

GLAZEBROOK J:

What do you take from that, as I think is now common ground?

MS KELLY:

It is now common ground. Up until the trial, and indeed halfway through the appeal, it was maintained that the settlement date arrived and that the settlement notices were valid. That's no longer the case but the Court of Appeal looked at the conduct in mid-2008 of the purchasers when called up on to settle as saying well before any of that happened, before any settlement date issue arose, the purchasers said no, not never, no how, they're not going to settle. Well did the purchasers do that? We maintain that they did not and I'll take you to the evidence now.

GLAZEBROOK J:

Even if they did say they weren't going to settle, and that was on the mistaken ground, and this is probably more a question for your friend rather than you, but if that was on the mistaken ground that they didn't have to settle at all because the contract didn't allow them to, but in fact later they find that they weren't obliged to settle because, and I'm quite interested in the evidence on that completion certificate and the backdating of it that you refer to in your submissions, but they find they've been wrongfully asked to settle at a time when not only with the appropriate certificate not there, but at a time when it was absolutely clear that they had no intention whatsoever of abiding by the side agreements, as at 2008. Whatever Mr Graham later may have said in 2010.

MS KELLY:

That's right. We say that the conduct of both parties was such that both were resisting meeting their lawful obligations. The purchasers on the basis that they hadn't understood that they had them, and Station on the basis that it had no money and couldn't put the furniture together, pay the 1%, or put in place the management agreement.

WILLIAM YOUNG J:

What was the date it went into receivership? Late –

MS KELLY:

February or March 2009. April, sorry.

WILLIAM YOUNG J:
April 2009?

MS KELLY:
Yes the proceedings started, receivership was April 2009, according to my learned junior, and then liquidation occurred half way through the trial, actually, in the High Court.

GLAZEBROOK J:
And so just to finish that so the, if you cancel on a wrong basis and then find out later you had a right basis, your cancellation is still valid?

MS KELLY:
Yes.

GLAZEBROOK J:
I would have thought the same thing applies to a wrongful repudiation as a cancellation but if you find out later you had a right to cancel then is it actually repudiation that should be sheeted home to you? Because you may have misunderstood the basis upon which you were saying you didn't have to settle i.e. because your purchasers didn't think they had an obligation to settle however unreasonable, leaving aside the representations that was.

MS KELLY:
Yes certainly, I'm sorry, did I interrupt you?

GLAZEBROOK J:
No.

MS KELLY:
Certainly as a matter of principle it wouldn't appear to be distinguishable between a purchaser saying, I was misled and a misrepresentation led me to misunderstand the basis on which I could cancel. If a purchaser doesn't use it to cancel but uses it to repudiate, it doesn't seem to be of any difference in principle.

WILLIAM YOUNG J:

Sorry, there are sort of two arguments here and maybe it's okay to do them alternately, it may not. There's an issue whether, in fact no issue now as to whether your clients were required to settle. The common position was they could not be given a valid settlement notice because there wasn't a valid architect certificate. The absence of an obligation to settle didn't in itself give you, your clients a right to repudiate.

MS KELLY:
Quite, that's conceded.

WILLIAM YOUNG J:
Okay. Now on the other hand it maybe an unwillingness, the totality of what Station did, the insistence on settlement on the basis of the quantity surveyor certificate and the unwillingness to conform to the side agreements, may have been a repudiation. I think that's the proposition that's been advanced to you. are you relying on what you did, your clients did, in late 2008 and following as a repudiation – as a cancellation?

MS KELLY:
Mr Selwyn did rely upon it to cancel. Mr Selwyn wrote and overtly purported to rescind the contract. Mr Kumar did not and nor did Ms Donaldson. What the next step that Mr Kumar and Ms Donaldson took which accepted, if you like, the repudiatory conduct of the, of Station, was to resist summary judgment. They defended summary judgment in mid-2009. They made it clear, by such resistance, that they did not regard themselves as bound to the contracts. Now whether they complied with the terms of the sunset clause is something that I ask Your Honours to consider. The sunset clause required a cancellation, no grounds needed, if Station wasn't ready, willing and able to settle by the 13th of March 2009. Station plainly wasn't and after 13 March 2009 the purchasers indicated that they regarded themselves as not bound any longer. They did not say, we settle pursuant to clause 26 – we cancel pursuant to clause 26, but they did say, we cancel. Whether Station can rely upon the terms and say it was essential.

WILLIAM YOUNG J:
Just pause there. This was raised in the leave, rather obliquely, in the leave application wasn't it?

MS KELLY:

Yes, that's right, that's right, I'm only responding to this because of the question that's been put to me about a sunset clause.

WILLIAM YOUNG J:
Because it wasn't pleaded was it, I don't think? It's just that –

MS KELLY:
No, no, it wasn't pleaded, sorry.

WILLIAM YOUNG J:
Sorry, it was dealt with in the Court of Appeal rather briefly I think.

MS KELLY:
It was dealt with very briefly, that's true. What, what was pleaded was that the variations were procured on the basis of the 1% promise. Now the variations –

GLAZEBROOK J:
The variation's the variation to the sunset clause, is that correct?

MS KELLY:
That's right, the variation occurred in August 2006. Just to, just to give you a chronology, the purchasers signed their copies and returned to Station the signed copies –

GLAZEBROOK J:
Of?

MS KELLY:
– retaining none for themselves. In October 2005, in Mr Selwyn's case, February 2006 in Mr Kumar, in Ms Donaldson's case.

GLAZEBROOK J:
Can I, can I, just – is it important, those dates, or is it 2005 and early 2006, is that enough?

MS KELLY:

That's all that's important. Station then executed, on the 26th of May 2006. Now the original sunset clause was December 2007 so clearly by the time Station executed the sunset clause was going to be too tight. So in August 2006 Station sought and got agreement from the purchasers to vary the sunset clause date. And it did so on the basis of reiteration of the promises of payment of 1% prior to settlement.

In Mr Kumar's case the promise altered so that the 1% would be paid upon the first construction drawdown, which was expected the next month. Now, so by September 2008, sorry, September 2006, Station had already breached its obligation to Mr Kumar in having obtained the variation agreement it failed to pay the consideration for that. So what was pleaded was that in each case the failure to pay the 1% vitiated the variation agreements. And so the purchasers were, in fact, entitled to rely upon Station's un-readiness to settle by the original sunset date, that was what was pleaded.

Is it appropriate for me to take you to the evidence of the alleged repudiations in mid-2008 in respect of each of the purchasers?

ARNOLD J:
Can I just ask a question about those? You took us to the statement of claim earlier and pointed out that it focuses on the refusal to respond to the February 2010 letter?

MS KELLY:
That's right.

ARNOLD J:
And this conduct in 2008 is, I accept, an important part of the background but if we were to assume that the conduct by the purchasers was repudiatory that meant that Station had an election to accept that, the repudiation and cancel the contract, or to affirm and carry on, and there's no doubt at all, in response to what happened in 2008, that it affirmed the contract and said, "I'm carrying on with it," so that repudiatory conduct, assuming that's what it is, while an important part of the background, analytically doesn't take you very far does it? I mean, us?

MS KELLY:

Yes, I agree with that wholeheartedly but the, the respondents' submissions have raised the absence of pleading of affirmation as a basis for which, on which this argument should not be heard.

ARNOLD J:

Well I thought that, though, was in relation to the 2010, the subsequent – were they raising that in relation to 2008 as well?

GLAZEBROOK J:

Well it's difficult to see that they elected to proceed after the 2010 alleged variation because they cancelled straight –

MS KELLY:

Yes.

GLAZEBROOK J:

– relatively straight afterwards.

MS KELLY:

Yes, that's not alleged on our part. We don't say that after February 2010 they somehow affirmed. We don't say that. We say that after the conduct in 2008 they affirmed by continuing to call for settlement. Three settlement notices – two settlement notices and a settlement statement, or vice versa, were subsequently communicated to the purchasers calling them –

ARNOLD J:

I see, so that's what the argument relates to. Well, if you look at that there's a lot more than simply the settlement notices so this is just a pleading point that's been raised against you is it?

MS KELLY:

Yes, yes, they – I don't think I'm doing the respondents a disservice by saying that they, they reject the affirmation, the section 75 argument, on two grounds. The first is that there was a continuing pattern of repudiation, on the part of the purchasers, from 2008. And secondly, that we can't raise this argument now because this is on appeal and it wasn't pleaded.

ELIAS CJ:

Well the first point simply means that like you they rely on the conduct in 2008 as background against which to decide whether the conduct in 2010 was repudiatory.

MS KELLY:

Yes.

ELIAS CJ:

Yes, well on that basis, I don't think it's necessary to take us to the evidence.

MS KELLY:

All right, all right. Can I simply say there's –

ELIAS CJ:

If you think it's necessary by all means –

MS KELLY:

- because the Court of Appeal did significantly, in my respective submission, overstate the evidence of the purchasers saying, "No," in 2008 and –

ELIAS CJ:

Well if you think that perhaps you should take us briefly to it.

MS KELLY:

Those, those –

ELIAS CJ:

Because it will affect the context, which is important in terms of the conduct in 2010.

MS KELLY:

Yes. I'm just mindful of the time – I'll do this now but I am embarking on something that will take half an hour I suspect, because of the need to turn to documents. I can do it now if you'd like me to do it.

ELIAS CJ:

Well, what documents are you going to be taking us to? Is this –

MS KELLY:

The briefs, I'm going to take you to the briefs in the transcript and they're contained in volume 3.

ELIAS CJ:

Well perhaps you can get – all right, let's see how we go.

MS KELLY:

All right.

ELIAS CJ:

It is only background and we don't need to have chapter and verse. Perhaps you can – sorry.

GLAZEBROOK J:

Is it – what I was wondering, is it anything more than saying that they didn't think they had to settle?

MS KELLY:

Well, all right, –

GLAZEBROOK J:

Sorry, it's just because if that's all it is then we understand that they didn't think they had to settle.

MS KELLY:

And that they didn't –

GLAZEBROOK J:

And that's been a consistent position they've taken through the, through the litigation as well.

MS KELLY:

Yes. In each case each of the parties said, I was an underwrite, not an outright, purchaser. In each case each of the parties obtained a valuation for the purpose of determining whether they could settle and in each case the parties had a conversation with those remaining Station employees who were still in the office and

that did not include either of the McEwans. That included Groves and Zamiri, both of whom gave evidence. Now Mr Kumar says that Groves suggested to him that he obtain a valuation so they could discuss it. So the Court of Appeal's analysis is that the obtaining of the valuation, and the making of the offer based upon it, as constituting repudiation, is simply unreasonable in my respectful submission.

GLAZEBROOK J:
And is that because you say it was just an attempt to settle a dispute?

MS KELLY:
Yes and at page 1008 Mr Kumar's letter of the 29th of September 2008 says –

WILLIAM YOUNG J:
Sorry you're going to have to give me just a moment. Is that volume 5?

MS KELLY:
Yes, tab 25. You see at paragraph 3, in the middle of the page, "Nevertheless as an attempt to find a compromise solution." And the next paragraph, "Please let me know if this is acceptable." Now that is now a clear evincing of an intention not to settle any terms.

WILLIAM YOUNG J:
Well what was the purchase price?

MS KELLY:
It was a great deal more than that.

WILLIAM YOUNG J:
About twice?

MS KELLY:
Yes, something like that. That's right. But Mr Groves had suggested that he do this. And –

GLAZEBROOK J:
If they didn't think they had to settle then they weren't going to settle, were they?

MS KELLY:

Quite.

GLAZEBROOK J:

Or they were only going to settle on terms –

MS KELLY:

They could afford.

GLAZEBROOK J:

– like this offer here.

MS KELLY:

That's quite likely to have been true but the essence of repudiation is communication and the communication to Station to the effect that I will not settle was not made.

ELIAS CJ:

Well except it can be inferred from conduct.

MS KELLY:

If it's clear.

ELIAS CJ:

Yes.

MS KELLY:

If it's made in a – sorry?

GLAZEBROOK J:

Well I was going to say there were settlement statements though and not – if you don't settle then you're repudiating, aren't you?

MS KELLY:

Only if the settlement –

GLAZEBROOK J:

No I understand that but in terms of saying what they were intending at the time, because at the time everybody thought, including your clients, thought those settlement notices were valid. Now I'm relatively interested in the evidence as to the certificates because you say they were backdated and against advice that practical completion hadn't occurred.

MS KELLY:

Yes can I – before I pass to that can I come back to the point, everybody thought the settlement notices were valid was our statement. That's not so, with respect. That's because the 1% wasn't accounted for. The furniture wasn't in and wasn't going to be credited and there's evidence –

GLAZEBROOK J:

Sorry, I probably should have phrased that differently. I meant in terms of the certificates, no one thought the certificate was invalid –

MS KELLY:

Ah, yes, that's true.

GLAZEBROOK J:

So any repudiatory conduct, or inability to settle, was nothing to do with the certificates but only to do with the side agreements?

MS KELLY:

That's right, that's right. Now each of the parties raised with representatives of Station the non-performance of the side agreements. They did that, Mr Selwyn, in particular, raised it in his first correspondence after receiving the 15 July letter which was the first notice he had that Station might call upon him.

GLAZEBROOK J:

So have you got copies of those? Where is that correspondence?

MS KELLY:

Page 983 which is at tab 23 in volume 5. At the bottom of 983 is the first email in the chain and it goes over to 984. "Also I have an email from Dan indicating there was a 1% discount for purchasers who were also investors on the project. Please check and advise."

GLAZEBROOK J:

This was Mr Selwyn bringing up the 1%?

MS KELLY:

That's right.

GLAZEBROOK J:

And have we got Mr Donaldson and Mr Kumar bringing that up, or is that in their evidence somewhere?

MS KELLY:

Yes, yes. Mr Kumar, you'll recall, was entitled to payment of his 1% –

GLAZEBROOK J:

Oh yes I understand, sorry, yes.

MS KELLY:

– on the first construction drawdown. Now he wrote a couple of times in 2006 and 2007 saying, "Where's the money?" I'll just get that reference looked up. And Ms Donaldson at page 883, this is Mr Kumar's seeking of his –

ELIAS CJ:

Sorry which volume is that in?

MS KELLY:

In volume 5, tab 21, 883., you'll see at the top of 883 the 21 December 2006 Mr Kumar seeking clarification of the first construction drawdown.

GLAZEBROOK J:

And are we still looking for Ms Donaldson?

MS KELLY:

Yes, sorry, just to finally leave Kumar, 888 is the other reference where he's seeking payment of the 1%, and we're just looking for Ms Donaldson's. Paragraph 86 of Ms Donaldson's brief.

ELIAS CJ:

Where's that?

MS KELLY:

At 568. Volume 3.

GLAZEBROOK J:

So this, and did Mr Groves have anything to say about this?

MS KELLY:

Mr Groves could not recall having had a discussion with Ms Donaldson.

McGRATH J:

We're looking at 568 was it Ms Kelly?

ELIAS CJ:

Yes, para 86.

MS KELLY:

Paragraph 86.

ELIAS CJ:

I'm losing the shape, I'm afraid, my fault, of where all this is going?

MS KELLY:

This is about the, the evidence relied upon by the Court of Appeal to establish whether the –

ELIAS CJ:

You say the Court of Appeal overstated the position and this is the evidence that you take us to in response.

MS KELLY:

That's right, as well as overstating, the Court of Appeal relied upon the fact that the purchasers had not raised the side agreements at the time of their objections in 2008. Now they plainly did. The other point to make –

GLAZEBROOK J:

So that's, so where did the Court of Appeal say that, just – I've got the reference – I do remember that being said by I can't –

MS KELLY:

At paragraph 65 the Court of Appeal says, "The factors of concern to them," that is the Donaldsons, "were undoubtedly their belief that they were not obliged to settle, their appreciation late in the piece they were being required to settle, and the intervening significant drop in the market value. These factors, combined with the continuing failure to respond to settlement calls," et cetera, "constitute a repudiation."

GLAZEBROOK J:

Where do they say, though, that they didn't raise the 1%? Oh, "Never made a written offer."

MS KELLY:

Yes, 6, 64.

GLAZEBROOK J:

That's slightly different from what, saying they never raised it though.

MS KELLY:

I think there's a further reference, if you'd just give me a moment. It's to do with the justification. Paragraph 85, "Since the respondents had all made it very clear they were not intending to complete the transactions for reasons quite unrelated to the terms of the side agreements," and at the top of that page 165, "For reasons already discussed if those matters," being the side agreement matters, "had been raised as barriers to settlement of the transactions, which the respondents were otherwise willing to perform, they could easily have been resolved by means already discussed."

ELIAS CJ:

So it's really that that you're referring to is it?

MS KELLY:

Yes.

ELIAS CJ:

Because you say they were raised, but 85 is a different point, isn't it, it's about the materiality of the non-compliance?

MS KELLY:

Yes, yes, it's certainly about materiality –

ELIAS CJ:

But your point is that –

MS KELLY:

– but it's also about –

ELIAS CJ:

– in 82 there's an indication that, or there may be an indication that they hadn't been raised as a barrier whereas they had?

MS KELLY:

Yes.

ELIAS CJ:

Yes.

MS KELLY:

Yes. And the principle, of course, is that a party, a party, assuming they were cancelling for Station's failure to comply with the side agreements, a party's not required to articulate the reasons for the cancellation. And furthermore, it's not required to be correct that it has the right, as at the time of cancellation, to do so, if it appears later, from later conduct, or later information that comes to light, there is a sound basis for such cancellation. That's the principle discussed earlier.

GLAZEBROOK J:

Well, can I take that what you're saying is that they did raise that as a barrier to settlement, that they weren't obliged to say, "Well we will settle," and in fact, they weren't obliged to settle anyway as it turns out that they weren't obliged to say, "We'll settle in respect of that," but that it was patently clear, as what you say, that in fact there was no way that Station was going to settle on those side agreements?

MS KELLY:

That's right, that's right, the evidence –

GLAZEBROOK J:

At certainly in 2008 whatever might have been the case later, once Mr Graham became involved?

MS KELLY:

That's right, Ms Zamiri actually told Ms Donaldson that she should sit tight.

McGRATH J:

Is it part of your argument, also, Ms Kelly, what is said at paragraph 64 and 65, the Court of Appeal relies on, acknowledged subsequently, acknowledged intentions on the part of the Donaldsons that they weren't going to settle come what may –

MS KELLY:

That's right.

McGRATH J:

– but you, you say that that's not a proper basis on which to make the finding?

MS KELLY:

Absolutely, absolutely. In fact, if one turns to the Donaldson – I'm sorry, it's not in respect of Donaldson but to varying degrees it applies to each of them, but in particular to Mr Selwyn's cross-examination by Ms Cooper for Station, at page 529, Ms Cooper says, at line 25.

ELIAS CJ:

What volume?

MS KELLY:

Volume 3, commencing at line 15, "The reason you've said you wouldn't settle was because the valuation was so far below the purchase price?" The answer, ultimately, is, "I don't think we disclosed that to the vendor." Question, "Well I'm not asking you what you disclosed Mr Selwyn, I'm asking you what the reason for you refusing to settle was" and that's the nub of it. Station, at trial, and the Court of Appeal on

appeal, both referred to the private reasons of the purchasers rather than what was disclosed to Station at the time.

With respect to Mr Selwyn, I've dealt with Mr Kumar's evidence. With respect to Mr Selwyn's evidence, Mr Selwyn says, at page 523, and following, he refers to the word, "doing his homework" about the side agreements. He refers to that repeatedly, asking questions about the side agreements. Plainly Mr Selwyn did raise Station's non-performance of the side agreements with Station prior to purporting to cancel on the 29th of August 2006, eight, eight, sorry.

McGRATH J:
Sorry, what line are you at?

MS KELLY:
On page 523 at line 27, sorry, line 26, he says, "I might be called upon to settle so I better start doing some homework." He says it again on the next page, at line 14 and at line 32. On the next page, being 525, at line 23, "This is part of doing my homework." At line 31. At the top of page 298 he says, "It's now becoming clear the McEwan Group has changed the rules," at line 8, 7 or 8, "Panic inside the McEwan Group, which I was slowly becoming aware of." And the homework reference again at the bottom of that page, line 28.

ELIAS CJ:
Now we should take the morning adjournment now. Where do you want to take us in your argument?

MS KELLY:
I want to answer the questions about the restrospectivity of the practical completion certificate. I want to deal with *Regalwood* and whether, in fact, the respondents submissions, as to the meaning of *Regalwood* are correct and whether, in fact, an obligation, a fork in the road, was created by the issue of a settlement notice and an obligation thereby arose and then I want to just briefly summarise. So I think I might be another half hour.

ELIAS CJ:
Yes that's fine, we'll take the adjournment now.

COURT ADJOURNS: 11.36 AM
COURT RESUMES: 11.51 AM

MS KELLY:
Just to complete the summation of the 2008 evidence as to what conduct might have constituted repudiation, with respect to Ms Donaldson, Ms Donaldson says at 605 in volume 3, at line 8, Ms Donaldson explains why she got the valuation. She says further at page 607, line 8, that she got the valuation done on advice from a mortgage broker, "So that we knew what we were actually talking about."

Down at line 27, "It was a response to the email, um, from Louise," Louise is Zamiri who at the Station is the contract manager. At page 610 it was put to her what Mr Groves believed he would have said, not having any memory of it, and at line 26 Ms Donaldson says, "No, he did not tell me that." This was about the willingness to put together the furniture package. And then at 611, line 14, "I rang Louise and asked if there was any, um, way they could help us. I suggested maybe they could get rid of the GST or maybe we could compromise a price or something of that nature. She just said they weren't prepared to do anything at that point." Her advice was hold on, wait and see what happens.

Now then it was put to Ms Donaldson that the Zamiri's advice to sit tight and not settle was her personal opinion, Zamiri's personal opinion, that's at line 32 and the next page, line 9, it was without authorisation from Station and line 16, that Zamiri was acting against her employer's interest.

WILLIAM YOUNG J:
Ms Zamiri gave evidence but we don't have it, is that right?

MS KELLY:
Yes we have it.

WILLIAM YOUNG J:
I thought it was crossed out in the index?

MS KELLY:
Sorry, that's because the index moved that to the next volume, yes.

WILLIAM YOUNG J:

I see. It's in volume 4.

MS KELLY:

Yes. Now the final reference here is page 617 at line 33. "Isn't it true that if Station had offered to settle at a discount to reflect the 1%, and a discount to reflect the furniture, you would not have been willing or able to settle the purchase?" The next page, "Even if they had you still wouldn't have settled, would you?" "I don't know, probably not, but I don't know." Our submission is that is far from a clear evincing of an intention to refuse.

GLAZEBROOK J:

And you say in any event it wasn't communicated, this is later –

MS KELLY:

Yes, yes. What's being asked of her is what were her private intentions at the time, not what she said. Station did not, at the time, consider the conduct of any of the purchasers to have been repudiation.

ELIAS CJ:

Or didn't treat it as...

MS KELLY:

Or didn't consider it to be so. I say that for this reason. One looks at the letter of the 5th of February 2010 to which I took you earlier. It's at page 1083 in volume 5 I think.

ELIAS CJ:

What volume?

MS KELLY:

Volume 5, sorry. No I'm sorry 1023 I should have said. There's no reference there to the contracts having been repudiated and similarly –

McGRATH J:

At 1023?

MS KELLY:

Yes.

McGRATH J:

Well there's a signal that it will be treated as repudiatory, isn't it?

MS KELLY:

Yes, they're continued –

McGRATH J:

And then it's followed up fairly quickly isn't it, I thought?

MS KELLY:

I'm sorry the point I'm making in that submission is there's no assertion that the purchasers repudiated in 2008. There's a future tense intentions. To treat something as repudiatory.

GLAZEBROOK J:

In light of that, well in light of the fact that they'd been warned about it being treated as repudiatory for not agreeing to settle, is no answer to the letter of 23rd February actually that repudiation? Normally it wouldn't be but in the context of having had that earlier letter...

MS KELLY:

The submission I make in respect of that is the letter, of itself, a party cannot itself create a repudiation in the other party by writing correspondence and making it a non-contractual, an extra contractual demand for confirmation. There was no obligation on the part of the purchasers to give the confirmation.

ELIAS CJ:

Well this, though, isn't really about confirmation, and I suppose it might be said it's the continuing failure to proceed in complete settlement and that even though the subsequent letter may have been in terms of confirmation, they're on notice that if they continue to fail to settle it will be treated as repudiatory.

WILLIAM YOUNG J:

Continue to defend the proceedings for instance?

MS KELLY:

Yes, look I fully accept the point, with respect, but the proper way to force a party to an election is to put oneself in a position of being ready, willing and able to settle and to make a valid call for settlement. You can't skate around Station's own un-readiness and inability to settle. At the time Station was asserting, and it continued to assert until the Court of Appeal, that it was ready, willing and able to settle and that it was validly calling for settlement. So it's not as if Station was without a remedy. Station could have looked to its knitting, looked to itself, and ensured that it had made, it had complied with its obligations. In fact, all the evidence was that Station was refusing that obligation.

With respect to Donaldson and the evidence that was later given by Graham, the receiver, that he would have made concessions, the lie to that rests in what happened with Donaldson's settlement statements. Donaldson was sent a settlement statement which had deducted an amount for the furniture, $40,000 for the furniture, which hadn't been supplied. That then was revoked and the full amount of settlement was called for in a subsequent settlement statement. So it cannot, it cannot be that Station is now heard to say, "Oh, we would have made a discount for the furniture," because when it did so, for Donaldson, it revoked the lower settlement statement and replaced it with a higher amount.

Unless there's anything that I can say – oh, sorry, I'll just say one further thing on that, the context of what occurred in February 2010. While it's true that neither party – sorry, while it's true that the purchasers had an ongoing failure to put themselves into a position to settle, so did Station. Unlike the purchasers Station had the knowledge, in its possession, about the practical completion certificate. Station knew everything there was needed to know about the invalidity of the PC certificate, the Maltby certificate. It knew that Maltby's were not the vendor's architect. The purchasers did not. It knew that Maltbys and Leuschke, the vendor's architect, had a dispute about PC. And it knew that the date that the Maltby's certificate referred to as being the date in which PC had been allegedly achieved preceded the date when Leuschkes said no, it's not complete. So the date couldn't be right either. Now all of that information was known to Station but not to the purchasers and yet Station persisted up to and during trial, through trial, through appeal, into the Court of Appeal in saying that the Maltby certificate was the valid one.

The retrospectivity of the date, if I can come to that, in answer to Justice Glazebrook.

GLAZEBROOK J:

Before you do that, can you – let me see if I understand the submission. Let's forget about the 2008 for the moment. But you say that the failure to answer, in 2010, can't have been a repudiation; one, because it was just a failure to answer, but two, because before it could be a repudiation – is this the submission, and if so what's the authority in respect of this, before it could be a repudiation Station had to be in a position to settle, is that the submission or what is the submission?

MS KELLY:

No, no, I see the respondents refer to that and, with respect, I agree with them. One doesn't have to be in a position to settle in order to accept the repudiation of the opposing party but one cannot place on the opposite party demands, extra contractual demands, for confirmation of willingness to proceed and then rely upon it as that parties evincing a clear intention. If Station wanted the clarity of intention it needed, absent any conduct by the purchasers in saying, "No, we're not settling," Station had to actually put, put the wood on it, actually had to put itself into a position of a valid issue of statement, settlement statement, and require them to settle. Now Station didn't do that.

WILLIAM YOUNG J:

But you can't really say that the only way a vendor can cancel is by, is if it issues a valid settlement statement, because that's not the law.

MS KELLY:

No, no, but in this circumstance where the vendor, having received conduct, which it now says was repudiatory, and having affirmed thereafter, a vendor can't, in my submission, require a party to confirm its intentions and rely upon that. The conduct that it's precipitated itself –

WILLIAM YOUNG J:

It's a bit of a game otherwise though, isn't it, because then they've got, they've got a position which, you know, perhaps the bank was, probably the bank was silly to insist on about some of the elements of the side agreements and they've got other elements that they're not particularly interested in putting in place because they're going to cost money and they don't see why they should when, in fact, they're dealing with people who they're very confident aren't prepared to settle, isn't it sensible to

say, “Look, are you interested in settling? If you're not then we’ll cancel and look for damages. If you are then we’ll put it in place”?

MS KELLY:

Well they were never going to put it in place because they denied, up to and through the trial, that they were – those side agreements were Station’s obligations. They said that’s, that’s the obligation of Forum Select Bowen View Limited.

WILLIAM YOUNG J:

But for – I don't know what the properties were worth by trial but there were hundreds of thousands of dollars at issue in relation to each transaction.

MS KELLY:

Yes.

WILLIAM YOUNG J:

Well it’s quite plausible to assume that they would have, they wouldn't have worried too much about $30,000 here and $10,000 there, or $11,000 there.

MS KELLY:

In circumstances where each of the purchasers had raised with Station, during 2008, the non-performance of the side agreements and, and the financiers position, that it was going to push back and no set-offs would be allowed, in view of that it’s not surprising, in my submission, that Station failed to say, in its February letters 2010, “Oh, look, here's the deal, we know there's a 1% agreement, we’re going to set it off. We know there's no furniture, we’re going to set it off.” They didn't do that. They maintained their position consistently the position they maintained to trial.

ARNOLD J:

I suppose the other thing is how would you put a monetary value on the failure to have a management agreement?

MS KELLY:

Well quite, and Mr Justice Toogood’s reasoning about the three side agreements being taken together is respectfully endorsed.

WILLIAM YOUNG J:

Didn't – wasn't on the management agreement, didn't the plaintiffs say they were prepared to put a management agreement in place?

MS KELLY:
They said that they had taken steps towards doing so in June 2005, sorry, June 2008 and their position at trial was they weren't obliged to put a management agreement in, the position still remains, the management agreement was a prospective intention but the Justice –

WILLIAM YOUNG J:
I thought the Court of Appeal was of the view that they would, if necessary, have put a management agreement in place?

MS KELLY:
I'm sorry?

WILLIAM YOUNG J:
I thought the Court of Appeal's view was that they would, if necessary, have put a management agreement in place and that it was a bit similar over the furniture?

MS KELLY:
I think the Court of Appeal accepted, accepted that the management agreement, together with the furniture and the 1% were not, were not sufficiently substantial to warrant, but also the Court of Appeal accepted Mr Graham's belated position that – retrospective position I should say, that he would have agreed to do whatever was necessary.

ARNOLD J:
I think the Court of Appeal dealt with it at paragraph 76 where they say, "We're satisfied on the evidence that had the respondents been willing to proceed it would have been a simple matter for a management contract to have been put in place or for an appropriate allowance to have been made against the purchase price." I don't know on what basis that was their evidence about management agreements and valuations associated with that.

MS KELLY:

I think, I think to answer that, and perhaps the question's better directed to the respondent, but the answer to that is there was no evidence that Station had put in place a management agreement and Mr Graham was retrospective that the receiver was retrospectively saying he would have, he would have done that once he was appointed in 2009, yes, 2009.

So if I could, if I could come then to the retrospectivity of the practical completion certificate. The contract specifies that the settlement, the time for settlement is of the essence. Let me turn up the contract. Volume 4 at tab 20, page 776, at clause 31, clause 31.2, "The settlement shall be effective before 3.00 pm on the settlement date, time being of the essence."

ELIAS CJ:
Sorry, volume and page?

MS KELLY:
Volume 4, the blue one, at 776.

WILLIAM YOUNG J:
Well the settlement date never came round did it?

MS KELLY:
Pardon?

WILLIAM YOUNG J:
Well the settlement date never came round did it?

MS KELLY:
Pardon?

WILLIAM YOUNG J:
Settlement date never came round so this clause never bites.

MS KELLY:
That's right, but the settlement date was expressed to be of the essence and Justice Glazebrook has asked me about the retrospectivity of the practical

completion certificate. So the settlement, time for settlement is of the essence. If one comes forward to 769.

WILLIAM YOUNG J:
Forward?

MS KELLY:
Well, yes, forward, from 776 to 769, and looks at the conditions in the special conditions. The important one for this purpose is 14.1(2) the date of practical completion. The important words, "as certified by the vendor's architect." The next page, subclause 7, "Designs, Leuschke," – the vendor's architect is Leuschke, "or such other person as the vendor may appoint to supervise construction of the work." Now just an aside there, they could never have appointed Maltbys to supervise the construction of the works because Maltbys the quality surveyors. That's not what quantity surveyors do and the vendors warranties, at 772, clause 19, makes it clear that the obligation of the vendor was to ensure the works would be constructed to be under the supervision of competent, properly qualified building or architectural or engineering personnel is they're not Maltbys.

So, in short, the obligation was to have Leuschke or some other properly qualified supervising person, issue the certificate.

GLAZEBROOK J:
Sorry, where was the requirement to have the architect supervisor? I'm sorry, I missed the reference.

MS KELLY:
I'm sorry, 19.1(2) on page 772. And 14.1(7) on page 770, which defines vendors architect as Leuschkes or a similar person they may appoint to supervise.

GLAZEBROOK J:
Yes I have that.

MS KELLY:
Right, now, then finally with this – come forward again to 769 and see the definition of settlement date, which is the later of those three items, being the date of practical

completion, which is, as I showed you earlier, is defined further up the page, at paragraph 2.

So what we have here is –

ELIAS CJ:
So were the other two conditions fulfilled?

MS KELLY:
Yes.

ELIAS CJ:
Yes.

MS KELLY:
Yes. So what we have here is an assertion made by a quantity surveyor that practical completion was achieved on the 3rd of June 2008. On the 24th of June Leuschkes wrote a letter indicating that they didn't believe it had then, by then, been achieved. Notwithstanding that on the 2nd of July Maltbys issued the certificate retrospectively nominating the 3rd of June as the date of practical completion.

Now I query whether, when time is of the essence, you can retrospectively nominate the time by which the settlement –

WILLIAM YOUNG J:
Well, presumably he said that was the date of his inspection?

MS KELLY:
No, the date of practical completion –

WILLIAM YOUNG J:
Yes I know. I understand, I understand there's a date, which is the 3rd of June and it's in a document that's dated in July, but presumably the 3rd of June was the date of his inspection?

MS KELLY:
Presumably.

WILLIAM YOUNG J:

Yes.

MS KELLY:

But that date preceded the date which Leuschkes had subsequently inspected and said no.

WILLIAM YOUNG J:

Yes I understand that.

MS KELLY:

Yes.

GLAZEBROOK J:

So where's the Leuschke's letter?

MS KELLY:

Yes, it's page 894 in volume 5. Sorry, it's in volume 6.

WILLIAM YOUNG J:

I don't think I've got a volume 6 have I?

MS KELLY:

Yes, we have only got five, sorry, I was looking in 4. The submission, the submission is –

GLAZEBROOK J:

So you're relying on the letter at page 894, is that?

MS KELLY:

Yes. The submission is that certification was an essential term of the contract.

GLAZEBROOK J:

And you get that from the definition, the date of practical completion, is that - because that's where certification is mentioned, is that the submission?

MS KELLY:

That's right.

GLAZEBROOK J:

Combined with the requirement to have, in 19(2), to have someone supervise?

MS KELLY:

That's right, that's right, that's the first submission. The second submission, as to essentiality, is that it was customary, it's customary in construction contracts, to have a point at which the duel obligations under sale of the plan contracts to construct and then to sell transfers. It's the bridging point between construction and sell obligations on the part of the vendor. I don't understand, from the respondent's submissions, that it's now in issue that certification was required because of the submission made therein that there's no assertion that they substantially complied with the obligation. The reason it's addressed in our submissions at some length is that the Court of Appeal appeared to regard certification as not centrally relevant whereas the parties must inevitably have agreed on the essentiality of certification because certification was fundamental and prerequisite to the settlement date.

GLAZEBROOK J:

And what's the relationship between certification and the sunset clause?

MS KELLY:

The failure to obtain certification means the vendor could not have been ready, willing and able to settle, prior to the sunset clause, sunset date.

GLAZEBROOK J:

And what do you take from that? That the contract came to an end therefore?

MS KELLY:

That the parties had an entitlement to end the contract without liability on the sunset date, 13 March 2009.

ELIAS CJ:

But it required some step?

MS KELLY:

It required a cancellation. Now it's true, there's no departing from the fact that the sunset clause requires giving of a notice in writing. Now the purchasers certainly evinced an intention by that time, after that time, sorry, that they did not intend to proceed, but whether they gave the notice saying, "This is pursuant to clause 26(1)."

WILLIAM YOUNG J:

But you never pleaded this did you? I mean this, I'm trying to think back to the arguments about leave. It wasn't pleaded was it?

MS KELLY:

What was pleaded, remember earlier I was asked –

WILLIAM YOUNG J:

Yes, about how the variation came in.

MS KELLY:

Yes that's right, that was pleaded, definitely.

WILLIAM YOUNG J:

But that's not really the issue we're talking about now.

MS KELLY:

Sorry, I'll just turn the defence up because I think…

GLAZEBROOK J:

Well, of course, it was relatively difficult to plead because at that stage everybody thought that the – until halfway through the Court of Appeal decision, everybody thought there was a certificate of practical completion.

MS KELLY:

No, sorry, the sequence wasn't quite that, with respect. The sequence was until just before the trial everybody thought there was a valid –

GLAZEBROOK J:

Oh, that's right.

MS KELLY:

– practical completion certificate. When Maltbys handed up some documents to the purchasers' solicitors, which disclosed the dispute between Leuschke and Maltbys, there'd been five affidavits of documents filed by Station at that point.

GLAZEBROOK J:
But up until the sunset clause date had gone –

MS KELLY:
The purchasers had not, in our submission, done anything indicating –

GLAZEBROOK J:
But up until, up until the sunset clause date had gone everybody thought there was a certificate of practical completion. Well, you say the vendors can't have thought that because –

MS KELLY:
Yes.

GLAZEBROOK J:
– they knew it wasn't but certainly the purchasers thought that.

MS KELLY:
The purchasers had no reason to doubt it is the best way of putting that. The purchasers had no grounds.

GLAZEBROOK J:
So that they're hardly going to plead then that there wasn't practical completion or the proper certification if up until past the sunset clause they thought there was?

MS KELLY:
That's right, that's right but the purchasers, in order to rely upon the sunset clause, didn't need any grounds. All they needed was for Station not to be in a position, ready, willing and able to settle, and they had that because of the side agreement non-compliance.

GLAZEBROOK J:
All right.

WILLIAM YOUNG J:

Well your position, I mean, leaving aside this, the position was that the unwillingness to comply with a side agreement negated the proposition that the vendor was ready, willing and able to settle.

MS KELLY:

I'm sorry, I didn't catch the last part.

WILLIAM YOUNG J:

So leaving aside the practical, the certificate of practical completion, was your position that the inability, or the unwillingness or inability of Station to comply with the side agreement meant that it was not ready, willing and able to settle?

MS KELLY:

Yes.

ELIAS CJ:

It's probably a very stupid question but can you get a certificate of practical completion if – or what do you get with a certificate of practical completion that isn't covered by a code of compliance certificate?

MS KELLY:

A great deal.

ELIAS CJ:

Oh okay.

MS KELLY:

A code of compliance, sorry if that sounded – a code compliance certificate only talks about compliance with the Building Act.

ELIAS CJ:

Of course, yes.

MS KELLY:

Certificate of practical completion is that the works had been completed in accordance with the plans and specifications. It deals with defects, it deals with manner of construction, and that's why it needs to be done by the appropriately supervised person, not the bricklayer.

ELIAS CJ:
Yes.

McGRATH J:
And it's defined, isn't it, defined term, speaking of occupations about material inconvenience.

MS KELLY:
Yes. Yes there's an Australian construction lawyer's joke that is very instructive on this and that is, "What's the difference between a pile of rubble and a 200 million dollar resort?" The answer is, "A certificate of practical completion." It's not funny, I know that, but it's instructive because before the certification you have a bundle of plumbing fittings, and concrete, and plans, and earthworks, and after certification you have a saleable, mortgageable, habitable place.

WILLIAM YOUNG J:
I know it's, there was a certification by someone who is a quantity surveyor.

MS KELLY:
Yes.

WILLIAM YOUNG J:
Now that doesn't meet the designated person who's required by the contract to certify –

MS KELLY:
That's right.

WILLIAM YOUNG J:
But in practical terms what's the difference?

MS KELLY:

A great deal as Mr Dawson's evidence said, he said in his evidence. He was asked, was he competent? Did he purport to supervise the construction? No, absolutely not he said. Mr Dawson himself disavowed that role because he's not professionally fitted for it as he said himself.

WILLIAM YOUNG J:
The differences came down to some issues over plumbing and handrails and things of that sort, didn't they?

MS KELLY:
The circumstance was there was some doubt, because this had never been the subject of discovery, and proper pleading, the practical completion had been achieved in fact because Station was relying on the Maltby certificate. This stuff was never put in, in a proper way to be traversed at trial. So people were, witnesses were asked questions about, well, in what ways did it fall short, and they were relying on memory. Not documents with them, not recent briefs, nothing like that. They were relying on memory. But there was one assertion by Mr Cocker about, he was cross-examined at length on the list of defects that had been attached to his 24 June letter that I took you to before. One of those related to some rubber stuff, I've forgotten what it's called now, that allowed leakage. So that, in fact, could have been a serious defect but he was unable to give specific evidence because he was unable to specifically recall at this point several years later.

WILLIAM YOUNG J:
The truth is they are all pretty minor issues. There's a screw that's exposed, there's a bit of tape still left on, there's a scaffolding has scuffed a bit of paint.

MS KELLY:
Well for that reason so Courts don't have to traverse those sorts of issues and decide whether they're minor or major, the parties agreed on the process to decide that, and that was the certification. Now Mr Cocker agreed, he's the Leuschke's architect, he agreed with Justice Toogood that different persons, different professionally qualified competent persons might have different views on whether practical completion had been achieved. And for that reason the Court should be slow to put itself in the shoes of the contractually agreed competent qualified person to itself, effectively, certify. The Court should defer to the agreement made between the parties that the proper person do the certification and determine it.

So we say certification was essential to the parties agreement and no amount of near enough will suffice.

Can I take you, quickly, to the distinction between the respondents and us on *Regalwood*. I can succinctly put it this way; *Regalwood* required – sorry, the respondents submissions on this point commence at page 10 of its submissions. At paragraph 2.25 the submission is made that the vendor can still call on the purchaser to settle, even where it's in breach of a term, and the purchaser must do so. Now, I respectfully submit that's not what this Court decided in *Regalwood* because in *Regalwood* the vendor was not, at that point, in breach. In *Regalwood* the breach would only accrue when the obligation accrued, of course, and that was at settlement. In this circumstance, in contrast, the vendor's obligations on the side agreements and the CCPC predated, were prerequisite to settlement. The settlement date, under clause 9, of this sale and purchase contract, the right to issue the settlement notice, the settlement statement and then the settlement notice, only arose if the parties fail to settle on the settlement date. In this case the settlement date had not arrived, as is now conceded.

Secondly, with respect to *Regalwood* you'll recall that *Regalwood* was about a breach of warranty and clause 6.5 of the standard form ADLS agreement preserved the obligation to settle despite a breach of warranty. That was an extremely important factor in the reasoning in *Regalwood* in my submission.

ELIAS CJ:
Clause 6.5 is in this contract, however, isn't it?

MS KELLY:
Yes, but this isn't a breach of warranty.

ELIAS CJ:
No.

MS KELLY:
6.5 is amended here and is replaced with the specials. The vendor's warranties are set out separately in the special conditions. So this is distinguishable from *Regalwood* in two very important respects. Furthermore, because of the settlement

date never having arrived, the settlement notice cannot have precipitated a fork in the road, because it was invalid.

The Court very clearly found in *Regalwood* that the settlement notice was valid. And in this case that finding's not available. The concession's made with the settlement notice. The settlement date didn't arrive. The right to issue the settlement notice didn't arise.

ELIAS CJ:
Well it is the, it is the fact that surely that you have to say that the vendor in this case was not entitled to cancel, isn't it?

MS KELLY:
Yes.

ELIAS CJ:
And why do you say that? Because there was no repudiatory conduct and because the time for settlement hadn't arrived?

MS KELLY:
Yes. The vendor, the one proviso is this. The vendor was entitled to cancel after the sunset date, 13 March 2009. It was then entitled to cancel relying on the sunset date.

ELIAS CJ:
Well that didn't get it very far though because of the terms of that.

MS KELLY:
It didn't want to. It didn't want to rely upon it but in terms of being entitled to cancel based upon conduct by the purchaser, it's our submission the vendor was not so entitled, because there had been no repudiatory conduct.

I had intended to traverse some issues about the inter-relationship between sections 7(2), 7(3) and (4) of the Contractual Remedies Act but I don't understand that I have any need to do that, having looked at the respondent's submissions, except to say this. The respondent argues that repudiation of part of a contract, which gives rise to a right to cancel at common law, may not have traversed the passing of the

Contractual Remedies Act, and refers to Burrows' statements that an easier way, or a better way, of dealing with that is to regard substantial non – a breach under section 7(3). In my submission the proper construction of Contractual Remedies Act is this. Section 7(2) as repudiation stands as the highest rung on the ladder of capacity to cancel. If there is overt and clear evidence that a party will not be willing to perform, 7(2) is the only recourse that the other party need have to treat that as repudiatory. However, if there is a breach of an essential term, such as we say there is here, the failure to procure the valid practical completion certificate, there is no need for there to be a substantial consequence and with respect to the Court of Appeal, and some earlier questions, that would appear to have been an error, in my submission.

ELIAS CJ:
It's just a question of the essentiality of the term.

MS KELLY:
Of the term, exactly.

ELIAS CJ:
On entry into the contract, yes.

MS KELLY:
Yes, that's right. And so to ask about the triviality of the consequence of the breach, of the breach that being the failure to obtain the CCPC –

WILLIAM YOUNG J:
But it's not a breach. It's just a failure to obtain a CCPC.

MS KELLY:
Well –

WILLIAM YOUNG J:
What term of the contract do they breach?

MS KELLY:
The reasonable inference to be derived from the tendering of an invalid CCPC, and the insistence that it was a valid CCPC –

WILLIAM YOUNG J:
You say that's a breach of contract?

MS KELLY:
It's an intent – the evidence is that you're not intending to perform it as required.

WILLIAM YOUNG J:
Well but isn't that the sort of point that can be made of anyone who takes a position that is not 100% right?

MS KELLY:
It depends on the gravity of the –

WILLIAM YOUNG J:
I thought that's where *Regalwood* might be relevant because it's of the view that a bald settlement notice that doesn't propose an allowance isn't a repudiation.

MS KELLY:
Yes. What my submission is about – whether the CCPC obligation was breached is this; if all that had happened was that a different certificate had been obtained and the wrong person signed it, as Station submitted somewhere, the wrong person signed it or it was mistakenly included in the documents, I concede fully that that doesn't constitute a breach, but that's not what happened. It was promoted to these purchasers as the certificate which precipitated the settlement date. And when it became clear that it wasn't valid Station didn't concede and say, oops, sorry, let's get the right one. Station insisted and pleaded that the Maltby certificate was the valid one. So contrary to the submissions that are now being made, that Station could have just gone back and got the right certificate from the right bloke, the right bloke was saying, no, it wasn't settled, it wasn't completed. Leuschke said –

WILLIAM YOUNG J:
But findings of fact made by the Court of Appeal from July on, they would have been able to get a certificate from the right bloke.

MS KELLY:

Well that's the Court of Appeal finding but it's not supported by the evidence. The Court of Appeal was directed to certain parts of the evidence about whether, whether Mr Cocker conceded that completion was, in fact, achieved. Well what Mr Cocker said was far more equivocal than that.

WILLIAM YOUNG J:
But Mr Dawson had evidence on the point too didn't he?

MS KELLY:
Dawson was Maltbys, yeah. Dawson was the person with whom Cocker was in dispute about it.

WILLIAM YOUNG J:
All right.

MS KELLY:
I don't think I can help you any further, unless you have questions.

ELIAS CJ:
Thank you very much. Thank you Ms Kelly. Yes, Mr Goddard.

MR GODDARD QC:
I have, Your Honour, a two page roadmap of where I'd anticipated I might go, although I don't know that I will, in fact, cover all of it.

ELIAS CJ:
Well if you're not going to go into it, do we need it?

MR GODDARD QC:
There are some bits I'm going to go to –

ELIAS CJ:
All right.

MR GODDARD QC:
– so I think it might still be helpful. In terms of – if I could hand it up through Madam Registrar.

ELIAS CJ:
Thank you Madam Registrar.

MR GODDARD QC:
It may, I think, be helpful to begin with a very short review of relevant provisions of the Contractual Remedies Act because they are the foundation, unsurprisingly, for my answer to the issues raised by my learned friend and some of the questions put by the Court in the course of my friend's argument.

The complete Act, which it's helpful to have to hand, I think, is under tab 1 of my authorities and to avoid having to come back to the Act unnecessarily there are a couple of provisions that I will go to, but I can begin on section 7, and I do want to emphasise that section 7 was intended to codify the law in relation to cancellation. That's important, both because, of course, the Courts must give effect to the intention of Parliament in prescribing a code, but also because that's how we can expect people to use the provision.

WILLIAM YOUNG J:
Can I just ask you a question before you go – just bear in mind while you're going through it. There is an exemption for law relating to specific performance.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
And it's troubled me in the case that the expression "ready, willing and able to settle" is actually an expression that tends to – it may not be specific to but it's certainly used in the law of specific performance. It's a plaintiff seeking specific performances required to allege that at all material times I was ready, willing and able to settle.

MR GODDARD QC:
Exactly so Your Honour and the Act doesn't effect that. So if one –

WILLIAM YOUNG J:

Okay and can we just go a little bit further. It always was open before the Contractual Remedies Act for a plaintiff seeking specific performance to seek damages in lieu of specific performance?

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
So is a claim for damages in lieu of specific performance governed by the Contractual Remedies Act or is it governed by the equitable principles?

MR GODDARD QC:
It's – there's actually also an option C, which is that it's simply a claim for damages for a breach which has occurred –

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
– where the settlement date has fallen due, a settlement notice has been given, and there hasn't been performance. So there are a number of forms of relief one might –

ELIAS CJ:
Is that C or is that just A? Isn't it just a claim under the Contractual Remedies Act? Is it – does it hang off the ability to apply for specific performance anymore?

MR GODDARD QC:
No and that's why I was identifying it as C because His Honour Justice Young put to me that it might be a claim for equitable damages –

WILLIAM YOUNG J:
Under what used to be called Lord Cairns' Act and is now section 16 or something or other in Judicature Act 1908.

MR GODDARD QC:
So there's a right to seek equitable damages in lieu of specific performance. One can, of course, seek specific performance, one might cancel before the date for

performance had ever fallen due and then one would be seeking damages for breach upon cancellation. And then there's also a third possibility – and in that option one has to step through whether there's been a proper cancellation under section 7. But there's also the possibility of giving a settlement notice, allowing the date for performance to pass, and then simply suing for breach of a contractual obligation, seeking what would have been thought of as common law damages –

ELIAS CJ:
But that's a contractual obligation to settle.

MR GODDARD QC:
It's a contractual obligation to settle which has been breached and that is not affected by the regime for cancellation, where it's not invoked.

GLAZEBROOK J:
Well there's also section 5 because section 5 in fact with the standard agreement it actually contracts out of a number of the provisions but –

MR GODDARD QC:
And that's yet another possibility.

GLAZEBROOK J:
That's yet another possibility except that I don't think anybody's relying on any of those cancelling out provisions in the agreement at present. But certainly if you put your remedies in the agreement and the standard form does so then you're not in the Contractual Remedies Act at all. Or at least some – you are but subject to the remedies that you've put in your contract.

MR GODDARD QC:
There are a number of remedial options open to one party to a contract where the other party fails to perform. All of these are potentially open happily, although several of them are in play here, not all need to be considered.

ELIAS CJ:
But you're not relying on on a breach through failure to settle.

MR GODDARD QC:

No.

ELIAS CJ:

No. You're relying on cancellation and damages for –

MR GODDARD QC:

Cancellation for repudiation –

ELIAS CJ:

For repudiation, yes.

MR GODDARD QC:

– and the right then to seek damages in those circumstances –

ELIAS CJ:

Yes.

MR GODDARD QC:

– which was, which is expressly preserved by section 10 of the Contractual Remedies Act.

ELIAS CJ:

Yes.

MR GODDARD QC:

So I did just want to sound a note of caution about looking to the pre-Contractual Remedies Act case law in determining whether or not a party is entitled to cancel a contract. There are many other issues on which this is not a code and where it is proper to look at the case law, but there has been a tendency, and it's one that Burrows and Carter refer to in their helpful book on statutory interpretation, they refer to the magnetic force of the common law that tends to lead lawyers, who are creatures of habit, and Courts, to look back to the common law even where there is a code. But it's quite clear that on certain matters this is intended to be a code and users of the statute can reasonably treat it as a code, turn their minds to two issues, the criteria in section 7, and the interpretation of the contract, and having regard to those decide whether or not they're entitled to cancel. Now other issues will require reference to the common law but what section 7(1) makes pretty clear, I think, is that

except as otherwise expressly provided in this Act, this section has effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it or treat it as discharged for misrepresentation or repudiation or breach. So we've got a code and this Court has noted that, unsurprisingly, for example, in *Mana Property Trustee Limited v James Developments Ltd* [2010] NZSC 124, [2011] 2 NZLR 25. I don't think there's anything particularly controversial about that but it's important when we come to the argument that one must be ready, willing and able to perform before one can cancel for repudiation because I'm going to go through section 7 and make a couple of points as we go. That term, "ready, willing and able" is not found in here.

So, second point, subsection 2, the provision relied on by Station Properties to cancel in April 2010, the provision relied on before the Courts below, and here, "Subject to this Act a party to a contract may cancel it if by words or conduct, another party repudiates the contract," and then what that is, is explained by making it clear that he does not intend to perform his obligations under it, or as the case may be, to complete such performance.

So on its face that's does not intend to perform the obligations under it, i.e., all of them, or where it's been partly performed, does not intend to complete performance.

Then we come to subsection 3, which sets out three other circumstances in which a party may cancel, subject to the subsection 4 threshold.

ELIAS CJ:
Sorry, can I just ask again to know, perhaps, where you might be going. So is it, it's part of your argument, I would assume, that you can't, that the case law on mistake doesn't inhibit a party treating an indication that the other party doesn't intend to perform his obligations from cancelling?

MR GODDARD QC:
That is part of my argument. That if this criterion is met then one is entitled to cancel. The remedial consequences may be influenced by the presence of such a mistake –

ELIAS CJ:
Yes.

MR GODDARD QC:

– and I'll come to section 9 but let's take that a step at a time. I think because, again, part of my submission will be that one has to make sense of these provisions as a whole and that, for example, my submission that on its face, subsection 2 is concerned with a global renunciation, as it's sometimes also called, in the case of the obligation to perform is reinforced by the way in which subsection 3 and 4 work.

GLAZEBROOK J:

It becomes difficult to have that submission as a bare submission though, doesn't it, because you may say, well I don't intend to perform my obligations under the contract because the building is only half completed? So you evince an absolute clear intention not to perform your obligations, but that's because the vendor can't perform what you say to be the full obligations. So it can't just be – the point really is, is it can't just be read without any requirement that the vendor must have at least what the vendor has said it's going to sell in…

MR GODDARD QC:

I think the answer to that enquiry, and of course Your Honour's right that to say to a vendor that's only half performed, well, you've only half performed so I'm not going to settle, is legitimate, and it's not a repudiation. It's not a repudiation not because it's necessary to read anything into subsection 2, but because that's not a statement by the purchaser that they don't intend to perform their obligations. Their obligations haven't arisen because the vendor is not able to meet their concurrent and mutually dependent obligations. This is dealt with in a number of decisions of this Court, both *Property Ventures v Regalwood* and *Ingram v Patcroft Properties Limited* [2011] NZSC 49, [2011] 3 NZLR 433. In both cases by reference to *Foran v Wight* [1989] HCA 51, (1989) 168 CLR 385, an Australia High Court decision which expresses that concurrence and interdependence of obligations on settlement, particularly beautifully, particularly elegantly, but it's not a novel proposition. So someone who says, a purchaser who says to a vendor, I am not going to settle because it's half built or it's a pile of rubble –

GLAZEBROOK J:

Or in this case because you're not going to perform the side agreement and because, not that they knew that there wasn't a practical completion certificate, and there will be a question as to whether those were important enough, concurrent enough but isn't that what is – what happened here, at least in 2008?

MR GODDARD QC:

It's not and I'll go to some of the evidence that makes that clear as the Court of Appeal found, and as I think my learned friend accepted at points this morning, the combined effect of the conduct through to the time at which Station cancelled, and of course that's the time at which to assess whether there is a live repudiation, amounted to the clearest of indications that the purchasers did not intend to perform come hell or high water I think was Justice Young's phrase earlier today.

GLAZEBROOK J:

Well that might be true but again coming back to the point, if that – and it might be true that that was the case anyway, whatever the vendor did, but if, in fact, those obligations were essential, and especially probably the management agreement, and the vendor didn't intend to, and wasn't in a position to fulfil that, certainly not before the sunset clause, then in fact the point is whether the repudiation, if there was a repudiation, was actually justified, not on the grounds that they repudiated, because they said they didn't have to perform because they misunderstood the nature of the contract, but on other grounds.

MR GODDARD QC:

I am going to come to Your Honour's question to my learned friend about justifying repudiations but let me give a snapshot of where I'm going to and then if I may I'll build all the building blocks and get there. The end point of my argument on that is that an unqualified refusal to perform future obligations under a contract, not a qualified one that says we won't until you do X, or we won't until you do Y, or we won't because, you know, but an unqualified refusal can be justified only by a party that has validly cancelled and in this case –

GLAZEBROOK J:

That's not the law though because people can validly cancel on the wrong grounds and find later they have the right grounds.

MR GODDARD QC:

But then they've validly cancelled because they were entitled to cancel and they have cancelled.

GLAZEBROOK J:

All right, so you say they're not entitled to validly cancel in this circumstance.

MR GODDARD QC:
Yes. So I say –

GLAZEBROOK J:
That's all right, you don't need to carry on, that's fine.

ELIAS CJ:
Does that mean as it turns out?

MR GODDARD QC:
I'm going to come back to that as well because the principle is not quite as bold in relation to justifying cancellation afterwards by reference to good reason when you relied on a bad one as Your Honour suggested in the question to my learned friend. The New Zealand texts deal with this issue a little cursorily but I'll take the Court to *Chitty* and a couple of cases which make it clear there's an exception to that principle where the good reason that is relied on was something which could have been cured if it had been raised at the time, and you've lost the opportunity to fix it, and this is quite an important point here, obviously, but I'm getting a little ahead of myself. All I wanted to say at this stage was that my submission is the only way in which you can justify a categorical refusal to perform your obligations under a contract is where you have validly cancelled. That requires both that you are entitled to cancel, in the circumstances which have occurred, and that you have taken the step of cancelling, because otherwise the contract remains open for the benefit of both parties, and in my submission there was no entitlement to cancel at the time that the purchasers conveyed their refusal to proceed and there was nothing, and my learned friend accepts this, that could be described as a notice of cancellation from anyone except Mr Selwyn.

GLAZEBROOK J:
So it has to be cancellation not repudiation, is that the submission, because it's slightly odd if that is the submission.

MR GODDARD QC:
One would have to argue that the conduct which is relied on by one party as a repudiation can properly be understood as a cancellation, as intimation of

cancellation, at least by conduct. Because otherwise, of course, in the absence of – it's quite clear that even if there's a right to cancel, if that's not exercised then the contract remains open and often that is a result that a party does indeed want to bring about. So one can't just leap to the conclusion that the contract's off. So I will come to that –

GLAZEBROOK J:
It probably is semantic.

MR GODDARD QC:
I think it might be and the Courts have at times got bogged down a little bit in this. One looks at *Thompson v Vincent* for example where there's discussion about a repudiation being justified but also a suggestion then that there was a subsequent cancellation. Actually it's very hard to fit the analysis in that case into the Contractual Remedies Act box but I don't know that that's an issue that needs to be solved by the Court in order to answer the issues before it in this case.

I'm conscious it's one, Your Honour, and I'm about to move on to subsection (3) of section 7 and then, after quickly skipping through the rest of the Contractual Remedies Act and making a few points about the law I'll turn to the facts of this case but I think probably it's as good a time as any if it suits the Court.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.20 PM

MR GODDARD QC:
Your Honour, I was doing what I think is going to have to be a slightly speed up tour through section 7 and following, of the Contractual Remedies Act, which was under tab 1 of my bundle of authorities. I've looked at subsection 1, it's a code, which replaces the laws of common law and equity governing the circumstances on which a party to a contract can rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

Subsection (2), repudiation, "A party can cancel if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it, or as the case may be, to complete such performance." And perhaps three things I should say about that before moving on. The first is that it's

got an obvious forward looking element to it; one can convey an intention not to perform obligations long before they've fallen due. One could, in fact, sign a contract due for performance a year or two years out, regret it the next day, and repudiate long before anyone's obligation to perform has fallen due and that would then give rise to the possibility of cancellation and, of course, the whole concept of anticipated repudiation, *Hochster v De la Tour* (1853) 2 E & B 678 (QB) was the first case it recognised it at common law was precisely such a situation, where a wealthy man hiring a courier for his trip on the continent conveyed to the courier, about a month before they were due to depart, that he was no longer minded to go on the tour and Mr Hochster took alternative employment and sued before the date for the tour had arrived and it was held that he could do so. Repudiation is an inherently forward looking concept. So that's the first point, you can repudiate before performance is due, and that's not, I think, in issue. My learned friend helpfully confirmed that.

Second point, the one that I made in answer to a question from Your Honour Justice Glazebrook earlier, that you must be making clear that you don't intend to perform obligations under it which, when they're due, when they arise, to say, "I'm not going to perform because I'm not required to," is not to repudiate, if you're right, to say, "I'm not going to perform anytime, ever, come hell or high water," Justice Young's formulation, to convey that by words or conduct is a different story.

And the third point, which again I also touched on earlier, it's on its face concerned with a global renunciation, repudiation, rejection of obligations.

And the fourth point, actually there are four, is that in this statement of the circumstances in which a party may cancel for repudiation there is no reference to a requirement that the cancelling party be ready, willing or able to perform. So four important points about subsection (2).

Moving on then to subsection (3), these are the other circumstances in which one can cancel, and at the risk of stating the obvious, they are, when taken together with the circumstance described in subsection (2), exhaustive of the circumstances in which one can cancel for misrepresentation or repudiation or breach. We've dealt with the repudiation, now we're onto breach and misrepresentation. 3(a), "induced to enter into the contract by misrepresentation." That's not directly relevant here. (b), "a term in the contract is broken by another party to that contract," or (c), "it is clear that a term in the contract will be broken by another party to that contract."

So where one has a situation where a party has not made it clear that they don't intend to perform all their obligations but they've made it clear that they don't intend to perform a particular term we're in the 7(3)(c) space and that's important because as soon as someone is conveying an intention not to perform some part of the contract, but not all of it, common sense suggests that we need to ask how much does that part matter? That enquiry is not referred to in subsection (2) and it's provided for in subsection (4), but only by reference to subsection (3) and that's because of the assumption, in my submission, implicit in the drafting that under subsection (2) you're talking about refusal to perform everything so you don't need to ask whether it matters or not because everything, by definition, matters. The whole of the contract. As soon as you're in a situation where someone's proposing not to perform, or clearly unable to perform some part of the contract, then you go down the 3(c) route and you are required to undertake the further enquiry provided for in subsection (4) of this code.

ELIAS CJ:

Mr Goddard, we are very familiar with this legislation. I think you really can just make the submission that you want to. I mean, maybe there's something that has never occurred to us in here but if so go straight to it.

MR GODDARD QC:

Right, I'll do that Your Honour. The point about repudiating everything, all the obligations under subsection (2) is one that hasn't come through clearly in the decisions of this Court or the Court of Appeal and Burrows, Finn and Todd do contemplate the possibility that you might be able to deal, under subsection (2), with a partial repudiation. My submission that's wrong, and that's why I was going through that. I am departing from the leading contract text in my approach and it seemed to me that it was helpful, both to flag that and to explain why.

ELIAS CJ:

Yes.

MR GODDARD QC:

But I absolutely accept that –

ELIAS CJ:

Well, no that was very helpful saying that Mr Goddard.

MR GODDARD QC:
I accept that I've been a little pedestrian in the way I did it and I'll put my skates on.

So then we've got, and again the Court is very familiar with this, the two alternative tests in subsection (4), an express or implied agreement that performance of the term is essential or the effect is substantial.

Subsection (5), affirmation, I don't need to deal with.

8 Cancellation, again, the Court's very familiar with this. You may have a right to cancel but you've then got an election and you actually have to exercise it by making it known by words or conduct evincing an intention to cancel, or both, but no particular form of words is required.

Section 9 is the next provision I wanted to look at briefly, "Power of Court to grant relief." That's a power which is triggered when a contract is cancelled by any party, so there has to be a valid cancellation before section 9 is available and there's a list of discretionary factors in subsection (4) that are relevant to grant a relief and the one I want to draw attention to is paragraph (b), "In considering whether to make an order under this section, and in terms of the order, the Court must have regard to, (b), the extent to which any party to the contract was or would have been able to perform it in whole or in part." So in my submission, when one looks at the scheme of this legislation it's actually reasonably clear that being ready, willing and able to perform is not a precondition for cancellation, certainly for misrepresentation, in my submission, for repudiation under subsection (2) but that a factor that's relevant to the remedial discretion is the extent to which a party, including the cancelling party, was or was not able to perform in whole or part.

WILLIAM YOUNG J:
Readiness and willingness and ability to perform has different connotations in different contexts but in some it just means a willingness to perform the obligations imposed by the contract providing the concurrent obligations on the other side are performed.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:
It's not necessarily, "I can settle tomorrow."

MR GODDARD QC:
No.

WILLIAM YOUNG J:
It's, "I am prepared to settle at an appropriate time when you're in a position to settle."

MR GODDARD QC:
That's the orthodox meaning of the term, both in the context of the required pleading, when you're seeking specific performance –

WILLIAM YOUNG J:
Well that's all it means, I'm sure, in the case of specific performance.

MR GODDARD QC:
Absolutely and because of the interdependence of the obligations. The flipside of the proposition that a vendor can't sue in debt for the purchase price because they're only entitled to the money if they deliver. It also has the same meaning, as a matter of common law, in the context of the criterion that a party terminating for breach must be ready, willing and able to settle. It's only that provided the other party did, performed their prior obligations on which your obligation's conditional, or their concurrent obligations that you have to be ready, willing and able to settle.

The High Court of Australia divided on the question of whether, at common law, a party cancelling for repudiation had to be ready, willing and able to settle. The majority of the Judges – and this is *Foran v Wight*, the majority of the Court thought that you did have to but that was an argument based on the cases, a very fine reading of the lines of English cases and the old rules of pleading. One of the Judges, Justice Dean, considered that that proposition was wrong in principle, an undesirable outcome. His Honour posited, and it seemed to me this was a very relevant situation to think about in relation to our Act, the situation of two parties, each of which was refusing to perform, or each of which was unable to. I think the

unable to is an even better example. If one imagines a situation where a vendor is unable to give title and at roughly the same time the purchaser discovers that they're completely incapable of finding the money to settle, if there's a prerequisite before you can cancel being ready, willing and able to settle when performance falls due – neither could settle and neither could cancel and His Honour asks, rhetorically, "Why should the contract be left hanging like an albatross around the necks of the parties?" And the answer is that there's no good reason to. It should be possible for either to cancel, applying the plan words of subsection (2) either could cancel. But the remedial consequences, of course, will depend on the extent to which each could perform because it would be a bit rich for the vendor, if the cancel because of the purchaser's inability to find finance, to say well, I want to be compensated for my loss under the contract in circumstances where they could never deliver title.

But the Act provides the machinery for dealing with those issues and there's no reason to read in requirements that are not found in the language of this code.

Your Honour did ask me to go faster. That was quite a quick traverse of some quite complex issues, not all of them, I think, need to be resolved here, happily, but that was a lightning tour of my submissions, paragraph 2.10 to 2.20.1.5 in my roadmap. And I should just add to that the reference to 9(4)(b) which I failed to note in my written submissions, I should have, but it's an important part of the picture.

Coming then, 1.6, very quickly, to the effect of breach by a vendor of a nonessential term and I'm using nonessential term here as a shorthand for a term that doesn't meet either of the section 7(4) criteria so there's no right on the part of the purchaser to cancel. What, then, are the obligations of the purchaser? Well, if the purchaser's not entitled to cancel, it follows that the purchaser is obliged to perform their obligations under the contract when they fall due. The importance of *Regalwood* is that it confirms that if the breach is sufficiently related to the obligation to settle, that it gives rise to an equitable setoff, and the Court said well that's not necessarily the case because it arises under the same contract, but it often will be. Then the purchaser is entitled not to refuse to settle, not to defer settlement, but to call for an allowance in the purchase price on settlement.

So the purchaser's not obliged to settle for the full price and – just pausing to see if Your Honour's troubled by the light.

ELIAS CJ:

No I was just going to ask the registrar if she'd mind – I'm always reluctant to because I feel we don't have enough sun in Wellington but…

MR GODDARD QC:

I could see Your Honour was suffering from an overdose of vitamin D.

So what *Regalwood* confirms is that the purchaser is not required to pay the full price and then pursue damages for the breach of warranty later. In many circumstances it will be open to the purchaser to say no, I seek an allowance and here is my good faith estimate of the amount of that allowance and this Court has said the parties must then come up with a practical solution for dealing with that claim. Either, of course, the vendor can accept that that allowance should be made or one might agree to arrangements involving a stake holder or in, if all of that fails, the purchaser can sue for specific performance and within that context the – sorry, the vendor can sue for specific performance –

ELIAS CJ:

Well either can.

MR GODDARD QC:

Either can but assuming a vendor's anxious to complete – if the vendor sues for specific performance, the purchaser can say, I will not oppose the order provided that it's made on terms.

WILLIAM YOUNG J:

Well here is a claim for specific performance had gone to trial, it would have been open to the Judge to decrease specific performance on the basis that a), a valid completion notice was provided; b), either there was compliance or compensation in relation to – compliance with or compensation in respect of the side agreements.

MR GODDARD QC:

And there could have been an enquiry into the appropriate amount, appropriate allowance. But one can rewind from that and say that a purchaser, faced with an action for specific performance, as these purchasers were in early 2009, can either oppose it in a blanket way, which is what happened here, or can say, I will perform provided that these terms are performed or provided that an allowance is made.

That is a pleading which is quite proper for the defendant to a specific performance, to identify the terms on which an order would be consented to and that would not be a repudiation. But saying that there is no obligation to settle is a very clear repudiation. There are a number of cases that have made that point and my learned friend said earlier today, I made a note of it, that the purchasers made clear by their resistance to summary judgment in 2009, that they did not regard themselves as bound by the contracts. And in my submission that's right, I'll come back to –

ELIAS CJ:

But is that repudiation? Is there authority that says if you, once you're into litigation and you defend that is repudiation?

MR GODDARD QC:

If you defend on the grounds that you're not bound, yes, I think I can provide that reference in a moment. I'm trying to remember which of the cases it is.

ELIAS CJ:

In a way it seems a little startling but maybe not.

MR GODDARD QC:

No more than the finding at filing a claim can amount to cancellation in one breath, uno flatu, which this, which the Court of Appeal said in *Chatfield v Jones* [1990] 3 NZLR 285 (CA) and which this Court, I think, has accepted. So one starts in litigation can be conduct, which conveys either a willingness to perform on condition or an absolute unwillingness to perform.

GLAZEBROOK J:

I'd be interested in the authority for that because I too find this slightly startling as a proposition.

GLAZEBROOK J:

That one starts in litigation can convey a repudiation? I think –

ELIAS CJ:

Well yes because what does it mean? Does it mean you have a, sort of, perambulating action or that you then issue further proceedings on the basis of repudiation?

WILLIAM YOUNG J:

You can just amend. But it just depends, doesn't it, I mean, it's possible to say – it's possible but it may not be easy to say, I don't accept I'm bound by this contract without repudiating. Could you say, but if I am bound then I'll honour it and let's litigate it?

GLAZEBROOK J:

Well exactly, that's the –

MR GODDARD QC:

That would be quite a fine line to walk.

GLAZEBROOK J:

Well, but no, but it's almost, it's almost saying just because you say I shouldn't be given specific performance, it's almost saying, but if the vendor is given specific performance then I still won't perform because you can defend an action and say, well, of course, if, if I find I'm wrong then of course I'm going to have to perform.

MR GODDARD QC:

Two things about that. First, the defence here was both that there was no obligation and also that the purchasers were unable to perform, and they said as much in their affidavits, and that's obviously not something that can just be retracted. If you're unable to perform you're unable to perform. But second, coming back to the authority, can I say this since it's arisen at this point. Can I take the Court to my supplementary bundle of authorities, tab 1, *Chatfield v Jones*?

GLAZEBROOK J:

Well they might be unable to perform but they'd just be made bankrupt wouldn't they in those circumstances?

MR GODDARD QC:

But then that's – but if you make it clear that you won't perform your obligations because you can't that, it clearly falls within subsection (2). I don't think that's ever been seriously questioned.

I can repudiate by saying, I'd love to perform but I have no money so I can't. And that's a repudiation Your Honour. So while I'm on that, if we look, for example, for reasons I don't fully understand, there's only one of the affidavits from the summary judgment proceedings in the bundle, but it's in the case on appeal, it's in volume 4 under tab 15, it's Mr Kumar's. This is the affidavit in opposition to summary judgment. The background to entry into the contract is described. Entry into the agreement for sale and purchase and what – if we jump over to page 682, paragraph 48, Mr Kumar says, "The alleged obligation to purchase the apartment now being argued by the plaintiff is an incredibly onerous obligation, entirely different from what I understood I had signed up for." And then 49, "I can't afford to settle and may well be forced into bankruptcy if the plaintiff succeeds." And both the other appellants filed similar affidavits, in fact I think that paragraph was word for word identical in each. I can hand them up if that would be helpful.

So, and then the authority for the proposition is *Chatfield v Jones*, a decision in the Court of Appeal, President and Justice Somers and Justice Hardie Boys, it's in my supplementary bundle under tab 1, and it was an agreement for the sale and purchase of a company in Fiji which owned a tourist railway and the vendors sought summary judgment. Then – sorry, sought specific performance, but then they sold the assets elsewhere because they came under financial pressure and they amended to claim damages. And the question was whether there had been a repudiation entitling the purchasers to cancel and the Court said, the relevant passage in the judgment of the President, is on page 290. This deals with two issues relevant to the present case. First His Honour said that seeking the specific performance doesn't prevent a subsequent cancellation, that you don't have to elect between specific performance and damages for loss of bargain until trial, that's line 16 and following.

But then at line 29, "By their statements of defence in September 1987 the defendants here continued to repudiate the contract. Indeed they enlarged the grounds of repudiation. Reiteration of their attitude that there was no binding contract was enough to entitle the plaintiffs to cancel it. The previous affirmation could not deprive the plaintiffs of the rights to take advantage of a continuing repudiation. By selling the subject matter of the contract elsewhere in October 1987 the plaintiffs manifested an intention to cancel the contract." Then jumping down to line 42, "Under the Act, however, the cancellation could not take effect until it was made known. On the evidence this was not until service of the amended statement

of claim, disclosing the sale and abandoning the prayer for specific performance." And as His Honour went on to say at lines 50 to 51, that was effective notice of the cancellation.

Justice Somers reached the same conclusion over on page 292, beginning at line 41, you can't get damages for loss of bargain unless the contract is at an end. Failure to settle on the extended date was in the circumstances a repudiation. "The sellers did not accept that repudiation but instead issued proceedings and sought summary judgment. In effect they were claiming specific performance. The affidavits in opposition contained a further repudiation by the buyers. This repudiation too was not accepted." Summary judgment refused. Revised statement of claim which – and, "The statements of defence to that pleading repeated the buyers' repudiations, their pleas were not based upon a bona fide though mistaken construction of the contract which would not amount to a repudiation."

And then over the page, 293, line 6, deals with the point that there's no, "Absolute rule that a party to a contract who commences proceedings for specific performance cannot change his mind and rescind," doesn't have to discontinue first. And then line 11 and following, "The conduct of the defendant in his defence, as for example pleading that he is unable to or refused to complete, will, I consider, entitle a plaintiff to rescind for repudiation." So it's exactly the point that Your Honour asked me. And then His Honour deals with the cancellation and concludes that it was notified in the pleading.

Justice Hardie Boys judgment begins on page 294 and over at 296, line 30, "it is not necessary to decide whether by these proceedings, which in their initial form were in effect a claim for specific performance...the vendors elected to affirm he contract. For even if a claim for specific performance does amount to affirmation, the plaintiff may in my opinion cancel on account of further repudiatory conduct." And then line 43, "The question in this case is whether there was further repudiation after 31 August 1987 entitling the vendors to cancel. In my opinion, there was." Defence was filed, details described and over the page, 297, line 5, "The purchasers were therefore not only repeating their contentions that they were not obligated to complete the purchase, but were adding further reasons why they were not. They were simply reaffirming the more strongly the intention not to complete that they had already demonstrated by their conduct as well as by their pleadings. In my opinion that reaffirmation, maintained by their continuing failure to settle, constituted

repudiation in terms of s 7(2) of the Act and gave the vendors fresh entitlement to cancel. Section 7(2) does not call for any particular form of repudiation. It is enough that the intention not to complete is made clear." And then again the next question, was the right to cancel effectively exercised, yes it was, by virtue of filing the amended claim.

ELIAS CJ:
So in your pleadings did you read repudiation in this way?

MR GODDARD QC:
It was pleaded as arising out of the refusal to settle and continuing failure to settle.

ELIAS CJ:
Mmm.

MR GODDARD QC:
In very general terms. It wasn't particularised by reference to the proceedings, that's certainly right.

ELIAS CJ:
Right.

GLAZEBROOK J:
Although it would have to be more than the continuing failure to settle when there was no requirement to settle, wouldn't it? Certainly the way it was pleaded, if there was a requirement to settle then pleading that as a repudiation, but where as it turns out there was no right, you can't now rely on the failure to settle in 2008, can you, apart from its background?

MR GODDARD QC:
Exactly right Your Honour.

WILLIAM YOUNG J:
Well it's a factor. It's a factor of a number of factors.

MR GODDARD QC:

I was going to come to, I think Your Honour described this as part of the context within which the position had to be assessed in 2010 and Your Honour made the same point about correspondence. What was the significance of a failure to respond to the two enquiries on 5 and 23 February 2010 about purchasers' willingness to complete? Now in my submission the position was clear enough, having regard to everything that had gone before, including the 2008 conduct at a time when everyone believed that settlement was due, because no party had identified the deficiency in the certificate. The conduct in the proceedings, both the affidavits and we can't settle, and the explicit rejection of an obligation ever to settle the purchase, effectively it being an option, well that was the way it was put and that's the way it's pleaded, and the pleadings on which the parties went to trial.

Against that background it would have been enough simply to proceed to cancel in the absence of any intimation from the purchasers that they had changed their mind. But very prudently what the solicitors for the vendor did was to write following the summary judgment decision in which the vendor had succeeded against one purchaser I think but failed against the others to say, well, actually you're going to end up in the same position we think as the one we succeeded against. Once we've gone through trial you are going to have to perform, there is a valid agreement, because you're not going to come home on the Fair Trading Act which is what you established needed to go to trial and are you willing to settle. So to remove any suggestion that their stance might have changed but not been communicated, an enquiry was made, and if the purchasers wanted to be heard to say, we will settle but only if you perform the side agreements, then it was necessary for them at that time to convey that. But against the backdrop of all that had gone before, the failure to respond to say, no, our position's changed, and we're no longer pursuing all the arguments that remain otherwise live in the proceeding –

WILLIAM YOUNG J:

Can I just say that I actually seriously wonder whether it was necessary for the plaintiff to point to a repudiation in a cancellation to obtain damages in lieu in specific performance. I don't think that that is a requirement when a claim is brought for damages in lieu of specific performance under section 16 of the Judicature Act.

MR GODDARD QC:

I think that's probably right but I think that one also has to show that one was entitled to specific performance –

WILLIAM YOUNG J:

Yes you have to show you were entitled to specific – so you have to show that you were ready, willing and able but it doesn't mean that the case would stand or fall on repudiation at a particular time by the purchaser.

MR GODDARD QC:

Your Honour's exactly right but it's part of my argument in relation to section 7(2) that if one does cancel for repudiation one doesn't have to get over the ready, willing and able threshold, so there's an easier path to entitlement to cancel and –

GLAZEBROOK J:

Well you agree though that you have to be in a position to perform mutual obligations?

MR GODDARD QC:

The –

GLAZEBROOK J:

Because otherwise there's no repudiation if it's merely –

MR GODDARD QC:

No –

GLAZEBROOK J:

Well what was your submission on that?

MR GODDARD QC:

That the enquiry simply isn't, you just simply don't undertake that enquiry, where it is repudiatory conduct. Where someone says blanket, I will not perform, then in order to be entitled to cancel the enquiry into the ability to perform other obligations including current obligations does not arise but my submission was that it may well arise at the stage of considering what remedies you're entitled to.

WILLIAM YOUNG J:

But I think it does arise, doesn't it? Doesn't it arise in a general sense that you've got to show that in a broad sense you are willing to perform your part of the bargain and that there's nothing that makes it impossible. That's really what *Foran* says, isn't it?

MR GODDARD QC:
That's what *Foran* says but –

GLAZEBROOK J:
You're suggesting we should follow Dean's view –

MR GODDARD QC:
Yes because –

GLAZEBROOK J:
– view on that rather than –

MR GODDARD QC:
– that's the only judgment –

GLAZEBROOK J:
Justice Dean's?

MR GODDARD QC:
Yes, both because – I'm really not suggesting one should follow that. What I'm suggesting is one should give effect to the words of the section which is a code but that that takes one to the same place as Justice Dean and that it's actually the sensible place to be in as a matter of policy.

GLAZEBROOK J:
Well one wonders that really but...

MR GODDARD QC:
No I think Your Honour identified some concerns in *Noble Investments v Keenan* (2005) 6 NZCPR 433, [2006] NZAR 594 (CA) which I think are fully met by two well developed principles that are completely consistent with treating section 7 as a code and those two principles are first the principle that someone is not refusing to perform obligations if they are simply declining to perform them until prior or concurrent inter-

dependent obligations are performed. So one has to, it's a factual enquiry then, what is being conveyed. Is it an absolute refusal to perform come what may, come hell or high water, or is it a refusal to perform because the corresponding performance has not been provided, and then of course there's the principle of estoppel, which is not effected by section 7.

So there may well be circumstances in which a party who, which has made clear that they're not going to perform, as a result of which they intimate to the other party that it's useless to perform, cannot then assert that that other party is in breach for their failure to do so, they're estopped from doing so. That's well developed, it's discussed in *Foran*, it was accepted by this Court in *Ingram* and those two principles together give effect to the deep principle that Your Honour identified in the judgment for the Court in *Noble Investments*, which is that one shouldn't be permitted to take advantage of ones own wrong. But that's not, with respect, a free-standing principle that governs the right to cancel under section 7, it's rather a principle that finds its expression through interpretation of the contract and ascertainment of whether obligations are due and through the law of estoppel.

GLAZEBROOK J:
At some stage you're going to deal with the mistaken belief in not having to settle are you?

MR GODDARD QC:
I am.

GLAZEBROOK J:
I don't want you to do it now, I'm just checking that you are going to.

MR GODDARD QC:
I am. So I think probably I should come back now to my road map. I won't spend any more time on the Contractual Remedies Act in general. I'm going to deal now with point 2, the repudiation by the purchasers. I've already dealt with some of the points I wanted to make. I do want to pause to notice 2.1. The Court of Appeal heard detailed argument over two days on this case, carried out a detailed review of the evidence which perfectly reasonably hasn't been repeated in this Court. But in the absence of that sort of detailed review it is, in my submission, not open to the purchasers to invite the Court to disturb the factual findings that were made. Those

findings of continuing repudiation by each purchaser, and of course it's in principle an enquiry that has to be carried out for each purchaser. In theory one could arrive at a different conclusion for each but actually the key conduct is common to all of them.

There is a history of conduct which together, the original failures and refusals to settle when called on to do so in 2008 at a time when everyone believed settlement was due. Their failures to confirm willingness to settle in early 2010. The stance in the proceedings. I've already taken the Courts to Mr Kumar's affidavit in volume 4 of the case on appeal but I also provide a reference there to the pleading on which the purchasers went to trial under tab 3. I won't go to it now but that's the pleading that they were only required to decide whether to proceed to acquire a unit or to split the profits from another sale at the time another sale became available, they weren't otherwise required to settle, and that was the stance they took consistently through the proceedings. It's one that was completely inconsistent with the terms of the contract. And, as I said earlier, and my learned friend accepted, that the resistance to the summary judgment proceedings conveyed that the purchasers didn't regard themselves as bound by the contracts.

And then there's the specific communications in 2008 which are peculiar to each purchaser. They've really just the background to the later conduct. I've provided references to the paragraphs in the Court of Appeal judgment for each of those as described. And it's the totality of that conduct that is the continuing repudiation and in particular the specific matter relied on, silence in response to the February 2010 letters can only be understood against the backdrop of what's gone before. That was specifically relied on. It was, in my submission, a repudiation. It was, one might describe it as a confirmation of an ongoing repudiation rather than a new one but that's all that's required in terms of both the language of section 7(2) and *Chatfield v Jones*.

And again in terms of section 7 being code one steps back and says, have the purchasers made it clear that they did not intend to perform their obligations and these purchasers were saying, well we're not obliged to settle in the circumstances which have evolved, we're never required to settle this and we're not able to, and that meets the subsection (2) requirements.

Then we come to the – and the way I'm going to deal with the mistake issue is by looking at each of the matters that it's suggested justified the refusal to settle and ask

whether that gets the purchasers there. First of all the absence of a valid certificate of practical completion. The first point, which I think is now common ground, is that a valid certificate and settlement becoming due wasn't a prerequisite for Station to be able to cancel for repudiation. In 2007, when construction had just begun, if the Kumars had written to Station saying we deeply regret this purchase. We do not want to acquire an apartment in Queenstown, we don't want to participate in this investment opportunity, we want out, then that would have been a repudiation long before any certificate could be provided.

The next point is that my learned friend emphasises in her written submissions, and emphasised here today, the importance of a valid certificate to the contractual scheme. Two points about that. First, although it played an important role in the contractual scheme, it was the trigger for settlement becoming due, there was no positive obligation imposed on Station to provide a certificate of practical completion by any given date. This is the point that His Honour Justice Young touched on when asking my learned friend, where's the term that imposes the obligation. If no certificate had ever been provided, for example, most obviously because practical completion was not achieved, then either party, including Station, had the right to give notice under the sunset clause terminating the contract, pay back the deposit, no breach. So there was not, in fact, a positive obligation to provide such a certificate but most importantly it cannot sensibly be suggested, against the backdrop of this contractual scheme, that there was an obligation to do so by August 2008, with time being of the essence. After all, the contract itself contemplated a sunset clause kicking in, in March 2009. So it was clearly open to Station to take, at least until then, to finish the project and provide a certificate of practical completion.

This is the distinction that this Court drew in *Mana Property v James* between a term being essential, the area of the land, and the time for compliance with that term being essential. Mana, Mana was the vendor I think, said we've got title but it was an area of land below the minimum threshold specified in the contract. This Court held in agreement with the Court of Appeal that the minimum parcel size term was essential and that any drop below that minimum, four point whatever it was, the number escapes me, was a breach of an essential term. But, this Court said time had not been made of the essence for the vendor to comply with this. If the purchasers wanted to rely on the fact that title was being offered to a block that was too small, they had to make time of the essence and then wait until a block of the required size was not delivered because it could be fixed, and in fact the vendor did fix it in that

case within a fairly short timeframe. So what is clear is that even if the purchasers were to persuade the Court that the obligation to provide, that there was an obligation to provide a valid certificate of practical completion, and that this was an essential term, nonetheless it was not the case in August 2008 that time was of the essence. If this deficiency in the certificate had been identified, and the purchasers had said, well this isn't a valid certificate of practical completion, it would have been open to Station to tender a valid one.

That's not a revolutionary proposition. I imagine if one opened any volume of the Lloyd's Law Reports at random, one would find a case about circumstances in which a party to a shipping contract, or a contract for the sale and purchase of goods, had tendered non-complying documents, and they were rejected, but because the final date for tendering complying documents hadn't yet been reached, a new tender was made of complying documents, and the vendor, as it usually is in those circumstances, sometimes the purchaser depending on whether your tendering shipping documents a bill of lading or a letter of credit, would then be entitled to proceed with the contract. So in a tender of invalid documents, non-complying documents, maybe ineffective to trigger the other parties' obligation to settle but it is never normally taken as conveying a refusal for all time to provide complying documents and on the facts of this case there's no basis for drawing that inference.

Now what does that mean? Well, in order to justify a refusal to perform their obligations in 2008 the purchasers would need to show that they were entitled to cancel. Let me be clear what I'm saying on that because that on its face might be too broad. Obviously if they had identified this defect in the certificate they could say, well hang on, this isn't a certificate of practical completion within the meaning of the contract. Our due date for settlement won't come about until you provide a proper certificate because this is from some people called Maltbys, that's in big letters at the top of the certificate, and actually also refers to a contract which is different from this one – just pausing there. The Maltbys' certificate was given for the purposes f the construction contract between Station and Fletcher Construction and we haven't got that contract in the bundle. I have absolutely no idea whether a retrospective certificate was or was not appropriate under that contract and what effect it had. It doesn't really matter but it wasn't given by Maltbys for the purposes of this contract. It was given for the purposes of another contract. There's nothing sinister about the fact –

ELIAS CJ:

It wasn't retrospectively dated?

MR GODDARD QC:

No it wasn't retrospectively dated. It was just – the date – the correct date was on it and it said practical completion was achieved at this date and it may well be that that had implications for what Fletchers was entitled to be paid under the head contract in terms of interest or something. I don't know, we don't know, doesn't matter. What went wrong is that as a result of penny pinching by Station in circumstances where it didn't have that many pennies, they didn't fly Leuschke down to do a further inspection. They just said, oh, this looks, you know, like a certificate that everything's been finished, we'll use that for the purchasers as well. Now – and no one seems to have realised that it wasn't effective for the purposes of the contract. My learned friend mentioned that Station knew who their architects were and knew that Maltbys were not those architects but without wanting to labour the point, because I don't think it's within the scope of the leave that's been granted, the signed purchase agreements had been sent to the purchasers' solicitors so they also had the agreements, the letters are in the bundle, sending them, and I'll perhaps ask my junior to just dig out the references to those, and the contract contains the definition of "vendor's architect" as Leuschke Group or other person. If this had mattered an enquiry could have been made saying well have you appointed Maltbys as the architect in place of Leuschke. I'll come back with those references. But I just don't think, with respect, that the Court needs to go there. I don't think that a you know/you knew argument has any bearing on the issue before the Court but the point is rather that if the issue had been raised at that time it could, as the Court of Appeal found, readily been fixed. It could have been fixed either by getting Leuschke Group down to do a further review or by appointing a new architect who would be given the plans and would do the review and would give a certificate and the Court of Appeal found again, after reviewing the evidence carefully, such a certificate would have issued from July 2008 onwards, because it was, in fact, practically complete.

Now, that brings me, I think, logically – so as I say, because it was readily cured, it wasn't repudiation and it wasn't a breach justifying cancellation. Why wasn't it repudiation? Because it would've been a repudiation, the provision of the certificate, only if providing it made it clear that Station didn't intend to perform its obligation. In fact, it's quite clear that Station thought it was performing its obligations and there is absolutely no reason to think that if the defect had been pointed out Station wouldn't

have been willing to fix it, every reason to think it would, given the value to it of these settlements.

So the threshold in (2) is not present. In terms of (3), I think what my learned friend is arguing is that by providing them with this contract, Station made it clear that a term would be broken and it was an essential one, but the problem is first of all that three is no term requiring it to be provided, Your Honours Justice Young's point, second there's nothing to suggest that providing it –

GLAZEBROOK J:
If it's a prerequisite, the settlement, what is it apart from a term? I don't think anything turns on that, but...

MR GODDARD QC:
It has to be a term will be broken so it has to impose an obligation –

GLAZEBROOK J:
No, no, I understand the argument that says that you could've fixed it up, but to say it's not a term so that you don't have to provide it at all can't be right, can it?

MR GODDARD QC:
The contract doesn't impose a positive obligation to provide it with any given time.

GLAZEBROOK J:
Well it doesn't take place if you don't, so what is it apart from a term?

WILLIAM YOUNG J:
But settlement, you're not in breach if you can't produce it. Actually you can always can the contract, but –

MR GODDARD QC:
That's exactly my point.

WILLIAM YOUNG J:
But isn't it – it's just a precedent to an obligation on the parties.

MR GODDARD QC:

And contracts often contained such conditions precedent, they don't impose an obligation to do something, so you don't talk about them being broken, but they just may not be satisfied.

WILLIAM YOUNG J:
There might be an obligation to take reasonable steps to satisfy the condition.

MR GODDARD QC:
I wondered about that, and I thought that might be implied in those circumstances, but I don't understand that to have been – I mean it's not an issue here. So, I think Your Honour, yes, it's a term of the contract, but contracts contain a range of terms, some impose obligations with the result that if you don't comply with them, the contract is broken and that's the language used in three. The term will be broken. Other terms just set preconditions. So, for example, if one thinks about option contracts, it may be a term that the options exercisable are only if the share price is within a certain window. If it's not within a – that's a term with a contract, but if it's not within that window, no one has broken any term, it's just that a precondition to the option being exercisable hasn't been met.

But it doesn't matter here, because as I said earlier –

GLAZEBROOK J:
That's why I said I don't think it matters, but I'm just – so what happens the contract just comes to an end at that stage?

MR GODDARD QC:
Because the condition isn't met and can't be met, that's right, and that's a very common outcome, many conditions lapse, many contracts lapse because conditions aren't met. If one imagines, for example, my entering into a contract to sell my car, if I win a beauty contest within the next six months, we can be quite sure that the time will come when that contract will lapse. I haven't broken it by not winning a beauty contest. One might have an interesting argument about whether it was always clear in terms of section 73C that it wouldn't be met, but...

GLAZEBROOK J:
I suppose the concern I have here is that if you just don't provide it through fault, because you just decide you're not going to provide it, it does seem that's a breach of

the contract, because you're obliged to provide it, it's a precondition of settlement, you've got it in your hand and you just say, ha ha, I'm not going to provide it because I actually don't want you to have the cancellation. I just want the contract to lapse. So, it seems to me that has to be a breach of the term.

MR GODDARD QC:
And that's where I think that the Courts would probably do what they do in relation to a lot of conditions precedent like obtaining resource consents and various other things and say that there's an implied obligation to use reasonable endeavours to do it.

GLAZEBROOK J:
Well it's not, there's an implied obligation to do it if you haven't and if you haven't got it, to have reasonable steps to take, to make efforts.

MR GODDARD QC:
Your Honour is asking whether once one actually has the certificate, one has to hand it over. Reasonable endeavours could only be met at that point by actually doing it. At an earlier stage I think there's a question about whether there's an obligation to try to achieve that state and I think if one looks at the obligations in relation to construction in the contract, one can see that there are some obligations to proceed with the construction with reasonable competence, diligence, things like that, but the breach and none of those is an issue, so –

McGRATH J:
If you've got to the date of the sunset clause operating, you would need in that situation to be able to show them that you had used reasonable efforts to get a practical completion certificate. But one the sunset data had arrived, never mind, but you wouldn't be in breach provided you used reasonable efforts until then.

MR GODDARD QC:
The vendor?

McGRATH J:
Yes.

MR GODDARD QC:

Yes, I think that is my submission, Your Honour. Again I don't think –

McGRATH J:

If there's no sunset clause, you simply will have a period by which your reasonable efforts will have to succeed or not?

MR GODDARD QC:

There would come a point where the delay either made it clear it would never be achieved –

McGRATH J:

Yes.

MR GODDARD QC:

– or where the amount of time taken was so far beyond the reasonable that the substantiality test –

McGRATH J:

But the reasonable efforts would still be the obligations, provided you had used reasonable efforts –

MR GODDARD QC:

Yes, Your Honour.

McGRATH J:

– it might expire in time, but –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

I think it's dancing on the head of a pin, frankly, to say that if there's a – if you have to provide something by a certain date and you don't, that that's not in breach of the contract. I mean I can understand certain – because we've got away from conditions precedent and conditions subsequent and whether they're part of contracts and things, haven't we?

MR GODDARD QC:

No, Your Honour, it's still a very important part of the law of contract actually and of land law. I think you're right, it's fascinating, but directly, Your Honour, I can't resist responding to the suggestion that I'm dancing on the head of a pin because it seems to me that the question has to be one of interpretation of the particular contract read as a whole and that if one reads this contract as a whole, it is difficult to spell out any greater obligation in terms of achieving practical completion and providing a certificate to that effect, than using reasonable endeavours but an implied term to that effect would be consistent with the overall scheme of the contract, including the various rights the vendor has at an early stage to pull the plug because of economic viability reasons and at a later stage pose sunset date to pull the plug.

So all I can do is say that my submission is not intended to be a fine grain technical one, it's intended to reflect the commercial substance of this particular contract as a matter of interpretation.

GLAZEBROOK J:

So if they don't manage to make meet practical completion, it's not a breach of the contract because of their views, reasonable endeavours to get there then it doesn't matter even though you've agreed you're going to sell that, so the contract just falls over without any damages?

MR GODDARD QC:

Because that's expressly provided for. Can I take Your Honour back to the sunset clause?

GLAZEBROOK J:

No, no, I understand –

MR GODDARD QC:

Yes, but the sunset clause includes – it's not just the purchaser that an invoke it, it's also the vendor.

GLAZEBROOK J:

No, no, I understand the context of the sunset clause, but you're making a more general submission about a difference between terms of the contract, anyway I don't think it matters here, so it's probably –

MR GODDARD QC:

No, my submission is confined to this contract and I don't want to get into a broader argument about that.

GLAZEBROOK J:

So it's only because of the sunset clause you make that submission?

MR GODDARD QC:

Yes, in many other contracts you would say that there were – you just have to interpret it and work out what's required, but whatever –

GLAZEBROOK J:

That's fine if it's only related to the sunset clause.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

I had understood it to be a much more general submission.

MR GODDARD QC:

No, I'm sorry, it's driven off the scheme of this contract including the sunset clause, and that's where I get my submission that even if there was an obligation to provide it, it can't have been an obligation to provide it in August 2008, because nothing had been done to make that timing essential.

GLAZEBROOK J:

No, no, I definitely understand that submission but I don't think –

MR GODDARD QC:

That's my more modest submission. So, then we pause and say, so was there a good reason for refusing to perform obligations based on the fact that this hadn't been provided? And there would be a good reason for saying I will, in no circumstances, settle this contract, only if there was at least a right to cancel, in my submission is also cancellation in fact, but let's just deal with the right to cancel. The right to cancel not there because no repudiation and no breach of a term that was

essential when one bears in mind the ability to fix it and that's where I come back to Your Honours' comparison with the rules on providing a good reason for cancellation even at a later date, even though no reason was given at the time of cancellation or a bad reason was given and I won't go into this in detail, but can I just invite the Court to note a couple of additional references beside the relevant paragraph of my written submissions.

So, I am on page 8 of my written submissions. The heading "Justifying cancellation by reference to new and additional matters," and I make the submission that it's difficult to see how that can apply to cancellation for repudiation because something can't, with the benefit of hindsight, be seen as a repudiation if it didn't convey a refusal to terminate at the time. But in terms of breach, identifying a breach of an essential term, which I think is what my friend is now arguing, that justified the cancellation. The references are *Chitty on Contracts* paragraph 24 dash –

ELIAS CJ:
Sorry, where are we putting this beside?

MR GODDARD QC:
Perhaps just above the affirmation heading as an additional note. Some further references that are helpful on this point. *Chitty* 24-014, that's page 1708, it's in tab 5 of my supplementary volume.

ELIAS CJ:
Yes.

MR GODDARD QC:

And also in my supplementary volume under tab 3, *Heisler v Anglo-Dal* [1954] 1 WLR 1273, [1954] 2 All ER 770 and under tab 2, Glencore BV v Lebanese Organisation for International Commerce [1997] 4 All ER 514 (CA) and those cases make what I think is a commonsense proposition anyway, but it's always – lawyers always like to have authority to support commonsense propositions that you can't rely on something that would have been a good reason if at the time that you purported to cancel, there was still time to remedy the relevant failure and the classic situation this arises in is where someone has tendered documents that were non-compliant in some respect. The other party cancels for a different reason and then as you're heading towards trial,

they realise, ah, those documents were non-compliant, they were in breach, and you can rely on that if it was too late to tender complying documents when you cancelled, but you can't rely on it if it wasn't too late because if, instead of cancelling you would've said, well there's a problem with those documents, the other party would've had an opportunity to fix it.

Now, in my submission, a simpler way to think about that scenario is just that you're not in breach of an essential term if there's still time to perform. It's the *Mana Property* point, but there is this line of cases which qualifies the bald proposition that you can rely on a good reason you discover subsequently where you cancelled for a bad one or for no reason at all and that's sound in principle and consistent with the scheme of section 7.

So, coming on then very quickly to item 4 in my road map, the side agreements, the additional terms –

WILLIAM YOUNG J:
Can I just, before you do, there was a fair bit of criticism about the lateness of discovery of the documents associated with the certification. What, if anything, do you say about that?

MR GODDARD QC:
That I can't see it has any relevance to anything on which leave was granted and I might say generally my learned friend's argument has roamed rather more widely than the grant of leave, which was very strictly confined to exclude, for example, the issues relating to the way in which the proceedings were conducted below, so I haven't looked at this in fine detail. The Court said in granting –

WILLIAM YOUNG J:
Yes, I'm conscious of what they said.

MR GODDARD QC:
– leave and it was the – there was an expressed statement that the Court said in paragraph 1, the applicants wanted to argue the Court of Appeal shouldn't have entertained the argument in which Station Properties succeeded and like the way the case was run in the High Court informed notice of appeal. No question of general

public importance, no miscarriage, they are not encompassed by the grant of leave to appeal, so first of all I say not within grant, but then secondly and subject to the fact that I haven't gone into this in the detail that I would've if I'd thought it was an issue before the Court. My understanding is that the Maltbys certificate had been discovered, that the full attachments to it had not been included with it, I think it was just the front page which referred to attached schedules, but there'd been no question raised about the schedules, that what happened was that, as my learned friend explained, Maltbys provided, I think, a more complete version of that to the purchasers in the course of discussions about evidence, third party request for documents, I'm not quite sure and my learned friend will be able to help with that and that produced enquiries as a result of which Station's receivers located the relevant documents, but I simply don't know how it came to be that a more complete version was not found by the receivers.

I would say these two things that up to that point no issue had been taken about whether practical completion had been achieved, so that was not a live issue in the proceedings and detailed schedules of defects as a result were not relevant. Second, that to the normal vicissitudes of discovery, which are fact of life although an unsatisfactory fact of life, has to be added the insolvency of Station in this case and the fact that people carrying out discovery had succeeded to someone else's files and quite how well they were or were not kept, I don't know, but it's not the easiest situation for receivers to be in when they turn up and change the locks and take over whatever they can get from the offices of the companies and of course they're not working from personal knowledge when they try to identify where particular material might be.

Now, none of that is a comprehensive answer. I hadn't prepared to give a comprehensive answer because I didn't think it was an issue, but that's the background. I'll just check, my juniors who know much more about this than I do are nodding, so I can't have gone too far astray otherwise they would be kicking rather than nodding.

So the side agreements, the additional terms. In my submission someone has to analyse whether they gave rise to an entitlement to cancel or to refuse to perform short of cancellation if there is such a thing. In my submission there isn't. Only if 73C and 74 criteria were met. Not a repudiation to say there are these discreet

terms that are not going to be performed. It's quite clear Station was intending to perform its substantial obligation to convey the property.

There are two times one needs to look at these depending on what the enquiry is. If the enquiry is whether there was an entitlement to cancel in August 2008, then of course you have to look at it in August 2008 and the first question is whether in terms of section 73C it was clear that these terms would be breached and as I say at 4.2, that and 4.3, 4.2, it wasn't clear those terms would be breached in 2008. The correspondence from Station to the purchasers was much more equivocal than that and the references I've provided in my chronology, which the Court should have as a separate document from my submissions. I should've checked actually that Your Honours have that chronology. And the electronic version is hyperlinked into the bundle, which is quite a nice way to steer around it.

ARNOLD J:
So at what point, I've just forgotten, at what point did the Bank of Scotland really start to call the shots in terms of what money, further money they were going to put in?

MR GODDARD QC:
Well before this August 2008 period. So there's no doubt but that Bank of Scotland but that if cash was needed by Station then it was unlikely to be found without Bank of Scotland agreeing to provide it. And that correspondence with Bank of Scotland saying, "We'll push back so far as we're legally entitled to," preceded the calls for settlement. But of course that wasn't an email to the purchasers. They weren't recipients of communications of any kind from the Bank of Scotland. They were getting feedback. For example...

WILLIAM YOUNG J:
Did the Bank of Scotland ever say, whatever happens, we'll never comply? You said, push back as far as we can. I don't think I've seen that email.

MR GODDARD QC:
Let me take the Court to that. So if, if the Court has the chronology, just to situate it in time first of all, we are in August –

WILLIAM YOUNG J:
21 August?

MR GODDARD QC:

So it's 21 August 2008, Your Honour, and the document is, as we can see in volume 5, tab 23 at page 987, which is what my learned junior has been trying to point out to me for some time, and again I want to emphasise this is behind the scenes communication between Station and the Bank. This is not a communication of purchasers. What we've got is, BOSI not being aware of the underwriting purchaser fees, then they deal with the arrangements. No set-off at settlement. You should provide me with any side agreements. "Needless to say credit will not be forgiving in this regard. We'll be pushing back on any set-off claim to the legal extent that we can." So the question is, what is "the legal to which we can"?

What had, was said by, if we rewind back in the chronology to 22 July 2008, I think it's faster than going to all the documents, the Court will see that Station wrote to the purchasers saying, "Select Hotels remains our operator of choice. Unlikely an agreement will be reached before settlement's for," so "unlikely", not "won't", "and we are still negotiating with the funder regarding those purchasers whose contracts included furniture packages." So that's hardly clear that it won't be performed. And there is nothing more definitive than that before the purchasers start pushing back in late April and saying, "Well we're – this is not what we agreed to. We're not going to perform."

Now, what needed to be done, in my submission, consistent with *Regalwood*, is that the purchasers needed to say, "Well you're in breach of these terms. we're not entitled to cancel for them because they're not essential", I'll come to that in a second, "but you must either perform them or you must make an allowance on settlement because we're entitled to a set-off." And in those circumstances Station would've had to go back to the funder saying, "Well look, we can settle provided we make this allowance. What do you say?" And as the Court of Appeal said in relation to the later 2010 period, commercial common sense suggests that if a purchaser is saying, "We'll settle for a price hundreds of thousands of dollars above current market provided you make an allowance of 40 or $50,000 for non-compliance with these terms," what you're going to do is settle and then if you're concerned about the balance, sue for the balance later. But you don't pass up settlement. So there was no rational basis for thinking that settlement would not be forthcoming on the basis either of performance of these terms or an allowance for them, which is all that the purchasers were entitled to under *Regalwood*.

Just, just on that point, I say that because none of these terms were agreed to be essential. Neither the High Court nor the Court of Appeal found that these terms were agreed to be essential. The Court then went on to consider the effect of non-performance and that's where there was a disagreement between the High Court and the Court of Appeal. The High Court considered that cumulatively the effect was substantial; the Court of Appeal disagreed. In paragraph 8.10 of my written submissions I go through why that was not essential. In headline form, 1%'s 1%. That's not something which deprives you of substantial benefit of the contract.

The furniture package, it seems inherently unlikely that Station and Station's funder would have insisted both on payment of a price that included $30,000 for furniture and on not providing the furniture or a $30,000 allowance. That would require a level of optimism that is hard to imagine, but even if they had done that, and as I say in 8.10(b) of my submissions, that ranges between 2.6% and 3.4% of the purchase price, it's a very small amount compared with what's in issue.

Turning to the management agreement, and Your Honour Justice Arnold asked about putting a value on this, if the purchasers wanted to show that the effect of being deprived of the management agreement was substantial, they needed to call some evidence about that and there was none. As a matter of common sense it's difficult to see how they could show that being offered the option of a management agreement in circumstances where the terms were completely up in the air would have any particular value to them because the value of the agreement would depend on its terms. Some management agreements would have little or no value; some might have a negative value.

ELIAS CJ:

Is it really a question though of putting a value on it? Can't it be thought that it is self-evidently important?

MR GODDARD QC:

Only –

ARNOLD J:

Think about it in terms – I mean these were people making an investment in a set of properties that were going to be rented out, I guess, on short- or long-term rental arrangements, and some of them would not have been local people, so that having a management agreement in place meant that you'd get an immediate income stream and if it happened to be with a branded organisation then so much the better. So in that sense it's pretty obvious that having something there was something that most of these investors would've, would've been pretty important to most of these investors wouldn't it?

MR GODDARD QC:

But it – what one has to ask is whether having it in place before settlement had a value that couldn't be achieved by then entering into it after settlement.

ARNOLD J:

Well that, isn't that slightly unrealistic? I mean if you've got a whole group of disparate investors, aren't they going to look for the developer to make the arrangements? To say, well you can do it yourself through your body corporate, is quite a different arrangement –

MR GODDARD QC:

What –

ARNOLD J:

– because then you've got all the time problems and uncertainty problems and –

MR GODDARD QC:

It was –

ARNOLD J:

– transaction costs and all the rest of it.

MR GODDARD QC:

It was always only going to be offered as an option in terms of the pre-contractual correspondence that was held to form part of the wider agreement. So it was always on the cards that some apartment owners would not take the management contract that was offered, either because they wanted to live in the apartment or because they didn't see it as a good offer.

ARNOLD J:

Yes, but how does that deal with the problem?

MR GODDARD QC:

So the first step is that we're not talking here about a management agreement that necessarily encompassed the whole of the property. Second, in terms of asking whether it was essential it's difficult, if one looks at the language of the two letters referring to this intention, which is very much as one of a number of incidental matters in a signed agreement to spell out that the parties had agreed that it was essential and it could plainly be breached in ways that were large of small, it could be performed in ways that conferred very little benefit.

WILLIAM YOUNG J:

Would it not have been possible just to get a real estate agent to agree to manage the apartment for 10% return or something?

MR GODDARD QC:

Absolutely, so I suppose the first point to make is that again if a purchaser had said this is important to us and we won't settle without it, the Bank of Scotland might well have made an arrangement of the sort that Your Honour just mentioned. Second, in terms of how large this loomed, I won't go back to it but if Your Honour looks at Mr Kumar's affidavit in opposition to summary judgment there's no mention of this as a factor and in my submission this is one of those situations where silence speaks volumes about what was important and the same is true of the other two and I can provide those if that will be of assistance. But it wasn't raised in the notice of opposition to summary judgment, it wasn't in the affidavits as something which they saw as material compared with the raft of other reasons given for not being required to perform.

ARNOLD J:

Did the provisions for the complex – did the arrangements make provision for a management unit?

MR GODDARD QC:

Yes, the email that invited investors to enter into underwrites said that the plans had been modified so that unit 3 could be used as a management unit, I think, the

references are – so that Your Honour can have a look at how this was raised, in the correspondence, are back in 2006. The – if we go right back in fact in 2005, the very first row in the table –

GLAZEBROOK J:
Is this in your chronology?

MR GODDARD QC:
In my chronology, sorry, so there's the email in volume 4, tab 19 at 749, the letter at 752 and the agreement instructions at 753. Perhaps I should just go to those very briefly. Volume 4 –

GLAZEBROOK J:
Whereabouts in your chronology was it –

McGRATH J:
Yes, just give us the date perhaps.

MR GODDARD QC:
20 September 2005, the very first row on the very first page.

ELIAS CJ:
Mr Goddard, we will take a short break, so indicate when it suits, right. It's just we'll go through until five.

MR GODDARD QC:
I'm sorry about that. I have been much longer than I expected to be. But I'll just, if it's all right, go to these very quickly and then move on. So, if the Court has volume 4, tab 19, the first email at 749 is one to which I think the Court was taken by my learned friend, "Hello shareholders," certain documents being sent out then over the page there's a reference to construction, cross commencement, finance, then layout and this is the point, Your Honour, Justice Arnold asked about. We managed to include several more apartments in favour of the building providing more income. Design altered to allow for management arrangement to be run from house 3 it's means management rights will be sold to the highest bidder. Say on purchase contracts, "Do not include an agreement at this stage however this will be made available during construction along with the furniture package."

So that's the first reference to it and then if we turn over to 752, this is the material that was sent out and in the sixth paragraph the vendor intends to arrange for the benefit of its shareholder as an option, a service department management agreement, decisions to be considered would be a number of weeks, a personal usage, operator and brand and whether the income would be pulled or tied to each unit. If pulled this would require a prospectus. So it's all –

WILLIAM YOUNG J:
Pretty loose.

MR GODDARD QC:
Pretty loose. Anything pretty much would do this and then the other reference to it is over on 754 around the middle of the page there's some horrible highlighting which as usual obscures the only part that's worth reading, but the second of the obscured paragraphs, a property management agreement will be offered pre-settlement. We expect settlement to be approximately April, I think that must be 2007.

So, - and then finally I should take the Court to tab 20 which contains the sale and purchase agreements and if we looks for example at the Donaldson's agreement which begins on page 758 we have special condition 28.2 on page 775. "The vendor shall procure the body corporate to enter into an agreement for the provision of body corporate secretarial services... The vendor may procure the body corporate to enter into a building manager's agreement, in the same or similar form enclosed, with a professional building management company," and I haven't seen any form enclosed. My understanding is that there wasn't one, but what is important about this clause which is in the signed contract is that it talks about the vendor may procure.

Now there was an unresolved issue before the Court of Appeal about whether when one reads all these documents together, this was merely an option for the vendor and if that was relevant that would be my submission today that this provision makes it clear that the only contractual obligation – that there was no contractual obligation and that the letters are a statement of expectation, a statement of intention, so there was no term requiring one to be provided at all, it's the only way one can reconcile these documents, but what the Court of Appeal said was even if there was an obligation, not deciding this, then it was not agreed to be essential and it's very hard

to see how it could've been agreed to be essentially when in the formal agreement what you have is merely a may procure.

In terms of substantiality of effect, as I have said ,that was a matter which needed to proved with evidence and there just wasn't any and the complete failure to raise the issue in opposition to summary judgment suggests it wasn't perceived in that way. If now is a convenient time, Your Honour. I'll try to prove what I'm going to do as vigorously as possible.

ELIAS CJ:
That's all right. It's not – it's helpful, thank you. We'll take the adjournment for 15 minutes.

COURT ADJOURNS: 3.48 PM
COURT RESUMES: 4.03 PM

MR GODDARD QC:
Your Honour, first I said I'd provide a reference to the letters sending the agreements for sale and purchase to the purchaser's solicitors. Those are volume 5, tab 25, page 1043 to five. So, in September 2006, the agreements were sent to the purchaser's solicitors and they were in a position from that point onwards to identify who the vendor's architect was and whether the certificate that was given was from that person.

Now, I was at my little road map. I dealt with whether it was clear that the terms would be breached in August 2008 and I said that it wasn't clear that they would be breached. There was every reason to think that if the purchasers had either formally tendered settlement or had said, we'll only settle if this is done, then BOSI or any rational lender identifying the value of settlement would have resolved those matters and I should make in that context the point that of course time wasn't of the essence in relation to those matters in August 2008. So even if it would've taken the lender a matter of weeks or a month to tee those things up, rather than the heartbeat that Mr Graham referred to in his evidence in relation to 2010, the receiver – that would have been perfectly consistent with the obligations under the contract.

Certainly, and this is my 4.3, when we come forward to April 2010, which is the relevant time for asking whether Station was ready, willing and able to perform to the

extent that that was a relevant enquiry, it couldn't be said that it was clear the terms would be breached in April 2010, rather as the Court of Appeal concluded and as commercial commonsense, it confirms if settlement had been tendered or offered, subject to compliance with these terms or in allowance for their value, it would've been accepted by the receivers. It just defies commonsense to think that settlement at prices in each case around half a million dollars, north of the current market value of these properties would have been turned down for want of compliance with these requirements and as the Court of Appeal concluded it was possible for Station to comply with all of those at that time.

The fact that it was possible to comply at that time does rather confirm that it was also possible to comply in August 2008 and that it couldn't be said with the necessary confidence that Station wouldn't do so. Indeed, one has to say that by August 2008 the possibility of a receivership of Station was not a fanciful possibility and the real possibility that receivers would be put in with the ability and nous to do whatever was required to maximise value from these contracts, in itself showed that one couldn't be confident that performance wouldn't happen.

4.4, none of these terms was agreed to be essential. I have touched on that in relation to the management agreement and suggested that against he backdrop of the mix of provisions in the formal contract and in the correspondence, once could hardly suggest that it was essential. It's difficult to see how the 1% fee could be regarded as something that had been agreed to be essential and I say neither the Court suggested it was. On the furniture, I should have referred in my written submissions, but didn't, to the agreement for sale and purchase clause 6.2(1), it's in volume 4 under tab 20, 6.2 is on page 768 and what one says, it's in the vendor's warranties is, "Chattels delivered to the purchaser in their state of repair is the date of this agreement, fair wear and tear accepted, but failure so to deliver the chattels shall only create a right of compensation." It has actually got an expressed term essentially saying it's not essential that the fate of the contract doesn't turn on the chattels.

So, as a matter of construction of the contract, as a matter of commercial commonsense, the substance of this was a promise to convey a property with certain attributes that was substantially complete and that was what the Station was offering to do. All the rest of these were side agreements, additional terms, incidental provisions. They weren't agreed to be essential and as I say in 4.5, "The effect of

non-performance would not be substantial." I went through that and I noted that in relation to the management agreement. There was no evidence whether quantitative in terms of valuing it or qualitative to suggest that the sort of arrangement that might have been put in place, consistent with this contract, had some material value to the purchasers and it certainly would've been open if it was an obligation to provide such an agreement at all, and the principal agreement suggests that it wasn't, but if it was required then it could've been met by the sort of arrangement with a local real estate agent that Your Honour Justice Arnold referred to earlier, which would not have had a material value-enhancing value. That's a very horrible sentence. A material value would've done I think. There were just some redundant words in there.

McGRATH J:
So the agreement really was just a management agreement in form? There was no substance to it, you're saying?

ELIAS CJ:
No detail.

MR GODDARD QC:
There was no, no detail that would enable one to say that it would have significant value if performed, and that is very consistent with the way in which it was approached in the principal agreement where it just said "may" provide one. But even if it was "must" there's no room to say that it had to have certain attributes which would ensure that it was valuable and value enhancing.

So there was no right to cancel, my 4.6, because what – for the dual reason that it wasn't clear these would be breached and that the 7/4 thresholds weren't met. Even if there was a right to cancel, my learned friend accepts that prior to April 2010 the only appellant who purported to cancel was Mr Selwyn. Neither the Kumars nor the Donaldsons purported to do so at a time that could be relevant for present purposes. And

ELIAS CJ:
And at April 2010, this reminds me, what do you say are the things that Station relied on or was able to rely on to justify cancellation?

MR GODDARD QC:

The continuing stance of the purchasers –

ELIAS CJ:

As evidenced by...

MR GODDARD QC:

As evidenced by their stance in the proceedings and against that – well, as evidenced by the 2008 exchange, their stance in the proceedings, and –

ELIAS CJ:

Well the 2008 exchange is only background which explains –

MR GODDARD QC:

Exactly.

ELIAS CJ:

– the evidence you're really relying on, which is –

MR GODDARD QC:

Exactly, and as I was going to say, and against that backdrop, the non-response to the letters in February.

ELIAS CJ:

Well does that – the non-response to the April 2010 letters?

MR GODDARD QC:

No the, the letters – the letters to them were written in February 2010, Your Honour, on the 5th and the 23rd –

ELIAS CJ:

Yes.

MR GODDARD QC:

– saying if you – basically, if you've changed your mind and your stance in the proceedings is no longer where you're at, let us know. If you don't we're going to treat that as repudiation. And, with the benefit of hindsight one might say, we will treat that as confirmation of your continuing repudiation as evidenced in the proceedings.

Same thing. No reply. Entitled to proceed on the basis that that rejection of any obligation to settle, and assertion of inability to do so, remained live in early 2010 and that cancellation was therefore justified.

ARNOLD J:

I just wanted to ask a question cancellation. You said neither the Kumars nor Donaldsons purported to cancel before April 2010. In the case that you referred us to, *Chatfield*, the cancellation there came about by conduct, putting the property on the market. So you accept that you can cancel by conduct which is inconsistent with continuing the agreement?

MR GODDARD QC:

Absolutely.

ARNOLD J:

Yes. So your submission is just the conduct of the, neither the Kumars nor the Donaldsons can properly be interpreted as cancelling?

MR GODDARD QC:

It's, it's in a way more basic than that; it's that neither the Kumars nor the Donaldsons have ever claimed that their conduct amounted to a cancellation. If they had asserted that there would have needed to be an inquiry into whether their stance in the proceedings ought to have been understood as a communication of an intention to cancel. And I can see how that argument could be run, but it's not the argument that's been made. The response to it, of course, would be that they weren't entitled to so it was a repudiation, not a cancellation. But I haven't explicitly addressed that argument because I didn't understand it to be being made.

There's quite an interesting discussion in Dawson and McLauchlan about whether simply, in dealing with the subject matter inconsistently with your obligation under a contract can amount to cancellation by itself if the person – on one might assume that on the face of it that it could – they identify some reasons why one might doubt that but I don't think its necessary to go there and get rid of the arguments that are being run. I am sure it's a question this Court will have to answer one day, but I don't think today is the day.

4.8, the purchasers may well have been entitled in respect of the 1% and the furniture package to require an allowance to be made on settlement, particular in relation to the furniture package, how a vendor could assert that they should be paid a purchase price calculated in the schedule of prices in part by reference to the cost of furniture without making an allowance for the value of any furniture that wasn't provided. I struggle to see. I think you would have to make that allowance. But what *Regalwood* makes very clear is that it's for the purchaser to say, "We don't want to settle in full, we want to invoke the set-off and here is our estimate of what the allowance should be," because it's not mandatory to settle on that basis, you could settle and then bring a claim later.

My learned friend suggested and I think there was an exchange with Your Honour, the Chief Justice, that that set-off approach and the absence of a right to defer settlement were the product of clause 6.5 and that these terms weren't warranties within clause 6 of the agreement which is what, in no right, to defer the provisions it deals with as the Court explains in *Regalwood* in Tipping J's judgment is particularly helpful on this. Clause 6.5 merely reflects what the law would be anyway. His Honour quotes from McMoreland who says that and says, "I agree with this analysis."

The short point is, starting with my friend's proposition which is right at least to his regards some of these terms were concerned that the obligation to perform them arose before settlement. If they're not essential and were to tell him to cancel, you weren't cancelling, what can the purchaser do? Well, if settlement is due, the purchaser must settle and must pay the full amount unless there's a right of set-off, it seems to me that the fact that the obligations were due before settlement rather than concurrently, is hardly going to diminish the right to seek a set-off if they directly impair the claim to payment in full, but it's also hard to see why they would defer the obligation to settle if, by hypothesis, they don't entitle cancellation. All the other primary obligations then continue. So, just as a matter of general law, one ends up in the same place that clause 6.5 takes you to, which is what this Court has said.

And that's why I say at 4.9 that Station's ability to cancel for repudiation in April 2010 is not affected by these matters and just stepping back from all the technical detail, that's hardly surprising. Station had a building. The actual compliance with the contract of which has never been called into question by the vendor. There was no evidence to suggest that it was in any way departed from the substance of what the

purchasers had contracted for. They refused to perform for reasons that had nothing to do with the two issues that have been canvassed before the Court today. The reasons they raised for not performing have all been held to be bad. They are running technical arguments to justify their refusal to settle with the benefit of hindsight. Now obviously that is in some circumstances open to them, but in circumstances where all the matters complained of were relatively minor and/or could have been fixed if pointed out at the time, it's hardly surprising that all the statutory provisions and case law that we've been discussing, take us back to the conclusion that they weren't entitled to refuse to perform.

The affirmation argument, I'm not going to spend much time on. My answer to it really drives off the point I made that it was a continuing repudiation. So, an affirmation in 2008 is irrelevant in 2010. I do note that seeking specific performance doesn't amount to affirmation at least whether repudiation continues and I took the Court to the relevant passages in *Chatfield v Jones*. That a settlement statement doesn't have that effect is a point made by this Court in *Mana Property* at paragraph 40. I could perhaps add that reference. There is also the point that because an assertion of affirmation inevitably raises questions both about how the conduct ought reasonably we understood the time and also about whether there was further repudiatory conduct after the time of the alleged affirmation. In other words it makes the timing critical. It's not something which is well suited to be raised for the first time on a second appeal, because it immediately raises questions of fact about the timing of the initial repudiatory conduct, the affirmation, subsequent repudiatory conduct which are difficult to deal with for the first time on a second appeal, but actually I think here, that difficulty is not great because the continuing nature of the repudiation as at April 2010 is so very clear.

Two other things that arise from my learned friend's submissions, some submissions were made about the sunset clause. I just wanted to note two things about that. First that leave was refused to run this argument which is why it's not addressed in my written submissions. The argument that cancelation by reference to the sunset clause, the cancellation had taken place under the sunset clause by the purchasers. They argued that in the Court of Appeal. It was unsuccessful. They sought leave to appeal and it was refused by this Court. That's why it's not dealt with in my written submissions.

Second, the reason given by the Court of Appeal at paragraphs 80 and 81 of the judgment are, in my respectful submission, correct. The two problems with this argument are first, that the condition for exercise of that right was never met because Station was ready, willing and able to perform all of its substantial obligations. So, the precondition for sunset clause exercise wasn't met and second, it required a written notice invoking that clause because it had particular consequences and as my learned friend accepted there was no such written notice.

Unless the Court has any questions for me, those are the points I had anticipated covering.

ELIAS CJ:
Thank you Mr Goddard.

MR GODDARD QC:
Oh, there is one more thing. I have referred several times to what the notice of opposition to the application for summary judgment did and didn't say. Would it be helpful if I provided copies to the Court?

ELIAS CJ:
Yes, I doubt we have that.

MR GODDARD QC:
I know you don't. The case on appeal has some omissions which probably makes sense in terms of the proceeding, but both our arguments are raised a little more widely than its contents today, so if I could hand those up through Madam Registrar.

GLAZEBROOK J:
Did I miss what you had to say about a mistaken understanding of obligation?

MR GODDARD QC:
I think I thought I dealt with it in passing, but let me see if I can make sure that I have. So, Your Honour's question is –

GLAZEBROOK J:
Well, it's really a – if you look at *Chatfield* it's a reference to – which I have now lost.

MR GODDARD QC:

It was in my supplementary volume of authorities under tab 1, but I'm also – here it is. It's smaller than the others so it's –

GLAZEBROOK J:

It was really the statement if you look at the end of page 292, because that was a reasonably major plank of your friend's argument. Does the statement at the end – that's only a convenient place where the proposition is set out, it's not that I'm suggesting it's…

MR GODDARD QC:

This is a question which really is, under the Contractual Remedies Act, a question of fact that falls to be answered under section 7(2), or in some cases, 7(3)(c). So if we look at it in terms of 7(2) the question remains whether the conduct makes it clear that the party doesn't intend to perform their obligations or to complete such performance and what one needs to do, as with any contract matter, is to put oneself in the shoes of the other party and ask how the conduct should reasonably be understood and the question is whether it conveys an intention not to perform the obligations or whether what it conveys is a view that the obligations are "X" rather than "Y" but a willingness to perform them, whether they're ultimately determined to be X or Y. That's, essentially, a question of fact.

GLAZEBROOK J:

So you can't say, and rely on this, that I don't have to perform any of the obligations under a mistaken view that say, for instance, there's a precondition to the contract has not been met?

MR GODDARD QC:

Exactly. You can't –

GLAZEBROOK J:

And is that clear from the Authorities or is that just an assertion or do you say that arises under the Contractual Remedies Act? Just so I can be clear. It has a certain, it has a certain attraction to it as a proposition so I'm not, I'm not asking – it's not a trick question.

MR GODDARD QC:

There are no authorities under the Contractual Remedies Act on that so consistent with my invitation to the Court to approach it as a code and not succumb to the magnetic force of the common law which lurks behind it, I would say that that is where a common sense interpretation of section 7(2) in the light of the scheme of the legislation takes you. But if I were to succumb to the magnetic attraction of the common law then there's quite a helpful discussion of the difficult distinction that the common law required to be drawn depending on the nature of the stance that was adopted and how it should be understood in Burrows, Finn and Todd and an even more detailed one in *Chitty*, both are in the materials, basically identifying cases that have fallen either side of the line. And what Burrows, Finn and Todd suggest is that you may well not be taken as repudiating if you assert, in good faith, a particular interpretation at a time when it's still realistic to clarify which meaning is right and, having clarified that, to perform the contract. But that in circumstances where –

ELIAS CJ:
And presumably in circumstances which wouldn't be in breach giving rise to section 7(3) considerations, would that be right?

MR GODDARD QC:
Yes, I think that it must also be open – it's not enough that the stance be taken bona fide. If a reasonable person would consider that the contract was very clear and that the stance that was being taken was a wholesale rejection of the obligations or Your Honour's point, made it clear that a term would be broken, properly understood, that right to cancel must subsist. So again, there's no room for saying that the right to cancel under the Act is lost because of a bona fide mistake on the part of the other party, when that's not provided for in this code. If one looks at the obligation of the purchaser to pay for the property when conveyed and one asks, "Is it clear that that term will be broken?" I say that on the facts of this case it is. They were saying they wouldn't and they couldn't perform it and Station was entitled to say, well it's quite clear that the term requires them to pay.

There's no sensible argument to the contrary, which is basically what the Court of Appeal said, and it's obviously essential; it goes to the absolute heart of an agreement for sale and purchase of land, the vendor's promise to pay for the land. It's probably the whole of the contract under (2) but certainly you can get there under (3) and (4). And so I'm entitled to cancel. And it can't be the case that the other party, the innocent party has to make a decision on whether or not to cancel

depending on the state of mind which is not apparent to them of the other party, especially as cancelling if you're not entitled to is repudiation.

So in terms of – in fact – that's, I think, probably my answer to Your Honour's question where do I get this objective test from? It's from the fact that the other party is sitting there having to make a decision about whether or not to cancel. So I enter into a contract with my learned friend Mr Tingey. I then say, "Well look, I think that all the contract requires me to do is X." Mr Tingey reads the contract and he says, "Goddard's taken leave of his mind. There is no way that any sensible person reading this contract could think he's required to do X. He's plainly required to do Y. So he's refusing to do Y. And he's adamant about it." I can be quite stubborn. And I say, "Whatever happens I'm only doing Y." He can say, "Well look, it's clear he's going to breach this." If it's an essential term he's entitled to cancel. It can't be that his ability to do that depends on some internal mental machinations of mine. It's got to be an objective test viewed from the other party. Otherwise he can't safely exercise his rights under this code.

Was that a more direct answer to Your Honour's question?

ELIAS CJ:
No further questions.

MR GODDARD QC:
Your Honour.

ELIAS CJ:
That wasn't an injunction. It was after enquiry.

MR GODDARD QC:
I understood it more as an expression of hope after what the last one triggered.

ELIAS CJ:
Thank you Mr Goddard.

MR GODDARD QC:
Your Honour.

ELIAS CJ:

Yes Ms Kelly.

MS KELLY:

Thank you Your Honour. In reply.

If I could come first to the, the issue as to whether the tender of an invalid certificate in these circumstances constituted a breach of the contract, can I ask you please to turn to volume 4 at page, at tab 20 at page 761? It can be seen that the operative clause of the contract required the vendor to sell and the purchaser to purchase the unit with, with the associated chattels. And if one then turns to 772, which is the special conditions of the same contract at clause 19, the vendor's positive obligation under the construction warrantees are that the vendor warrants that, (2), the works will be constructed and completed. And on the next page, certain warrantees related to watertightness as at the date of practical completion. Taken together, the vendor has a positive obligation to bring the works to completion and to achieve the date of practical completion. So that in this context when the vendor asserted that the date of practical completion had been achieved it was not merely the tender of the wrong document, it must be seen in the context of the vendor asserting that this document is the right document, the date of practical completion has been achieved, that's positively asserted in the letter of the 2nd of July. In the – sorry, the 15th of July. So it is not merely the tender of a wrong document such as one might have in a shipping case with time to fill in the rest; it is the assertion that this is the right document when Station was in position of all the information to know that it was not. And as my learned friend says, what happened was that Station simply couldn't be bothered sending Leuschke back down to Queenstown.

Further, in corroboration of that analysis, the insistence by Station once it was known in June 2008 – sorry, June 2011, once it was known that the certificate was wrong, Station denied it and insisted and, indeed, pleaded it, that the Maltbys' certificate was the valid certificate. My learned friend's recollection as to the sequence of events is almost right, that the sequence of events was that Maltbys provided the documents in June 2011 directly to the purchasers' solicitors after which an amended defence witnesses filed on the 1st of July. If you turn to volume 1 you'll see that the relevant amended defence in these proceedings, the current and the latest defence, was filed on the 1st of July and immediately you'll see reference therein to the fact that the practical completion certificate was not valid. The plaintiffs subsequently filed a reply

to that asserting that it was valid. So in all of the circumstances it cannot be rationally argued that all that this was about was someone getting the documents mixed up.

So the assertion that we make on the part of the purchasers is that, armed with the knowledge, all the necessary knowledge it needed to know that the certificate was not the right one, Station nevertheless pressed forward, thereby indicating an insistence on am mode of performance which was not consistent with the contract.

The second point to which I want to take you in reply is as to the notices of opposition. I commend reading of those notices of opposition which my learned friend has just put in, and one will see this: there's no denial contained within the notices of opposition that the purchasers' interpretation – sorry, there is no assertion in the notice of opposition that the purchasers' assertions about being underwriters and so on should be the operative one. Instead the notices of opposition cite defences: misrepresentation, breach of fiduciary duty, misleading conduct, et cetera, defences. Furthermore, the, the –

ELIAS CJ:
Sorry, I'm not quite following.

MS KELLY:
All right. I'm sorry.

ELIAS CJ:
I'm sure my – no, no. Just – the point you're making arising out of that is what?

MS KELLY:
Is that the notices of opposition are now, as I understand my learned friend, relied upon as constituting repudiatory conduct.

ELIAS CJ:
Repudiation. Yes.

MS KELLY:
Now, what the purchasers were doing in the proceeding was saying that they should not have to be bound to the contracts because of misleading and deceptive conduct

and breaches of fiduciary duties et cetera. That is, that is not the blanket denial of, of the, the proposition that they were bound in the absence of such defences to comply with the contracts by settling.

GLAZEBROOK J:
Although we have been pointed to affidavits which said they were unable to settle –

MS KELLY:
Yes.

GLAZEBROOK J:
– even if they were required to.

MS KELLY:
Yes and I'd like to take you to that now. At volume 4, tab 15, at 674, Mr Kumar's affidavit is sworn on the 8th of June 2009, page 683. Mr Kumar's affidavit is properly – what Mr Kumar's affidavit properly does is indicate, as at the 8th of June 2009, three months after the sunset date, that he can't afford to settle.

GLAZEBROOK J:
Sorry, so it's 2009 not 2000 and – I thought you said 2007, 2009.

MS KELLY:
Look I may have, I may have said 2007 but it was 2009 because the proceedings only commenced –

ELIAS CJ:
No you said 2009.

McGRATH J:
That's what you said.

GLAZEBROOK J:
I must have got that wrong, sorry.

MS KELLY:

So, Mr Kumar's affidavit was sworn 8 June 2009, three months after the sunset date. Mr Kumar was, at that point, entitled, absent Station's readiness, willingness and ability to settle, he was entitled to indicate that he didn't want to proceed and consistently with *Chatfield* the principle applies to Mr Kumar. He's entitled to indicate, by means of the filing of a document, by his conduct, that he regards himself as no longer bound by the contract because by this time he was no longer bound by the contract should he choose –

ELIAS CJ:
But you're not saying that this was notice in terms of clause 37 was it?

MS KELLY:
No, it's clause 26, the sunset clause.

ELIAS CJ:
26, sorry.

MS KELLY:
Yes, no, I'm not saying it purports to say, on Mr Kumar's part, "I'm entitled to cancel under the sunset clause." But insofar as it is conduct that evinces his not intending to follow through and settle on the contract, he was entitled –

ELIAS CJ:
It's too late to be repudiatory, is that what you're saying?

MS KELLY:
That's right. He was entitled to so indicate as at the date he did so. And if –

ELIAS CJ:
Because you're saying he could have cancelled?

MS KELLY:
Yes, yes, he was entitled to walk away.

GLAZEBROOK J:
But if he hadn't walked away, can't it still be repudiatory if the contract is still on foot?

MS KELLY:
Well –

GLAZEBROOK J:
Because the fact you're entitled to walk away – because you're also entitled to affirm in those circumstances, even without a sunset clause.

MS KELLY:
Yes, yes.

ELIAS CJ:
Do you mean that both parties could have cancelled but the consequences are as in clause 26, not –

MS KELLY:
Yes, that is my point. That Mr Kumar could have cancelled in March 2009 and in June 2009 he's indicating an unwillingness, or an inability, to proceed to perform, but it doesn't have the consequence of being repudiatory because he was already entitled to cancel. And so the construction of the factual context that is argued for by my learned friend, which relies upon the filing of this document, together with the failure to answer the correspondence of February the next year, is not well made, in my submission. My learned friend must rely solely upon the failure to answer the correspondence in February. And I say that for these reasons: The 2008 conduct was not argued at the time to be repudiatory, it was not pleaded, and even if it were it was the – the contracts were affirmed thereafter.

The 2009 filing of material could not have had the consequence of being repudiatory and did not have that consequence because they indicated a position at law which Mr Kumar was entitled to take.

So in 2010, when asked does he continue his position. In fact, he wasn't asked in those terms, that's the terms my learned friend paraphrased it to be, he was asked would he confirm his obligations under the contract and he failed to do so. That's all my learned friend has to point to as repudiatory conduct and by that point, by that point, it was manifestly obvious that Station was not ready, willing and able to perform and was not going to perform.

Now just, finally, in support of that last proposition, Your Honours will have received, and I apologise for the lateness of it, that it was not included in the bundle, you would have received on Monday, yesterday, a copy of the original statement of claim that was filed by Mr Colthart, counsel, on the 10th of February 2009. Now, you'll note that the proceeding number was different and that this is in respect of Ms Donaldson only, or my copy is anyway.

ELIAS CJ:

I've got two statements of claim; one is dated the 10th of February 2009 and the other's dated the 11th of February.

MS KELLY:

They're in respect of –

ELIAS CJ:

– they're different people, I see.

MS KELLY:

– different defendants. The proceedings were consolidated in March but the form of the statement of claim was similar. Now in paragraphs 5, 6, 7, up to paragraph 11 the failures to settle in August to October are pleaded as you will have seen were also pleaded in the third amended statement of claim. There's no repudiation pleaded.

WILLIAM YOUNG J:

Didn't happen. I mean, sorry, the notice of opposition and the events of February hadn't happened.

MS KELLY:

That's right, that's right, but no repudiation from 2008 is pleaded. I'm sorry, I meant to make that clear.

ELIAS CJ:

Well that's not relied on.

WILLIAM YOUNG J:

They were seeking specific performance so they wouldn't plead repudiation.

MS KELLY:

Yes quite, quite, but there's no assertion –

WILLIAM YOUNG J:

But why would they assert it?

MS KELLY:

– that there'd been any repudiatory conduct which the plaintiff hadn't accepted.

WILLIAM YOUNG J:

Why would they plead repudiation?

MS KELLY:

I take your point Your Honour but the next paragraph is the one to which I want to draw your attention and that's paragraph 12. "The plaintiff is and has been at all material times ready, willing and able to settle." Now, that pleading was not repeated in the next version of this document. It was not pleaded thereafter, that the plaintiff had been at all relevant, all material times, ready, willing and able to settle.

ELIAS CJ:

So what do we take from that?

MS KELLY:

That the plaintiff, the plaintiff had a, a knowledge, a self knowledge if you like, that it had not been ready, willing and able –

WILLIAM YOUNG J:

But may it be that they thought that once they were seeking damages they didn't need to be readiness, willingness and ability to settle?

MS KELLY:

Well the plaintiff, with respect, was pleading failures to settle on the settlement date. The settlement date required readiness, willingness and ability to settle, under clause 9.

ELIAS CJ:

But this claim is for specific performance.

MS KELLY:
This claim is.

ELIAS CJ:
The third, by the time of the third amended statement of claim they've – have they cancelled by then, I can't remember.

WILLIAM YOUNG J:
Yes, they're seeking damages.

MS KELLY:
Yes.

ELIAS CJ:
Yes, they're seeking damages.

WILLIAM YOUNG J:
Now a plaintiff at specific performance proceedings is always expected to plead readiness, willingness and ability to settle.

MS KELLY:
Yes.

WILLIAM YOUNG J:
Now that's not conventional in respect of a claim for damages.

MS KELLY:
If the, the – all right, all right, I won't persist with the point. I won't explain what I was trying to say because I take it that, that it's not going to be persuasive.

WILLIAM YOUNG J:
Well it's only me that's, sort of, pretty uneasy about it, but –
1650
ELIAS CJ:

Well I don't see that it is, I don't see what you can make of it, the absence of it, in the subsequent pleading, when the nature of the claim has changed.

MS KELLY:

I certainly accept that the nature of the claim has changed but it is usual, in my submission, my experience, it is usual to claim that the plaintiff remained ready, willing and able to settle up until the time of cancellation. Now that didn't happen here. That was the point I was making.

You were taken to the contractual documents that, together with the sale and purchase agreement, constituted the contract. At volume 5, in page 966, you were taken to this email of the 22nd of July and I want to – it's in very small print but in the middle of the page there's a manager operator heading that commences, "Select hotels." I want to draw your attention to the second sentence, "The construction fund is not prepared to purchase furniture for the unsold units, which would leave the operator with insufficient funds to run an efficient operation." So it was plainly being advised to the purchasers, on the 22nd of July 2008, that the management agreement was not to be forthcoming. Furthermore, in the, in the –

ELIAS CJ:

Sorry, who's this from? What's this about?

MS KELLY:

Louise Zamiri, Louise Zamiri was Station's contract manager for this development and it's an email from her to the purchasers. It's through –

ELIAS CJ:

"At this point we consider the deal to be dead." What's that a reference to, the?

MS KELLY:

I'm sorry, where's that reference?

ELIAS CJ:

Under, "In line sales contract/individual sales."

MS KELLY:

Yes, that's the reference to the intention of the parties, that the development would be sold en masse, as a whole, that I referred to this morning. That's called an in line sales contract and that was the understanding that the parties mutually had. That the intention was to tell the whole thing half way through construction and split the profit.

ELIAS CJ:
I see, yes.

MS KELLY:
Now in volume 3, sorry it's volume 4, at tab 19, you were taken to the emails and letters that constituted the side agreement – that constituted the contractual documents and incidentally set out the terms of the side agreements. You'll note that these have the same contractual force as that contained within the sale and purchase agreement yet whereas the sale and purchase agreement refers to the management agreement maybe offered, in these documents the term is "will" be offered and look at page 750, at the paragraph headed, "Layout... this means the management rights will be sold to the highest bidder (around 25,000 per unit is the market rate) providing further income for the company. The sale and purchase contracts do not include a management agreement at this stage, however this will be made available during construction, along with the furniture package." So the terms are positive not speculative.

If you turn forward to page 754, my learned friend has taken you to the almost obliterated reference to the management agreement will be offered pre-settlement, and then the next page is the one I want to take you to because you weren't taken to this. Page 755, this is the price list which constituted a contractual document according to an unappealed decision of Justice Toogood. You'll see that the first asterix below the table says, "For use as a serviced apartment. Air conditioning/heating and furniture package is required. A furniture package is mandatory," and you'll see in the price lists that in each case the furniture package for each of the units is $30,000 worth thereby giving the total price on agreement. So it cannot be the case that the parties contemplated management agreement as separate from the furniture package. It was a bundle and it was a bundle which fed the price. Secondly, it was a bundle which was mandatory. One could not pick and choose. It was not an option.

Then finally in this regard I ask you to turn to page 757. On the 12th of April 2006 an email from Kelly McEwan, a director – director in the group, I should say, not of Station, but talking about this project says in the last paragraph, "We will update you when we have the projections and management agreements." Bear in mind this precedes the contract, the 12th of April 2006 pre-dates the contracts.

The submission is the management agreement and the furniture package, together with the 1%, were exactly as Justice Toogood found. A bundle of rights, a bundle of obligations on the part of the vendor, to provide something that was essential to the investment that the parties were entering into. Justice Toogood found that the breaches were substantial but he also used the term "essential" in his discussion of the side agreements. In our submission it's not rational to try to dissect each individual agreement and say that it was not part of the substantial burden to the vendor, or the substantial benefit to the purchasers.

Finally, my learned friend referred to the failure, at least if I understood this properly and I apologise if I didn't, the failure of the purchasers to raise the invalidity of the certificate of practical completion at a time when it could have been remedied and Mr Justice Young asked a question about the relevance of discovery to that. No documents were discovered by the plaintiff about practical completion, about the dispute between Maltbys and Leuschke, and as I indicated the only time when they could first have been raised by the purchasers was in June 2011, just prior to trial. So to impose upon a party who has no knowledge of the mistake, if we put it in that neutral term, the mistake in the documents, the contractual documents, an obligation to have raised it at a time before they could even have known about it, would be a bizarre outcome in my submission. It was raised immediately it was known and finally, with respect to that principle, that a good reason can be substituted for a bad reason, if one uses those terms in a broad sense, once a good reason comes to light, in my respectful submission, it's entirely irrational to apply that principle only to breaches for misrepresentation, breaches of misrepresentation but not to repudiation. If a party has a mistaken belief about its entitlement to repudiate, and repudiates on a particular ground, which is subsequently found not to have been sufficient, if there's a different sufficient ground, it should be able to be relied upon to have the same effect.

Thank you, I have nothing further.

ELIAS CJ:

Thank you Ms Kelly. Thank you counsel. We'll reserve our decision in this matter. Thank you for your help.

COURT ADJOURNS: 5.02 PM