IN THE SUPREME COURT OF NEW ZEALAND SC 85/2008

BETWEEN **PROPERTY VENTURES INVESTMENTS LIMITED**
Appellant

AND **REGALWOOD HOLDINGS LIMITED**
Respondent

Hearing:	25 June 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	A J Forbes QC for the Appellant NRW Davidson QC with H M Smith for the Respondent

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CIVIL APPEAL

MR FORBES QC:

If Your Honours please, I appear for the appellant.

ELIAS CJ:

Yes Mr Forbes.

MR DAVIDSON QC:

May it please Your Honours I appear with Ms Helen Smith for the respondent.

ELIAS CJ:

Thank you Mr Davidson, Ms Smith. Yes Mr Forbes?

MR FORBES QC:

I have some notes Your Honours of what I wanted to address the Court on. If it was any assistance I could hand them out and that may save you having to take more notes.

ELIAS CJ:

Yes that's fine.

MR FORBES QC:

I wanted to address the Court first of all on some general issues that I submit arise from the appeal. First is to just briefly outline the somewhat unexpected and perhaps unsatisfactory history of the case in the Courts below. In the High Court the main issue was Regalwood, then the plaintiff's, application for summary judgment and the main issue there was whether Property Ventures claim for compensation in terms of clause 5.4 of the standard form of agreement had been sufficiently quantified. The Associate Judge also held that although this didn't figure so much in argument that Property Venture did not elect at what course it proposed to take when the issue had arisen and the parties were in standoff mode. The main ground of the appeal to the Court of Appeal was the quantification point but that Court didn't decide this in the event. The other grounds of appeal were that Regalwood was not able to issue a valid settlement notice requiring Property Ventures to settle in full and that it had elected to affirm the contract or there had been a waiver of time as being of the essence under its settlement notice. The Court of Appeal's judgment dismissed the appeal by reference to the non-availability to Property Ventures of clause 5.5, generally known as the compensation clause in the standard form, and the application against it of clause 6.5 which as you are probably aware essentially says that a breach of a warranty under 6.2 does not defer the obligation to settle without prejudice to rights at law and equity.

TIPPING J:

There's a key issue there as to whether that means settle in full.

MR FORBES QC:

Exactly Your Honour. Those two clauses will figure obviously prominently in argument no doubt on both sides. The separate availability of Property Ventures of the equitable principle of abatement Your Honours was a ground of appeal and was argued in front of the Court of Appeal but not dealt with in its judgment. The waiver point was upheld on the facts in favour of Property Ventures but Regalwood was held to have validly set a new settlement date and that's now a live issue in front of Your Honours. The appeal accordingly in my submission gives rise to the proper interpretation and application of the standard form of agreement for sale and purchase and particulars 5.4, in particular clauses 5.4, 6.2, 6.5. 5.4 compensation clause, 6.2 breach of warranty doesn't defer obligation to settle – sorry. 6.2, breach of a warranty in particular compliance with building permits and Building Act obligations. 6.5, breach of such a warranty doesn't give rise to the obligation to settle but without prejudice to rights at law and equity and 9.2 which governs the circumstances in which and what's required for a valid settlement notice to be issued and as Your Honours are well aware of course this form is used throughout New Zealand on a daily basis.

So the general issues that I wanted to address the Court on, that I submit that the case gives rise to, is first whether it was intended under the standard form agreement that a vendor assumed, as it is for the purpose of this appeal, to be in substantial breach of warranty under clause 6.2 and the building not being in a state to comply with the requirements of the Building Act 1991 that can nevertheless effectively compel an innocent purchaser either to cancel or settle in full – sorry I'm just going to give my friend a copy of what I'm addressing the Court on. I didn't realise, thank you, as Your Honour pleases. Such a purchase the vendor having complied with the Building Act as well can effectively compel an innocent purchaser either to cancel or settle in full when the vendor cannot provide what he has or it has contracted to provide. Property Ventures says that this is tantamount to the vendor taking advantage of his own wrong.

Secondly, whether it was intended under the standard form agreement to oust a purchaser's long established equitable rights of abatement of the purchase price and set-off.

BLANCHARD J:

Was set-off discussed below?

MR FORBES QC:

No Your Honour it wasn't. In fact it wasn't specifically raised to be candid about it but it's very totally allied to the principle of abatement and at least in most circumstances Your Honour I would submit it's hard to tell what the practical difference would be in terms of availability to a purchaser faced with a breach of warranty by a vendor. Thirdly, the consequence for a purchaser like Property Ventures in this situation where the agreement was subject to finance and the reference is there, it was part of the due diligence cause that there had to be satisfactory finance available to Property Ventures as the purchaser, and asking the rhetorical question, how is the purchaser to obtain finance for the full price when the building has a substantial deficiency or indeed insurance for the building, and even if the purchaser can settle in full it will of course then have no security for repayment of any compensation fixed later.

Fourthly, a general issue, whether it was intended under the standard form agreement that the purchaser would be placed in this, what I submit, is vulnerable position in the event of an assumed substantial breach of warranty by the vendor and the property having a substantial deficiency.

Fifthly, the significance of the drafters of the standard form agreement having said that it should be there was not intended to alter the existing law when clause 6.5 was introduced into it in 1999 and indeed whether in any event it had that effect, that is, a change in the law.

TIPPING J:

Is there any argument about the admissibility of that? It seems at least at first blush, a rather startling piece of information to come before one.

MR FORBES QC:

I'm about to address the Court on that, perhaps you can then take it up with me so to speak.

TIPPING J:

I will hold my peace.

ELIAS CJ:

Mr Forbes, 4.3 isn't a separate argument, is it? It's an argument for –

MR FORBES QC:

It's not really an argument Your Honour. It's a general observation –

ELIAS CJ:

Yes, yes.

MR FORBES QC:

– which I've described as general issue. It's not part of this particular –

BLANCHARD J:

Well I think it might actually have considerable significance in relation to equitable set-off.

ELIAS CJ:

Yes.

BLANCHARD J:

I'll flag that right up front.

MR FORBES QC:

I didn't meant to – well that concession to the Chief Justice to say that it was irrelevant but it's not a specific ground of appeal.

ELIAS CJ:

No I'm just trying to get a map of where you're going. You're not arguing that it's a stand alone –

MR FORBES QC:

No.

ELIAS CJ:

– reason, it's an additional reason to the one in para 4.2 in particular.

BLANCHARD J:

Where I see it possibly fitting in is that for equitable set-off you have to impeach the claim and one way of impeaching the claim would be to demonstrate your inability to meet the claim because of the breach of warranty.

MR FORBES QC:

Exactly Your Honour. And over and above that, is it likely to have been intended under the standard form that the consequence could be that a vendor whose assessed compliance cost, as best as my client was able to do, was assessed at $565,000 to bring the building up to Building Act and building code standards, is nevertheless seriously required to settle in full with those consequences. How do you get the money, how do I insure it and how would I ever recover any compensation that's, under the Court of Appeal's judgment, to be assessed later.

BLANCHARD J:

What's the impact on insurance?

MR FORBES QC:

Well the building won't be compliant with the Act when you try to insure it.

BLANCHARD J:

Does that affect insurance?

MR FORBES QC:

Well I – my instructions were, there is no specific evidence on it, I'm raising it as a general matter.

BLANCHARD J:

I suppose you're entitled to do that because we're only at summary judgment stage.

ELIAS CJ:

And it does seem like –

TIPPING J:

Well it must have some bearing somewhere.

MR FORBES QC:

Well I mean the first thing the insurer is likely to say is well what's wrong with the building, is this increasing the risk I'm insuring because it hasn't got a building warrant of fitness and now you're say there's no compliance schedule and it's going to cost another $565,000 or thereabouts to bring it up to standard. That cost, I should make clear Your Honours, it was because of the tenancy arrangements in the building. It was known that an application for a building consent to carry out certain renovation work would be required and it was also known, and indeed the City Council made it clear, that when that application was made there would be requirements imposed to bring the building up to a 67 percent earthquake seismic strengthening standard. So that's a large part of that cost is to bring it up to that –

BLANCHARD J:

Well the seismic earthquake situation would, I imagine, affect insurance cover.

MR FORBES QC:

And as you may recall from the narrative of facts as it happens this building had been on-sold to the City Council, it was then to be used for a new bus exchange or the area was provisionally, it's not any longer, and it was the City Council who cancelled the on-sale on the grounds that you haven't got a building warrant of fitness. They were also involved of course in the regulatory role in terms of what would be required to bring it up to the correct standard.

My sixth and final general point Your Honours is that there are now, and I refer to them and they're in the submissions, conflicting decisions of the Court of Appeal and the High Court, two decisions of the Court of Appeal, *Lingens* and *Lifestyle* and a recent decision of Justice Venning in *Tapp v Galway* exist as to the interpretation and application of clause 5.4 in the effect of the introduction of clause 6.5. So that's a matter for, appropriately in my submission, for this Court to address.

And – well I said that was my last point, there is one further point. I just wanted to take you to this reference in the third volume of the case on appeal at page 97. It's in the cases, the last page of the agreement, in fact it's the cover page but they're often put at the end.

ELIAS CJ:

What page?

MR FORBES QC:

It's at 97 Your Honour, volume 3 of the case on appeal. And you'll see, this is just a general point again Your Honours, you'll see that it contains on the left hand side some advisory notes for those that are going to use the form, no doubt generated out of the joint efforts of the Real Estate Institute of New Zealand and the Auckland District Law Society. The third to last one says, "that the vendor should ensure that the warranties and undertakers in clause 6 and 7 are able to be complied with or if not that the applicable

warranty is deleted from the agreement and any appropriate disclosure is made to the purchaser." And what I submit Your Honours is that that merely reflects what the normal and reasonable expectations of the parties would have likely to have been, namely that these warranties by the vendor would be complied with. That, I'm meaning, by settlement date or that they would be deleted from the agreement an appropriate disclosure made to the purchaser.

Now I also wanted, before I deal with the specific points on appeal, to refer to some general contractual and equitable principles. In New Zealand and in allied jurisdictions, Australia, England and Canada, the general and equitable principles are commonly that where party A have a claim against party B for the price of goods or services and B has a cross-claim arising out of deficiencies in the goods or services for breach of warranty then B is entitled to deduct the amount of its cross-claim by way of abatement of the price and set-off. It also appears, and New Zealand may well be in this category following the decision of the Court of Appeal in *Grant*, that this maybe recognised even if the cross-claim arises independently, not an issue in this case because it doesn't arise independently. I then cited some authorities and I have a bundle Your Honour, they're separate authorities, they're just as to general principles and also as to some other authorities I'll refer to that reinforce what's already in the submissions. So I can hand that bundle in Your Honours but the law as stated from New Zealand in Burrows and then in Halsbury's for England and –

TIPPING J:

Is the relevance of this Mr Forbes that you're going to argue that there is no basis on which realty should be different from personalty.

MR FORBES QC:

Or indeed that New Zealand should be different.

TIPPING J:

Or that New Zealand should be…

MR FORBES QC:

Exactly. Just a fundamental platform I'm putting there that across the board as a matter of contract principle, if you go in to buy a car and the car salesman says, well you can have it, it's $15,000. When you come to pick it up he says, oh by the way it hasn't got the gearbox. You don't just say, oh that's all right, here's my cheque and we'll sort it out later. So a broad analogy, why should a realty be any different unless the contract brings about that result in a way that it's clearly intended.

BLANCHARD J:

Technically it's different though because that's common law abatement.

MR FORBES QC:

Yes.

BLANCHARD J:

Whereas we're looking here, if we're looking at set-off, at equitable set-off.

MR FORBES QC:

You're right Your Honour but I think the fundamental premise is still a valid comparison. That if you supply goods which are deficient in breach of a warranty you expect the price to be adjusted to take account of it.

BLANCHARD J:

And I suppose you're saying it shouldn't make any difference that the vendor's claim, in order to insist on payment of the price, is a claim in equity. You'd have to say that, wouldn't you? And should also make no difference that it's a claim in equity because its specific performance involving an exchange.

MR FORBES QC:

Yes I wasn't for sure Sir that the vendors claim for the purchase price would be in equity, would it?

BLANCHARD J:

Well you can't claim for debt. You can only bring a proceeding for specific performance. You can claim for debt in relation to an installment which is due before settlement or indeed after settlement but when it's a claim related to settlement, I think the case is *Laird v Pim*, although my memory may be at fault there.

ELIAS CJ:

Unlikely.

BLANCHARD J:

But you can't claim in debt.

MR FORBES QC:

The mode by which you recover the purchase price is by getting an order for specific performance?

BLANCHARD J:

Yes.

MR FORBES QC:

Yes.

TIPPING J:

Well it sounds like the ghosts of actions past.

MR FORBES QC:

Yes indeed.

TIPPING J:

Clanking their medieval chains.

BLANCHARD J:

Well I'm not trying to demonstrate that it should necessarily make a difference.

MR FORBES QC:

No, no.

BLANCHARD J:

But we do have to understand the nature of the cause of action to which the purchaser is responding, when looking at whether to meet a demand for settlement.

MR FORBES QC:

Your Honour is probably elevating it to a slightly more sophisticated level than the basic point I was endeavouring to make which was no more or less, you don't pay for –

ELIAS CJ:

Except you were elevating it to a pretty high level yourself by saying realty should be no different from personal property.

MR FORBES QC:

Well I hear that Your Honour, yes, but my fairly simplistic platform was you don't pay in full for something that you know, when you come to pay has got a deficiency that shouldn't be there.

TIPPING J:

You take the risk if you're wrong.

FORBES QC:

Exactly, no security. And this isn't a claim for damages for misrepresentation made.

TIPPING J:

If you refuse to settle in full on the premise that there has been a breach of warranty and there hasn't, the cancellation against you, if that's occurred, will be valid.

MR FORBES QC:

Exactly.

TIPPING J:

You make up your mind.

MR FORBES QC:

Yes, and in most cases you could probably say goodbye to your money.

TIPPING J:

Yes.

McGRATH J:

Mr Forbes, when you, in paragraph 6 of your notes you said, "There's no reason for New Zealand to be different," does that mean that some of these texts you've referred to apply the principles of land?

MR FORBES QC:

No, they are applying it to goods and services, yes.

McGRATH J:

Yes, thank you.

MR FORBES QC:

I wanted to put it in that area before I move onto vendor and purchaser. I'm saying it shouldn't be any different and there's the law and even Canada, not even Canada, I've included Canada as well.

ELIAS CJ:

Well it's not so much the law, it's the underlying policy that is common.

MR FORBES QC:

Yes, exactly Your Honour.

WILSON J:

Mr Forbes, are these principles always subject to any expressed contractual terms in any particular case?

MR FORBES QC:

Of course Your Honour, of course. It's quite clear you can contract out. The issue is when you interpret that contract is that consequence to be expected. You need to be fairly clear, in my submission, that there would be.

TIPPING J:

If this contract, for example, had said "shall settle in full" you would have found no argument.

MR FORBES QC:

Yes, exactly. And then I think people would be crossing it out probably from time to time, well hopefully and my final, I keep saying it is, further general principle is, that a party should not be allowed to benefit from his own wrong by seeking to cancel so as to deprive, that's party A, party B from the benefit of the contract where either B is not in breach or B's breach is the direct result of the breach by A. The party cancelling a contract must himself be ready, willing and able to perform it and again in this additional bundle that's just the result of *Noble Investments Ltd v Keenan* where the vendor sought to cancel for the non-payment by the purchaser of deposit.

McGRATH J:

In this case I suppose you are able to establish it would be his own wrong, is that your point here, that it wouldn't always be clear who was in the right and who was in the wrong.

MR FORBES QC:

No, no.

McGRATH J:

In this case you're saying it's fairly clear because there was no permit?

MR FORBES QC:

Yes. And it is assumed for the purpose on which leave was granted, and indeed it was assumed in the High Court on the summary judgment application Your Honour, that the Regalwood as vendor was to be taken as being in breach. And it's a case, if I may say so, that it's not just a minimal breach. If the Property Ventures position as assessed as best it could, because it couldn't, of course it couldn't get access to the building to do it correctly or accurately and I'll come to that point shortly, the amount involved in reasonably substantial.

ELIAS CJ:

If you succeed the matter goes back?

MR FORBES QC:

Indeed, presumably to be prosecuted as an ordinary action Your Honour. Now taking Justice Tipping's point I derive some comfort from a case in this Court and my friend, Mr Davidson, of course was counsel in *Otago Station* where, in the judgment delivered by Justice Blanchard, on behalf of the Court, this Court referred to the existing law as to the mode of the payments of deposits and as undoubtedly being known to those who had prepared the seventh edition of the standard form agreement. The Court said that there was not to be anything found in the standard form indicating an intention to depart from established law so there was some reference to, well, do you think the drafters would have expected this consequence, that is a change in the law as to how a deposit, pursuant to a formal notice under this agreement, should be paid, and I suppose, just addressing Justice Tipping, I would submit that the evidence as to whether there was an intention to change the law, where you are talking about a standard form agreement, Your Honour, is not

so different to access to Hansard to see whether a piece of legislation, you see what I'm trying to say is –

TIPPING J:

Yes I understand but I think the mirth is perhaps equating to levels of appreciation.

MR FORBES QC:

Thank you. It's just that I know it may be to some extent a semantic distinction but the evidence is, or the point is not made as to what the draft is intended by the meaning of the words, it is did we intend a change in the law, and on that premise, and by reference to the way that obliquely at least the same comparison or consideration was raised in *Otago Station,* I was bold enough to suggest the same here.

TIPPING J:

Ms Forbes, when you say here that these authors were saying that the Courts were not intending to change the law, apropos of clause 5.4. Well, the clause only applies to condition 6.

MR FORBES QC:

No, no, 6.5 is what they say. The introduction of clause 6.5 in 1992.

TIPPING J:

Yes I appreciate that, but 6.5 expressly states it's reach is only to breach of any warranty or undertaking contained in this clause.

MR FORBES QC:

That's right, Your Honour.

TIPPING J:

So it couldn't possibly be designed to affect the position under 5.4.

MR FORBES QC:

But the Court of Appeal held that 5.4 wasn't available for other reasons.

TIPPING J:

But did they actually say that they weren't intending to change the law apropos of one's rights if you like generally on settlement to set off or –

MR FORBES QC:

No what the authors, what the co-drafters have both said, or two of them, Dr McMorland and Mr Rob Thomas, is that the introduction of clause 6.5 was in fact intended to reinforce the decision of *Lingens*, because the policy from about that point on, as I understand it, was that the standard form agreement should be, as far as possible, self-contained and you shouldn't have to look out from a practical conveyancing point of view for assistance as to what the law is, it should be there in the agreement, albeit at the extent of, well possibly at the expense of a reasonably lengthy document. So they've said we weren't intending at all to change the law, we were intending to reinforce the decision in *Lingens*, which of course had treated a breach of warranty under clause 6.2 as giving raise to a claim for compensation under 5.4 and that had been the law since 1994 and applied up until the decision of the Court of – well, under the two decisions last year in *Lifestyle* and in *Tapp v Galway* had been assumed to be the law in New Zealand and appears to have worked without any undue problem. It's now maintained that 6.5 indeed change the law and the Court of Appeal frankly said – and that's my other point as well, addressing Justice Tipping's point, the Court of Appeal itself was prepared to look at what the drafters said.

TIPPING J:

I was only being slightly provocative Mr Forbes.

MR FORBES QC:

And they just said frankly we don't agree and so Dr McMorland, for instance, has said, and I cite the reference in the bundle of authorities, that the right available to the purchaser under *Lingens* was considered to a right available

at law in terms of clause 6.5. It was intended that this right would remain available to the purchaser and the intent was to reinforce the decision of the appeal in *Lingens.* Mr Thomas has said that in last year, July also, that the July 1999 edition stated the parties rights at law with more precision and consequently clause 6.5 found its way into the agreement. The clause was not intended to affect the reasoning in *Lingens.* Now I leave it at that level to say that well, there's something else that seems rather surprising as a result of the decision of the Court of Appeal.

I now turn to the specific issues –

TIPPING J:

Well in the light of *Lingens,* I think one can say that this was put in the light of *Lingens.* I think I would be prepared to accept that without any further assistance. In the light of *Lingens,* if the intention had been to require settlement, the concept of settlement in 6.5 to mean settle in full, you would have expected them say exactly and precisely that.

MR FORBES QC:

And I am also going to address Your Honours shortly as if it means that it has internal inconsistencies semantically and grammatically, quite inconsistent. It can't mean that you've got to settle in full because how then do you exercise right of cancellation and that's the one specified right at law and in equity that it says it's without prejudice to, so clear inference there are others, and the one's that there has to be exercised before settlement. The Court of Appeal, and I'm going to come to this, but the Court of Appeal suggested almost, with the greatest of respect, as a throwaway line that the clause appears to suggest a cancellation after settlement might occur. Now it's hard to see in terms of the Contractual Remedies Act, section 8, and that's in the bundle that I keep referring to, additional to the bundle of authorities. What remaining obligation is there after settlement? You've paid your money and you've had a transfer so that isn't what that clause is aimed at all, but can I come back to that because that's really at the kernel of this case.

BLANCHARD J:

If 6.5 was going to modify the obligation to settle, that it existed independently of the clause, you would have expected it to say so. It doesn't. It says the opposite.

MR FORBES QC:

Exactly Your Honour. So I take some solace in turning to clauses, the applications many a scope of clauses 5.4 and 6.5 which is really the central point of this case and in that context a purchaser's equitable rights. Mr Thomas has in a recent article in the New Zealand Law Journal, it's at tab 32, been critical in the Court of Appeal's judgment in this present case and I take up his criticism as part of my submissions. First of all, Regalwood was assumed to be material breach and so it was not really willing and able to settle in terms of clause 9.1(2) and that is the one that says that if the purchase has not been settled by the settlement date, "The notice to settle shall be effective only if the party serving it is at the time of service either in all material respects ready able and willing to settle in accordance with the notice or it is not so ready able and willing to settle only by reason of the default or omission of the other party."

TIPPING J:

And in accordance with the notice must presuppose a notice in terms of the contract.

MR FORBES QC:

Exactly and Your Honours have expressed that view more than once and it doesn't just say, we can dress up our notice how we like, you've got to settle in accordance, it means in accordance with the contract. I think the authorities are clear on that now Your Honour.

TIPPING J:

Well I hope so.

MR FORBES QC:

Good. So for a settlement notice issued by the vendor said Mr Thomas to be valid it has to be in accordance with the contract including making allowance for a valid claim under clause 5.4 or as is also argued in this appeal by Property Ventures pursuant to the equitable principles of abatement and set-off. I'm going to address you shortly, the two are complementary but they are independent. Clause 5.4 by its terms should be available to a purchaser said Mr Thomas, like Property Ventures, where the vendor, like Regalwood, is in breach of warranty under 6.2 at the date of possession and this amounts to a misdescription of the property, that is, it concerns the quality of the property. Compensation clauses like clause 5.5 were originally related only to property issues not to title issues. So the genesis of compensation clauses is misdescriptions of property and indeed were introduced ironically to protect vendors so that the purchaser's right for compensation was defined and they weren't faced with indiscriminate claims that a purchaser could run at you in order to delay or argue about on settlement. And then Mr Thomas makes the point already raised today, clause 6.5 does not by its terms require the purchaser to settle in full and Mr Thomas has further queried, and I take his criticisms up again, the two decisions of the Court of Appeal and the High Court in 2007, *Lifestyle Group* and *Tapp v Galway* Court of Appeal and Justice Venning respectively. That the inclusion, which are referred to by the Court of Appeal in this case, and it's judgment 9, paragraph 19 that the inclusion of clause 6.5 in the standard form in 1999 means that *Lingens* no longer applies. I infer they're presumably meaning that it has not applied since 1999. I then proceed to make the point that it appears to be, and I do so in my submissions as well, that it appears to be generally accepted that a compensation clause like clause 5.5 giving a purchaser a right to compensation for misdescriptions does not derogate from the purchasers equitable right to specific performance with compensation for a deficiency in the property, or in my view exactly the same thing, abatement of the purchase price. Such a clause is complementary to the equitable right. A purchaser

has always been entitled, subject to the terms of the contract, Justice Wilson's point, to insist that the vendor convey so much of the property contracted to be sold as he is able with compensation for any deficiency and I deal with that at some length in the submissions. There are numerous authorities, those that I would just like to bring to the Court's attention again are the decision of the High Court of Australia referred to in *Lingens* at some length by Justice McKay or Justice Starke with the Chief Justice concurring. And Justice Higgins who dissented on the issue of whether a claim for damages for delay in settlement could constitute – came within the compensation clause. He doesn't dissent on anything else. His dissenting part of his judgment is that. And it's interesting that in the exposition of what constitutes the equitable right of abatement of the purchase price in *Lingens*, the Court of Appeal refers to Justice Higgins' judgment rather than that of either Justice Stark or the Chief Justice Knox. *Beard* is (Justice Mason when he was in the Court of Appeal of New South Wales) to the same effect. *Lingens* of course supports that proposition and I also refer in this additional bundle to the decision of the High Court of Australia in *Travinto Nominees* and taking, and that's really seen at least in this neck of the woods so to speak, as the leading authority that a misdescription of property relates to the physical quality of the property and in that case with where a defect in title was held not to give rise to the application of a compensation clause. And Justice Menzie said in *Travento* the right to compensation under a clause in the contract was independent of the right to compensation in a claim for specific performance. Effectively to the same effect as the earlier decisions from New Zealand before the Privy Council in *Rutherford v Acton-Adams* Viscount Heldane, the purchaser – that was the case where Mr Rutherford maintained that Mr Acton-Adams had misrepresented, innocently, the number of miles of fencing that the farm that he was purchasing had. Instead of being 280 miles it was only 230 and it seemed surprising that especially in 1915 during the time of the first world war they should say or were intending to argue before the Privy Council an amount of £350 was involved or believe it or not, $675, seems a different world in more ways than one. Anyway –

TIPPING J:

It was a serious matter between the Rutherfords and the Acton-Adams Mr Forbes.

MR FORBES QC:

It must have been a matter or principle, even in those days.

TIPPING J:

I can assure you

MR FORBES QC:

You heard it on the wire so to speak. Vicount Haldane said that the purchaser – in that situation the Court held that a claim for damages for innocent misrepresentation does not come within the compensation clause, you can't get damages in that situation. Now of course remedied by the Contractual Remedies Act apart from anything else in New Zealand but in – what Viscount Haldane said, that the purchaser may elect to take all he can get, that is with the deficiency, and have a proportionate abatement from the purchase price. But this applies only to a deficiency in the subject matter described in the contract. It does not apply to a claim to make good a representation about the subject matter made not in the contract itself but collaterally to it which was exactly the facts for that case. And to the same effect there's a very, and again it's in the bundle, Professor Butt's article in the Australian Law Journal, Compensation for Errors or Misdescriptions in Contracts for the Sale of Land and I come back to that again supporting the same proposition really unequivocally Professor Butt cites no less than five texts on vendor and purchaser to support the proposition including *Rutherford v Acton-Adams*.

BLANCHARD J:

What do you say was a misdescription in this case?

MR FORBES QC:

The misdescription is that I warrant, when I sign this contract, that on settlement you will receive a building that complies with the Building Act and that it has a current building warrant of fitness.

BLANCHARD J:

Well that's a promise as to the future state of affairs but how does it misdescribe the property at the time of the contract?

MR FORBES QC:

Well my first point Your Honour is it doesn't have to misdescribe it at the time of the contract. That the Court of Appeal was wrong –

BLANCHARD J:

Well it has to be a statement of fact about the property.

MR FORBES QC:

Well –

BLANCHARD J:

In *Lingens* you could argue that implicitly there was a statement of fact about the state of the property because the warranty warranted it as at the date of the contract but where it's simply a statement about what will be the state at a future point, it seems to me that it isn't necessarily saying anything about the state of the property at the time of the contract.

MR FORBES QC:

Can I just answer that in two respects Your Honour? First of all, in terms of the equitable right to invoke the doctrine of abatement of the purchase price or set-off, it cannot matter when the deficiency in the contract arises. It cannot matter and it didn't matter, obviously in Justice Higgins analysis, because there the deficiency, and he says it, I come to it shortly, it doesn't matter whether the deficiency is entitled – what the deficiency is in terms of time or quality. There the case was that the vendor had delayed settlement and the

purchaser had accordingly lost pasturage and had incurred cost by having to pasturage the stock elsewhere.

BLANCHARD J:

Was that in his analysis turning on misdescription?

MR FORBES QC:

It was in his analysis turning on abatement of purchase price.

BLANCHARD J:

Yes, but not on the basis of misdescription?

MR FORBES QC:

In terms of a compensation clause?

In terms of the compensation clause?

BLANCHARD J:

Yes.

MR FORBES QC:

No, Your Honour, that's right. So my answer to Your Honour is that even if, contrary to the grounds of appeal, a misdescription within 5.4 of a property has to exist at the date of settlement, at the date of the contract, which is what the Court of Appeal upheld Regalwood's case on, that doesn't apply when it comes to equitable abatement. The deficiency can arise at any stage and there are cases where there's been a deterioration or damage to the property while the vendor holds it as a constructive trustee under the agreement for sale and purchase and again a right of abatement or compensation at settlement has been upheld.

TIPPING J:

Are you really saying, Mr Forbes, that it doesn't matter whether it's a misdescription or a breach of warranty as long as it's one or the other you can

get home because I, like my brother, have some slight difficulty on this misdescription front.

MR FORBES QC:

Well what I was going to submit, and I will do it but I'll just signal it now is, that in the case of a breach of a warranty under clause 6 Your Honours.

ELIAS CJ:

Under?

MR FORBES QC:

A breach of warranty under clause 6, or 6.2, non-compliance with the Building Act including not having a compliance schedule or building warrant of fitness. At the point where the vendor either says, "I am not going to comply," or it is clear that he cannot comply then there is a misdescription of the property and there is nothing in clause 5.4 that suggests that that sort of misdescription should not come within the ambit of that clause.

BLANCHARD J:

I thought you might be going to argue that this was a deficiency, which did not fall within 5.4, but for which you could claim an abatement, given that 5.4 is only directed to errors, omissions or misdescriptions.

MR FORBES QC:

At the date of the contract?

BLANCHARD J:

At any time but yes, probably correctly at the date of the contract. My point is that you appear to be contending for a form of abatement, which isn't related to error, omission or misdescription.

MR FORBES QC:

I am Your Honour. I'm trying to run it both –

BLANCHARD J:

Yes.

MR FORBES QC:

I'm trying to get myself in 5.4 but my strongest case, if I can put it that way, my preferred position, is it doesn't matter if I can't get within 5.4 because I've got it anyway –

BLANCHARD J:

And on that argument you'd have it even if you didn't have clause 6?

MR FORBES QC:

Even if I didn't have clause 6, yes, that's right, but I say 6.5 in fact preserves that very right. What can it mean otherwise? But I'd have it without that reservation.

BLANCHARD J:

Well I just have to flag that I'm not sure that I'd go with you on the argument that I've just pulled out of you as it were because we're talking about a deficiency of quality and normally deficiencies of quality do not have to be disclosed by a vendor.

MR FORBES QC:

Well that gets back to the same problem, Your Honour, that it couldn't be disclosed at the date of the contract because the warranty and undertaking that's being given is not to be operative until a date in the future.

BLANCHARD J:

Well if the deficiency existed at the date of the contract it was capable of being disclosed then.

MR FORBES QC:

Well it didn't –

BLANCHARD J:

The point about the deterioration of the property cases is that it is something arises between contract and settlement.

MR FORBES QC:

That's right.

BLANCHARD J:

And for that, classically, an abatement is available, but something that is purely a deficiency in quality normally would not give rise to any rights, it's caveat emptor, subject of course to a provision like clause 6.

MR FORBES QC:

I think, with respect, we might be slightly at cross-purposes Sir. It was known from the outset, that it didn't have a building warrant of fitness and it wasn't Building Act compliant and I'm going to refer you shortly. Property Ventures' solicitors said right from the outset, "Don't forget we will require a building warrant of fitness," and initially –

BLANCHARD J:

Well that's dealt with by clause 6.

MR FORBES QC:

Yes but –

BLANCHARD J:

I can sell you a building which doesn't have a building warrant of fitness. Under an open form of contract you can't object to the fact that there's no building warrant of fitness can you?

MR FORBES QC:

A fortiori, if I know about it.

BLANCHARD J:

But even if you didn't know about it, even if I didn't tell you?

MR FORBES QC:

Right, I'll accept that. I'll accept - here there is a warrant and undertaking that, I warrant now, when we signed this agreement, that when we come to settle this building will be compliant. It will not have the current deficiency, which we all know about, which is that it is non-compliant.

BLANCHARD J:

Yes, but there were three possibilities. One, that you fitted within clause 5.4.

MR FORBES QC:

Yes.

BLANCHARD J:

I'm not sure you do because I'm not sure you do because I'm not sure that there's a misdescription at the date of the contract. You may want to debate that with me further. Secondly, that there was something that gave rise to a right to abatement, even under an open contract, and I'm not sure that situation exists and then thirdly, there's the warranty in clause 6, which may be your strongest point.

MR FORBES QC:

Indeed, if you look at the warranties in clause 6, some of them clearly don't relate to the quality or state of the building, they relate to promise and sure that the rates are being paid, that's not a reference, but 6.2 – 6.25 is rather different. That relates to compliance issues.

TIPPING J:

Would it be much simpler, Mr Forbes, if your case was simply presented under clause 6, because then we wouldn't be into this complex business of what constitutes misdescription and for myself I can't see a misdescription here quite frankly, I mean, where is it? I mean what words constitute the misdescription?

MR FORBES QC:

Well the misdescription, I have to accept, can only be at the date of possession. It can't be at the date of the contract.

TIPPING J:

But isn't it here that there is a promise that it will have a certain attribute at the date of possession. It is not a misdescription in the sense of stating what it is at the moment.

MR FORBES QC:

Well –

TIPPING J:

I would understand misdescription to be that you've said something about the building, or whatever it is, that is not correct.

MR FORBES QC:

I can't put it any higher, Your Honour, and Justice Blanchard is taking the same point essentially, than there is nothing in 5.4 from its terms that confines it to misdescriptions in existence at the date of the agreement and that if they have arisen between the date of the agreement and the date of possession I submit that it doesn't do any violence to the language at all to say that that constitutes a misdescription because you're –

TIPPING J:

Well I understand the –

MR FORBES QC:

What you're providing is not what you promised you would when you entered into this agreement.

TIPPING J:

Yes, well I'm not saying I'm definitely against you, I'm just saying I think that is a more trifocal argument than the very obvious one that there's a breach of warranty here.

MR FORBES QC:

Well, that's right and that I've got the right to abate.

TIPPING J:

Not only that but if you are in breach of warranty you're ready, willing and able to settle in terms of the contract. I mean pretty simple basic stuff. That's your argument anyway.

MR FORBES QC:

Well I was about to –

McGRATH J:

Mr Forbes, just before you move on can I just ask this, 6.2 and the representation as to the state of the premises at taking of possession, was that a change in the 1999 form?

MR FORBES QC:

I don't – not to my knowledge.

McGRATH J:

That's all I need to know.

MR FORBES QC:

Well no, that's not quite right. My recollection of reading Mr Thomas' article was that that clause was re-ordered to make it clear what related on to the date of, warranties at the date of the contract and warranties that applied on settlement or on possession and some on settlement and possession.

McGRATH J:

But there's no suggestion the re-ordering was in reaction to the *Lingens* case.

MR FORBES QC:

No, the only – my understanding is the only aspect of *Lingens* that was sought to be brought into the agreement, as I said, to reinforce it, was clause 6.5, which was used.

McGRATH J:

Thank you, that's all right.

MR FORBES QC:

And it's correct, it became apparent in the Court of Appeal that it hadn't been realised until shortly before the Court of Appeal hearing that that change had occurred and that made a rather different, put a rather different complexion on the case.

TIPPING J:

Well in *Lingens* the warranty was at the date of the contract, wasn't it?

MR FORBES QC:

Well it was Your Honour. It was that it didn't have a building permit and also that subsequent to the contract there'd been a demolition order from the Council but certainly a state of affairs at the date of the agreement existed.

BLANCHARD J:

Well the demolition order was because of the lack of permit so the critical question was whether, I imagine the critical question was whether, there was an implicit misdescription at the date of the contract?

MR FORBES QC:

What I say a bit further on Your Honour that in fact the issue of the date of the misdescription didn't, wasn't specifically addressed in *Lingens*.

BLANCHARD J:

Well I suppose they didn't need to for the reason I've just given you.

MR FORBES QC:

This is the first case where the argument's been run that in terms of clause 5.4 the misdescription can occur at a date subsequent to the agreement.

WILSON J:

In any event from my point of view there's nothing to indicate that the date of taking of possession is something that the creators of the document have commented on as being in relation to the *Lingens* case?

MR FORBES QC:

No, no. As I reading Dr McMorland and Mr Thomas' articles, the intention was that only 6.5 would reinforce it.

WILSON J:

As you've said, 6.5, thank you.

MR FORBES QC:

And they reordered clause 6 generally in an attempt to make it clearer and more self-contained.

TIPPING J:

How can it be a misdescription if the parties know what the true circumstances are?

MR FORBES QC:

Well again as I've said likely it's quite cross-purposes. What the purchaser is saying is, you've got to give me a building warrant of fitness and you haven't got it and indeed one of the first letters from the solicitors are, we need the building warrant of fitness, what are you doing about it?

BLANCHARD J:

But that's not a misdescription. A misdescription requires a description. The description has to be of the property at the date of the contract, I would have thought.

MR FORBES QC:

Well I'm pleased you added that. It doesn't say that Your Honour and I'm arguing that when the purchaser is able to say that the vendor's told me he's not going to comply on settlement, or on possession, or it's clear that he cannot like three or four days out and we're going to have to do half a million dollars worth of work, you have now misdescribed the property that I'm about the buy when we settle later this week and that doesn't do violence to clause 5.4 at all.

ELIAS CJ:

I'm stuck on a slightly prior point which is, I'm not sure that it really does fit within the meaning of misdescription or the usual meaning of misdescription irrespective of whether your point that it doesn't matter whether it's at the date of settlement or it's at the date of the agreement, which I think maybe was what Justice Tipping was puttingto you, maybe not.

TIPPING J:

Yes I think so. My imposition is on the "mis".

ELIAS CJ:

Yes.

TIPPING J:

I mean if I – take your gearbox. This is a car. Well without a gearbox it may not be a car but if both parties know it hasn't got a gearbox it hasn't been "mis" described.

MR FORBES QC:

I would then say, leaving aside the fact that we're talking about goods rather than realty, when the purchaser comes to hand the cheque over after they've given it a warrant of fitness and he says it hasn't got a gearbox, he's saying well that isn't what you promised to give me.

TIPPING J:

You promised to give me a car.

MR FORBES QC:

With a gearbox.

TIPPING J:

So there was a warranty if you like that you'd put a gearbox in?

MR FORBES QC:

Or it would have a gearbox.

TIPPING J:

Yes well I think that case is going to turn elsewhere frankly.

MR FORBES QC:

Okay right, well I won't pursue that point any further. I mean the Court of Appeal took the same view.

ELIAS CJ:

What is the, we might actually have advanced this earlier, but what is the misdescription you say?

MR FORBES QC:

The misdescription is that on settlement, on possession, the building will be compliant.

ELIAS CJ:

And where is that derived from?

MR FORBES QC:

Well it's only derived from the combination of clause 6 and clause 5.4 Your Honour and I have to accept, and I don't pretend otherwise, that that isn't the state of affairs at the date of possession, at the date of the contract sorry.

ELIAS CJ:

Yes.

MR FORBES QC:

It's known it doesn't have it because it's addressed right from the outset. There was about six or seven letters, what are you doing about the building warrant of fitness? We're getting engineer's reports, we're looking at it, we'll come back to you.

TIPPING J:

I don't think we're really going to try and solve all problems in this case Mr Forbes, it's just those that are crucial between the parties. Well that would be my approach anyway.

MR FORBES QC:

I make the –

ELIAS CJ:

Which is the case that says that representations as to quality are capable of being misdescriptions?

MR FORBES QC:

Well –

ELIAS CJ:

Because there is authority for that, isn't there?

MR FORBES QC:

I, well I would have thought there would but I haven't got that –

ELIAS CJ:

All right, that's fine.

MR FORBES QC:

I mean I treat it as, under the rubric of the phrase that there's a deficiency in the property.

ELIAS CJ:

Well I am not sure that that's not a little sloppy but –

MR FORBES QC:

Well anyway –

TIPPING J:

If it was described as a car, and I know this is personalty, but it was a car in running order and it wasn't in running order that would be a misdescription. If it was described as a lovely car, implying that it was a sort of great car, that may or may not be a misdescription, I don't –

MR FORBES QC:

Well Your Honour –

TIPPING J:

But does it really.

MR FORBES QC:

What if there was a condition – what if it was described as a building that's statutory compliant?

TIPPING J:

Oh that would be misdescription.

MR FORBES QC:

Right, well the only difference between us is when can that kick in?

TIPPING J:

Well that's a direct statement of fact –

MR FORBES QC:

Yes.

TIPPING J:

And I would – of an attribute. As you say the only issue is when.

MR FORBES QC:

Yes, that's right.

BLANCHARD J:

But if you warrant as at the date of contract I think you are implicitly misdescribing the building.

TIPPING J:

If you're warranting that it will be compliant at the date of settlement, you're implying that it may not be compliant at the date of contract.

MR FORBES QC:

Yes and there's no doubt here that everybody knew that. There's no issue that anyone was misled about that.

TIPPING J:

I think – it's interesting this.

ELIAS CJ:

Was this misdescription capable of being a subject of requisition?

MR FORBES QC:

I –

ELIAS CJ:

Non-compliance?

MR FORBES QC:

I wouldn't have thought so. It's not a –

ELIAS CJ:

No. Well I'm still stuck on this question of whether it's a description within the meaning of clause 5 as a whole but I understand there is some authority on that point adverse to the preliminary view I would take.

BLANCHARD J:

It doesn't go to the question of title.

MR FORBES QC:

No, no it's not a requisition.

ELIAS CJ:

No but misdescription of the property or the title under a clause dealing with title boundaries and requisition, doesn't seem to me to sit happily with adopting 6.2 as your defect.

MR FORBES QC:

Well I think *Travinto* talks about it, you'll see at 16 in a compensation clause, a misdescription of the physical subject matter of the contract as against – that only goes to title was treated as a misdescription.

ELIAS CJ:

Yes.

MR FORBES QC:

But then we've got the time point again and I don't think I should pursue that any further –

ELIAS CJ:

No, that's fine.

MR FORBES QC:

– because I have a broader and indeed I think a sounder basis for the attack on the requirement that we had to settle in full. Professor Butt at 17 of these notes Your Honours says in the article I've just referred to above that the right to compensation is the right to abatement of the purchase price for a deficiency in the subject matter as against a right to damages where the purchaser's claim is for "compensation" for deficiency is entitled to refuse to settle unless the price is abated accordingly.

Now I won't go into 5.4, we've debated that, where I say weight should be given to the words in 5.4 and that there's nothing that limits it to those in existence at the time of the contract. I can, as a side wind,say that it's difficult to follow that the Court of Appeal was justified in relying on the heading on this

interpretation of clause 5.4 because the contract specifically provides that headings are not to be taken into account in the interpretation of it.

I then make this point, but again it's just, I won't dwell on it. That there is no reason why deficiency in terms of clause 6.2 could not also constitute a breach of warranty which constitutes a deficiency of the property which is what 6.2 in my 5 and 6.2 constitute the compliance provisions as to warranties, could also constitute a misdescription. I can see that that's not enjoying singular success with Your Honours so –

TIPPING J:

Warranty of present state might be a misdescription but not warranty of future state. I think that's the crunch for me.

MR FORBES QC:

Yes. I've endeavoured to say that it gives a warranty at the time of the contract on possession, a stipulated state of affairs will exist, it's the same point. Now coming to 20, however, clause 6.5, nothing in the wording of this clause requires it to be interpreted so as to exclude a deficiency in the property which was a breach of warranty under 6.2 from also being a misdescription of the property whether under clause 5.4 or to enable the purchaser independently to invoke the equitable principles of abatement and set-off. The clause in fact expressly reserves the rights of the parties at law or in equity. A misdescription in terms of 5.4 and the equitable principles, and I'll rely principally on the second limb of that, arises when the vendor either says it will not remedy the deficiency or comply on the date of possession, or it is clear that it will not be able to do so. At that point, I demand under 5.4, we've already debated that, or for an abatement of the purchase price or set-off under the equitable principles can be made by the purchaser. Likewise, full weight to all the words in 6.5, both semantically and grammatically, should be given. Therefore, I make these submissions to the Court. While a breach of warranty under clause 6 does not defer the obligation to settle, clause 6.5 does not apply to a breach of warranty which is also a misdescription of the

property, whether in terms of 5.4 or as to allow the purchaser to evoke equitable principles.

Coming then to the point that's been raised specifically clause 6.5 says nothing about settlement in full being required which interestingly, at paragraph 15 of its judgment, the Court of Appeal's judgment reads as though those words are part of the clause –

TIPPING J:

It seems to have just been an assumption and almost it goes without saying.

MR FORBES QC:

Yes, goes without saying. They don't say well, we've added that in because that's clearly the intent.

BLANCHARD J:

The impression I have is that the case is on when you can contractually restrict a right of abatement or set-off. You have to do it very explicitly.

MR FORBES QC:

Exactly, that's right Your Honour. I make the further point, the settlement is not to be confused with the amount of the purchase price that's properly payable by the purchaser. Importantly, at 22.3, "6.5 provides that settlement will be without prejudice to any rights or remedies available to the parties at law or in equity. These rights and remedies are those including but not limited too, the right to cancel the agreement under the Contractual Remedies Act. So, cancellation is but one of the rights and remedies which settlement is without prejudice to. The right of cancellation must be able to be and invariably will be, exercised prior to settlement."

I comment on the suggestion by the Court of Appeal about the right to cancel being able to be maintained even after settlement. When you look at section 8 of the Contractual Remedies Act, 8.3, "The contract is cancelled so far as the contract remains unperformed." Well, there won't be anything

unperformed after settlement in the vast majority of cases. It's a side-window so to speak. The point is that the rights and remedies referred to in 6.5 are not confined to those that are only exercised post-settlement. They include the purchaser's right to invoke, in my submission, the equitable remedies of compensation or abatement and set-off prior to settlement. The purchaser is entitled to refuse to settle unless the –

WILSON J:

Mr Forbes, just looking at 6.5. Doesn't the second sentence of 6.5 assume that settlement has taken place?

MR FORBES QC:

Well it can't, can it Your Honour, in regard to the specific right or remedy at law and equity, that it specifies the right of cancellation.

ELIAS CJ:

Can cancellation be exercised after settlement?

TIPPING J:

It can theoretically but it's in practical terms. What this clause is saying as to cancellation is, that while you may have a prima facie obligation to settle, you may, if you are otherwise entitled, cancel.

WILSON J:

It doesn't pick up that phrase, "the obligation to settle" from the first sentence at paragraph 6.5, it refers to settlement, doesn't it?

ELIAS CJ:

Yes.

BLANCHARD J:

It refers to what you do in pursuance of that obligation but I think it's still forward looking.

MR FORBES QC:

"Settlement shall be".

ELIAS CJ:

But it assumes settlement. Any settlement is without is what settlement shall be.

TIPPING J:

Yes, yes, that's a fair point.

MR FORBES QC:

Then we have to analysis what do we mean, in the context of a particular case, as to the basis in which settlement should properly occur.

WILSON J:

Seems to me, this doesn't, this construction, doesn't the feature set-off or abatement argument because that can still be accommodated within the first sentence of 6.5 given, as you've rightly pointed out, that there's no obligation to settle in full.

MR FORBES QC:

I keep coming back, that the last part of the second sentence, specifically refers to a right that's to be expected to be exercised before settlement and indeed, it's on the basis that settlement won't occur.

ELIAS CJ:

I must say, it's not the way I would read it. I understand it's not the way it's been interpreted and that maybe a power pointer to a different interpretation but I read this in the natural sense that's being put to you by Justice Wilson.

MR MILES QC:

With respect, I'm not sure what Justice Wilson's answer is to the fact that the one example given is inconsistent with settlement in full, indeed, it's inconsistent with settlement at all.

WILSON J:

At least theoretically, couldn't you have cancellation following settlement?

TIPPING J:

I think you could but it's extraordinarily hard to think of something that would fit within the Contractual Remedies Act.

MR FORBES QC:

Just to remind what section 8.3 says, "Subject to this Act, when a contract is cancelled, the following provisions shall apply so far as the contract remains unperformed at the time of cancellation, no party should be obliged or entitled to perform it further." Then (b), "So far as the contract has been performed at the time of cancellation, no party shall by reason only of the cancellation be divested of any property transferred or money paid pursuant to the contract."

WILSON J:

Doesn't that reference to the possibility of the contract having been performed, arguably support the interpretation I'm putting to you?

MR FORBES QC:

Well, I call that an aid Your Honour, to indicate that that is unlikely to be the intended construction of the clause.

WILSON J:

I can see that argument.

MR FORBES QC:

If that clause is directed in a standard form agreement to be used every day of the week throughout New Zealand infrequently, that we're only talking here about cancellation after settlement, most people would say, what on earth were they talking about.

ELIAS CJ:

It's making it quite explicit that all your remedies include the right to cancel. So, it's not really dealing directly with cancellation, it's dealing with preservation of remedies.

BLANCHARD J:

The short point is surely, that the first sentence deals with the obligation to settle. What is that obligation? It's an obligation which is modified if you have a right to abatement, compensation or, I assume for the moment, equitable set-off.

MR FORBES QC:

Is it to be construed as clearly taking that right away because –

BLANCHARD J:

I would have thought it plainly doesn't.

TIPPING J:

The word obligation is as important as the concept of settlement in this composite phrase. If you, at law, have an obligation to settle, then the question is, in what terms do you have the obligation to settle?

BLANCHARD J:

I think this provision, most naturally, is interpreted and I'm putting to one side the views of the commentators who say they were the drafters because I don't think you should take into account the fact that they may have been drafters. I think it's purely a precautionary provision so that you don't get a purchaser saying well, I'm entitled to a big deduction and I'm sitting on my hands now until everything is sorted out.

MR FORBES QC:

I don't have to settle?

BLANCHARD J:

Yes.

MR FORBES QC:

I think though Your Honour, I'd have to address the fact, what do you do then if they can't agree? In *Lingens* it says the parties should come to some sensible arraignment –

BLANCHARD J:

That's a very real difficulty, a practical difficulty.

MR FORBES QC:

You're going to have that difficulty, as I endeavour to put to the Court of Appeal, when you do clearly come within 5.4 because what happens if you've got a disagreement then?

BLANCHARD J:

Yes, mhm.

TIPPING J:

Exactly.

MR FORBES QC:

To which the answer from the President was well, let's not extend the range of such difficulties but it's there anyway. I've seen, for instance in Australia and I think the English standard form agreement from the Law Society may have the same, as you might expect, is that there is a mechanism for what should happen if the parties can't agree on the amount to be withheld.

ELIAS CJ:

Here, they'd have to sue for specific performance.

MR FORBES QC:

Yes and there's more than one authority, including *King v Poggioli* which says the Court will sort out the equities between the parties, I mean compensation –

TIPPING J:

Couldn't you tender what you honestly think is an appropriate figure and thereby both parties take the risk. If your tender was too low then you might be entitled to be cancelled against. If it was too high then that's your bad luck. You're unsecured for whatever it is that was wrong.

BLANCHARD J:

Providing that you're offering that the figure that you're offering is merely your best estimate and that you're prepared to abide by a decision of a competent authority as to the correct amount of the deduction, you wouldn't be, I think, found to be not ready, willing and able.

MR FORBES QC:

Well take that in the present case where you've got a commercial building and the purchaser says well, we haven't had access to the building but our quantity surveying engineers, based on their knowledge of buildings of this sort in Christchurch, would suggest that to bring it up to standard, plus the other work required, the seismic strengthening standard plus the other work, is going to be roughly $550,000.

BLANCHARD J:

So you're jumping onto a segment of the argument we haven't yet reached.

MR FORBES QC:

Yes, I know, but I'm just saying that gives some semblance to the authenticity to the figure that's being put up and all that – Dr McMorland when discussing

Lingens on this basis talks about that the parties should come to agreement on a figure and pay it to a stakeholder but you've still got that issue if they can't agree, especially if the vendor is saying we're not obliged to deduct at all, no abatement. So the amount of it becomes slightly artificial, which is what the case was here, we're not obliged.

BLANCHARD J:

This may simply point out a deficiency in the standard form, but the Court can't cure that.

MR FORBES QC:

No, you can't provide for a mechanism to resolve when it's not there and the authorities say, well if you can't agree the Court will fix it for you and I even tried to suggest to the Court of Appeal that it may well be a case where a Court would be, the High Court, would be reasonably amenable to giving you an urgent hearing if the parties are being held up, but that didn't seem to appeal as being a likely way of resolving it and I said, well what else can there be, we can't agree, so the answer was –

TIPPING J:

You serve a specific performance and subject to directions.

MR FORBES QC:

Yes, yes, and this is an important deal we need to get through, could Your Honour accommodate us please. How much would be helped.

TIPPING J:

Or at least an interim order might be able to do that.

MR FORBES QC:

To which the purchaser is going to keep saying, well I can't pay that amount Your Honour because I can't get the finance from the bank.

BLANCHARD J:

The English used to have a procedure called a vendor and purchaser summons, which was designed to get these things to Court fast. I don't know whether we've ever had that.

MR FORBES QC:

Not to my knowledge Sir and I think –

BLANCHARD J:

Delays in the Courts are another problem.

MR FORBES QC:

Yes. It may not be entirely satisfactory but it's the only solution that that form appears to allow for and then I refer finally on this area to Dr McMorland's text that this clause, that is 6.5, and the text book says, does not take away from the purchaser any right or remedy the purchaser may have consistent with settlement, including compensation pursuant to *Lingens.*

BLANCHARD J:

I can accept that as a statement of opinion of someone with expertise. I should flag that I'm not sure that I can take any notice of Dr McMorland if he says, "And I know this because I was the drafter."

MR FORBES QC:

Well that's fine Sir, I will leave it as the author of the standard text in New Zealand. He doesn't, the author, at that point refer to the equitable principles of abatement or the purchase price or set-off but he does elsewhere in the text so I don't – the validity of the statement is not affected by the fact that he only specifically meant that he was talking about the right of compensation pursuant to *Lingens,* because that's obviously an issue now.

And then I address some points raised in my friend's submissions on this issue, that is 5.4 and 6.5, the accommodation of and purchase of equitable rights. My friend's looked to obviously *Tapp* and *Lifestyle Group,* but I submit that the relationship between the two clauses is not considered in

either of those two decisions in any depth. They both simply state that 6.5 has the consequence if the purchase is claimed for breach of warranty gave it a right to claim damages post-settlement and no other rights of the purchaser at law or in equity were discussed. The issue of the time when the vendor's warranty were to given was not specifically discussed in *Lingens* and I refer to the fact that in *King,* which is cited by the Court in *Lingens,* he treated the breach occurring after the date of the contract that was giving rise to the right to specific performance with compensation. Justice Blanchard, however, is correct it's not in the context of a compensation clause. What Justice Higgins said, the cases have, that should be have, never made a distinction for purposes of compensation as to the nature of the deficiency of the subject matter, whether the deficiency is in the size of the land or character of title or in time of possession or enjoyment. As I said in that case it was your delay has cost me pasturage costs and I want compensation, held that didn't come within the compensation clause in that case, but it didn't derogate from, sorry, the Court held that that was a claim for damages, not a claim that gave rise to the right of abatement. Justice Higgins dissented saying that he considered it did. My – I am reinforced to the fact that the Court of Appeal and, nevertheless, it was Justice Higgin's decision that they specifically refer to in that decision, the Court frequently refers to.

The allegation that Property Ventures is precluded from claiming compensation because it was aware of the misdescription is frankly not a point that had previously pleaded or raised. Property Ventures cannot be said to have been aware of the misdescription at the time of the contract in the sense that it hadn't arisen, it knew it didn't have a building warrant of fitness. As Regalwood itself argues the warranty, although given the date of the contract, was applicable only on settlement, and here I make the point Property Ventures, through its solicitors, Cousins & Associates, repeatedly made it clear from the outset that it would require a building warrant of fitness and there is the correspondence. Quite early on they're saying please advise what progress you're making in regard to the building warrant of fitness and at 118 of volume 3, the first response from previous solicitors, Woodward Toomey, acting for Regalwood, was that they said, this is at page

118, our client expects a new code compliance schedule this weak and any work required to meet the obligation of the code compliance scheduled would be undertaken. We will then report to you when the new code compliance schedule is available and a new warrant of fitness is available for inspection. So at that point they're indicating that they are going to endeavour to comply.

McGRATH J:

When you say they've made it clear from the outset it was after the contract had been executed?

MR FORBES QC:

After the contract had been executed, of course Your Honour, yes. But well before – the first letter that I've referred to there is at 98 from Cousins, so we've got an agreement.

McGRATH J:

The February one?

MR FORBES QC:

February. October, 18 October is the agreement and the first letter that I refer to is at 98 where they say simply –

TIPPING J:

This goes to the misdescription argument, it can't possibly go to the breach of warrant argument, can it?

MR FORBES QC:

No.

TIPPING J:

Well the way you put it there, your 20 cents.

MR FORBES QC:

Yes, that's right.

TIPPING J:

Well you can't say you were away, you needed to do something, therefore, we don't have to do it.

MR FORBES QC:

I think it can only be a point that's being raised against me in so far as the only applicable misdecription that it's available to you under 5.4 you were aware of it. Well we were.

TIPPING J:

Well that's back into misdescription.

MR FORBES QC:

But it can't assist the respondent all with regard to what they didn't provide on position, or were clearly not going to, in terms of the equitable principles. I can't help them there because that's when the obligation arose. It's no answer to say that promise that on settlement there will be a building warrant of fitness and then turn around and say, well you were aware that it didn't have a building warrant of fitness, well of course.

TIPPING J:

To be fair, I think this is directed to the misdescription point, which is really the point that was troubling us before but we don't need to go back.

MR FORBES QC:

The first reference of Cousins that I was referring to is on 24 January, Justice McGrath, just relatively modest, please keep us informed regarding the building warrant of fitness and then the ante starts to come up, what are you doing about it. Are you going to get some costing and so front and show them to us and we can discuss the matter then it is submitted on the 17 of

those notes, that our rights, or my client's rights are confided to 5.4, to which I replied that the equitable principles are independent of the contractual right. I think the authorities are clear on that. There 's a reference then, by my friend in the submissions, to surprise text that he could – that in fact specifically concerns that a material defect is the property can arise after the date of settlement. If I just take you to page 23 of the submissions. The extract from Spry, at page 7, is it should be observed though, that although these principles apply where the material defect has arisen before or after the date of the entry into the contract, subject of course to any indication of a contrary intention by the parties, nonetheless they do not apply save to compensation or abatement of price for a deficiency or defect, entitle, or for a misdescription. So, they do not apply to enable compensation to be given for breaches of other terms in the material agreement such as for delay in delivering up the possession.

That's why I've endeavoured to answer the Chief Justice. That the misdescription for the purposes of the principles of abatement and set-off here, is a statement that relates to the state or quality of the building. The statement here is on settlement, you will receive for your 1.5 million, a compliant building and it was clear that wasn't going to happen and indeed, it was denied that it was required to. The vendor denied that it was required to provide that the purchaser's right to settle in full existed nevertheless.

There was a suggestion in the submissions, as I understand them, that the right of each party to invoke the principle of abatement, or set-off, has to be closely connected and that's not the case here, to which my answer must be that even accepting and I don't concede in terms of the decision of the Court of Appeal in *Grant*, that it has to be directly arising from the cross-claims. The principle in the submissions is, "That they must be so closely connected with the rights that are relied on, that it would be unjust to allow the other party to proceed without permitting a set-off." I say, well here, the rights that are relied on by Property Ventures, are such that it would be unjust to allow Regalwood to proceed to seek payment of the purchase price in full on settlement without permitting a set-off.

I then refer to another point that hasn't been specifically raised, was the failure of Property Ventures to tender payment of the purchase price. In any event, that's clear that that would have been futile because Regalwood's settlement notice made it clear that settlement in full was required and that was never going to occur. So, the point could only be well, you did intend a settlement for the amount that you said –

TIPPING J:

There would be a further point there I suppose, that even if tender was required, absent futility. By their conduct, they deprived you of any opportunity to work out what was a reasonable tender.

MR FORBES QC:

Exactly and it also assumes and this is a continuing problem, that I have got a problem about getting the money.

TIPPING J:

There are all sorts of difficulties but that would be the immediately occurring one. You can hardly say, you can't even come and have a look but you've got to, some how or other, punch in the dark.

MR FORBES QC:

What in fact was happening Your Honour, was that Regalwood were getting a report from their engineers and they had indicated that it would be disclosed and we'd get across the table and discuss it. They then found what the report said and indicated the extent of the work required and Property Ventures only finally got that report by going to the City Council file because it had been put in, in an endeavour to persuade the Council that the level of seismic strengthening should not be 67% by only 22% and that the alterations we were doing would only have to be in place for five years. To which Property Ventures said but what do you mean five years, we're buying this building without any such restriction, we're not accepting that limitation.

Having indicated that we'll get our engineers onto it and discuss the costings with you, they then declined to do so. I make the submission, it's clear, it's because they didn't like what their engineers were telling them. It's Holmes Consulting Engineers, were involved. Therein is the next point that this Court, if Property Ventures was to succeed, my client, my appellant, on the principal point as to whether the doctrine, or the principles of abatement and set-off are available, there is then the issue that the Associate Judge had held that the demand for compensation wasn't sufficient which is really the primary ground on which the Associate Judge held against Property Ventures in the High Court. Again, I make the point that there is an article by Mr Thomas criticising the Associate Judge's judgment in that regard and also another decision of the same Associate Judge, that the demand for compensation cannot be made at the eleventh hour.

My submission is, if a demand for compensation under 5.4 can be made in writing before settlement, it must follow that it does not have to be quantified because it can validly be made, for instance, the day before or on the morning of settlement.

TIPPING J:

It only has to be quantified reasonably if you're seeking set-off. You don't have to, you could settle and then make the demand later.

MR FORBES QC:

You could, yes.

TIPPING J:

I mean, you probably wouldn't tactically, but I mean it doesn't follow logically that you have to quantify in all circumstances, does it, but you would have to fairly attempt to quantify if you were seeking a set-off surely.

MR FORBES QC:

If you're under the rubrics Sir, of clause 5.4 you have to quantify sooner or later. To which the purchaser says, this building isn't compliant, I'm not going

to settle, I estimate, this is what Cousins said, that it could be $700,000 but until you allow me access, I can't quantify it accurately. Or alternatively, what's your report, or what's your position as to how much it's going to cost, do you want to deduct or do you want to comply but at this stage, I can't make an accurate or meaningful quantification.

When that was put to the Associate Judge, with the greatest of respect to him, he didn't answer it in Court or in his judgment, just didn't deal with it at all, or what's to happen, how was the purchaser to be able to quantify it. As I said, there's another decision of the same Judge, with a bent against this, I suppose ability on the part of the purchaser by saying, you can't do it at the last minute. As say that the second consequence of being able to pay compensation before settlement and I'm addressing in the context of 5.4 because that's where it was held against me but the principle, as Justice Tipping says, in general arises when you're asserting abatement or set-off under the equitable principles, that the general principle anyway is that when you're making a demand for payment you don't have to quantify the amount unless the contract makes that clear that you do and that includes under the Law of Guarantees for instance.

I just make the point that the purchaser will not often be able to do so in accurate way prior to settlement. Indeed, a purchaser may not even be aware of the relevant breach of warranty until the eleventh hour before settlement. That wasn't the case here but it could arise, so why can you say that you've got to do it a week out or whatever. There just isn't any basis for that view, let alone the view that you must quantify it, even though you've had no real means of being able to do so and the vendor wouldn't let you have access to the building anyway.

BLANCHARD J:

I think you've got a general obligation to try to quantify it the best of your ability but it's going to be modified in a case like the present. If in order to come up with any sensible figure you have to be able to inspect the building.

MR FORBES QC:

Even after cancellation, my client maintained its rights, a request for access was specifically denied, it's in the chronology. So, it has the consequence, in my submission at 33.5, that the obligation to settle is deferred both in terms of 5.4, put that to one side and as well, under the equitable principles until either the vendor rectifies the deficiency so that the building is complaint, or the vendor allows appropriate compensation by way of abatement of the purchase price or set-off, if this is agreed, or if the parties cannot agree on this, until the Court resolves the matter.

TIPPING J:

Wouldn't there need to be a further little step in there because the spirit of 6.5 is clearly that you have to settle without prejudice to your general rights. Wouldn't you have to, you couldn't defer it generally, could you, you'd have to tender. Are you saying that in a case like the present where there's no way you could come up with any sort of sensible, you'd have to sue for specific performance, that would be the only – yes, I think you might be right on that, if you simply can't make any sensible estimate.

MR FORBES QC:

It appeared that the solicitor's instructions were that it was going to be at least several hundred thousand dollars but that doesn't translate into an accurate basis for settlement.

TIPPING J:

No, so in that situation, as the contract is worded and of course it would be desirable if the contract had a mechanism but as this contract is worded, the only thing the purchaser could do would be to sue for specific performance, with appropriate adjustments.

MR FORBES QC:

Yes and it's interesting that when Justice Higgins' judgment in *King v Poggioli* is cited in the Court of Appeal in *Lingens* by Justice McKay, there is a

reference, “That the purchaser is entitled to take what the vendors can give them.” That is, with a deficiency and seek abatement, “The purchaser can tell him to convey” and then it’s cited by way of emphasis in italics, “This Court will arrange the equities between the parties.” So it must be the Court that deals with the matter. These parties can’t agree, should there be an abatement, if so how much and what other terms of settlement should be required in order to get –

TIPPING J:

The Court can, in an equity suit of that kind, can make all sorts of interim arrangements, can’t it, for possession or not for possession, security, all that sort of thing?

MR FORBES QC:

As you say, interim.

ELIAS CJ:

Can you tender settlement in which you hand over your claim for specific performance?

TIPPING J:

Here’s our statement of claim, here’s the writ.

MR FORBES QC:

I don’t think the bank would honour it Your Honour.

ELIAS CJ:

Yes but you wouldn’t have to be putting up anything perhaps. If it was a significant abatement that was in issue and you needed to bring matters to a head, you say well, we’re ready, willing and able to take transfer. You give us transfer and here’s our writ to sort out the equities between us.

MR FORBES QC:

Yes, well I can understand the vendor not being very happy about that.

ELIAS CJ:

Yes, well I wonder whether we should take the adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MR FORBES QC:

Just a final point before I address what I think Justice Tipping suggests is certainly an important part of the case and that's the application of clause 9.1. The adequacy of the demand I should have included in 35 where I say that the demand was sufficiently clear and indeed clearer than one of the authorities cited in my friend's submissions, but if you go to that demand, which was the letter on the 25th of May 2005 at 151. If you look at page 2, and this wasn't referred to by the Associate Judge. Having set out the options we can cancel or we can require abatement and our estimate would be several hundred thousand dollars. They make it clear that we want to enforce the agreement. It will seek specific performance and –

ELIAS CJ:

Sorry, what page is this?

MR FORBES QC:

Sorry, the demand for compensation is at page 151 of volume 3 Your Honour and it's a letter from Cousins, Property Ventures' solicitors, to the then solicitors for Regalwood, Goodman Steven, and the Associate Judge said that they were simply saying that they, this is Property Ventures, were entitled to compensation and were entitled to cancel but hadn't elected, but when you look over the page, on page 2, what it says is if you are not prepared to adopt

a sensible approach, it's entirely of your own making, you're fully contractually responsible and our client will be filing proceedings for specific performance.

BLANCHARD J:

What was the reaction to that?

MR FORBES QC:

I'm not sure Sir. The chronology shows that the 21st of June is the first letter back from Goodman, I think, which is at 155 Your Honour.

BLANCHARD J:

It's not responding to the same letter.

MR FORBES QC:

Not responding –

BLANCHARD J:

It doesn't matter. I'm just intrigued why Regalwood adopted such an ostrich-like posture.

MR FORBES QC:

Yes. They're actually responding to a later letter so it looks like – but you'll see from the chronology in the meantime Regalwood is endeavouring to negotiate with the City Council about its requirements and the Council, at this point, is out of the picture as a potential purchaser but still there as the regulator.

TIPPING J:

But the claim for specific performance wasn't – this purported cancellation intervened, did it?

MR FORBES QC:

Yes.

TIPPING J:

Then there was a claim for a ruling that the cancellation was valid after that.

MR FORBES QC:

That's right, a declaration.

TIPPING J:

And then if there is to be a claim or there may already be a counter claim for specific performance.

MR FORBES QC:

Well there hasn't been.

TIPPING J:

There hasn't been but that would have be the vehicle by which –

MR FORBES QC:

If the proceeding goes back to the High Court and is to carry on, there'll be a counter claim.

TIPPING J:

Yes.

MR FORBES QC:

I then turn to the issue of the invalidity of Regalwood's settlement and cancellation notices. Regalwood was unable, this is at 36 to give a valid settlement cancellation notice because at all times it was, it says presumes, it should assumed, to be in substantial breach of its warranties and there was substantial misdescription of the property such that Regalwood could not give an effective settlement notice in terms of clause 9.1(2), which is at page 390, probably familiar to Your Honours. Upon service of a settlement notice the party on whom the notice is served shall, sorry. If the sale is not settled on the settlement date either party may serve a settlement notice. The notice shall be effective, 9.1(2), only if the party serving it at the time of service is in

all material respects ready, willing and able to proceed to settle or it qualifies that the only reason why it can't is because of the default or omission of the other party.

So the claim, or the point being made Your Honours is that Regalwood was not, in all material respects ready, willing and able to settle in accordance with its notice, which the authorities are clear means in accordance with the contract. Regalwood's settlement notice required Property Ventures to settle by the payment of the full purchase price, which was more than Regalwood was entitled to ask and Regalwood's notice of cancellation was further invalid because as the Court of Appeal had held, the essentiality of time under its settlement notice issued a year earlier on the 17th of May had been waived, and no further settlement notice complying with clause 9.2(i), which is upon service of the settlement notice, the party on whom the notice is settled shall, on or before the twelfth working day after the date of the service – shall settle on or before the twelfth working day after date of service of the notice because neither of the further letters written by Goodman in 2006 gave 12 working days to settle. Indeed, the first of them didn't talk about cancellation at all, it talked about suing for specific performance.

So I then finally, I reply to Regalwood's, my friend's, submissions on settlement and cancellation notices. My friend's submissions that where there is a contract where the required time to comply with the settlement notice is regulated by the contract under which the notice is given, that the essentiality of time under that notice is by conduct or otherwise lost, described by the Court of Appeal as waiver. Under the doctrine of the waiver, a fresh settlement notice does not necessarily have to give the contractually prescribed time to which my answer is that, with the greatest respect, cannot be right and there is authority specifically in point in the appellant's bundle at clause 6, sorry tab 6, Delta Properties, I'm just checking the – it's the Court of Appeal in England that a settlement notice, which gives a lesser period to settle than that provided for in the contract is invalid, and Dr McMorland in his text confirms there's two. Indeed he refers to it as being plainly invalid and my submissions say the same thing. And I submit the

whole purpose of 9.2(i) would be defeated at a lesser period for compliance under the general law could be stipulated.

My friend suggests that clause 9 is without prejudice to any other rights or remedies available in law or in equity meaning you can adopt the general law as to giving a reasonable period of notice under a second notice or a fresh notice following the time being of the essence, having been lost under an earlier notice. But that provision in clause 9.4 is following non-compliance with a settlement notice. If the purchaser does not comply with the terms of the settlement notice served by the vendor then, without prejudice to any other rights or remedies available to the vendor at law and equity, the vendor may supersede performance, cancel the agreement et cetera. So there's no suggestion that the requirements as to the form and the period prescribed in the notice are being subject to, or without prejudice to, either parties rights in law or in equity, they are stipulated quite clearly. The intention obviously is that by the agreement, the required time to settle is stipulated and then you don't get into all these arguments about what is a reasonable period, one party thinking 14 days is and another saying no, I need a month, it's 12 days.

TIPPING J:

There's nothing in this agreement is there, in clause 9, making any distinction between a first settlement notice and any subsequent settlement notice, it just refers to "the settlement notice". It must be referring to the one upon the failure to perform which you are purporting to cancel. In other words, the whole cancellation structure is based on a failure to comply with a notice in terms of the contract. So, it would be a long step to say that you could, some how or other, imply a variation –

MR FORBES QC:

Exactly Your Honour, exactly.

TIPPING J:

– if there was an earlier one and now a new one.

MR FORBES QC:

The earlier breach is not spent but the earlier notice is spent. You've got to start again. One of the difficulties with the Court of Appeal's judgment is the point was not raised at any stage, either in argument, in argument, let alone before the case, as to the adequacy of Regalwood's solicitor's letters which effectively the Court of Appeal treated as being an informal settlement notice and the issue of compliance with clause 9.2(i) isn't addressed by the Court. It's almost, with the greatest of respect to the Court, as though it was overlooked because all they say is that the letters from Goodman made it clear what date they required settlement by. Well, so they did but they didn't have any basis –

TIPPING J:

Well, that could be tomorrow. Nothing could be clearer than tomorrow.

MR FORBES QC:

Exactly and it's no assistance to my friend, with respect, who seeks to argue that the length of the delay that's occurred up until then can some how or other be called an aid to allow for a shorter period of notice, as I put it Sir, you've got to start again.

I then refer to the authorities that my friend relies on to support it, "Either is not really turning on this issue at all like *MacIndoe*, or a number of the authorities didn't in fact involve cases where there was a prescribed period of settlement notice. Regalwood's notice on the 22nd of May 2006 relied on its settlement notice expressly, issued a year earlier on the 17th of May 2005, in respect of which the Court of Appeal had held that time being of the essence had been waived. It held this because of Goodman's letter of the 21st of June 2005" and that was the letter Your Honours which referred to upgrade work being done by Regalwood and costings being obtained. So, at that point indicating that it was going to do what it could to obtain compliance.

"The Court of Appeal also referred to negotiations by which it meant the negotiations between the parties and their respective solicitors because they

had been conducting direct negotiations and through their solicitors and simply by the lapse of time. In these circumstances, Regalwood would not have had any grounds for issuing a fresh notice under the general law with a shorter period for compliance than 9.2(i) in any event but I of course, make no concession that the general law applies." Then finally my friend says, "No issue as to the validity or reasonableness of the time allowed in Regalwood's solicitor's letters, that is Goodman Tavendale at the 30th of March and 12th of May, had arisen in the proceeding or been taken by Property Ventures. Of course, that was for the very reason that until the Court of Appeal delivered its judgment no such issue was thought to exist. Neither the validity or adequacy of the letters and settlement notice was argued. Property Ventures assumed that if its waiver points succeeded, Regalwood's cancellation notice would be held to be invalid. Goodman's letter of the 30th of March in any event, made no reference to cancellation, it referred to specific performance proceedings being issued. The letter of the 12th of May referred to a settlement notice issued a year earlier, in respect of which the Court itself, that is the Court of Appeal, held that time being of the essence had been waived."

My only final point is, if I could from the bar, Mr Thomas who is here in Court today, has confirmed in answer to Justice McGrath's issue, that what I answered wasn't strictly correct Sir. The previous addition of the standard form simply provided for a range of warranties on the part of the vendor, of a broadly similar nature. It didn't specify the date they were operative, so the clear inference Justice Blanchard and Justice Tipping would say, it would be at the date of the agreement and Mr Thomas said that was probably the intention, that they are re-ordered in order to specify when they're to be operative and the first set are expressly to be undertaken at the date of this agreement that the vendor has not, the reference to "as at the date of this agreement" Sir, was put in, so that is an addition.

TIPPING J:

In order to make a studied contrast with 6.2 presumably?

MR FORBES QC:

The article in 1999 of Dr McMorland, refers to them being re-ordered to make it clear that some apply on the date of the contract, some on settlement, some on possession and some on settlement and possession, so it's just to put them into groups to that effect. Subject to anything else that Your Honours what to raise, that's the case for the appellant.

ELIAS CJ:

Thank you Mr Forbes.

MR FORBES QC:

As Your Honour pleases.

MR DAVIDSON QC:

May it please the Court. The discussion so far in the Court leads me to the perspective that the question of a misdescription is not really, while technically alive, is not really a matter of considerable interest to the Court. I'll make submissions on the point but I'm now focusing on two issues, the question of whether a clause 6 breach is something which must be dealt with under the contract by, in this case, the purchaser settling in full and taking its remedies in addition, or alongside, that settlement and secondly, the extent to which a notice prescribed by the contract can become a lesser period as the result of the dealings between the parties and the circumstances of the breach alleged, given rise to the notice.

I must say that in beginning this, I have noted carefully what several of Your Honours have said and, to a degree, I acknowledge from the outset that if one looks very broadly at the equities of the case, that the notion that someone can compel settlement where there is a very significant breach, with consequential financial implications for the purchaser, looks odd. My first reference, or my first submission to the Court in that regard, is that this is a contract which has to fit all purposes. So, we have a stark case where anyone looking at the facts would respond, other than the vendor here, by saying it seems odd or unusual or unfair, that the purchaser must pay up one and a half million dollars on settlement for something which will have a

breach across it, a defect across it, in terms of the contract and secure the remedy by another process.

It could be a very different setting, this contract applying to all circumstances. It could be a case where the issue which gives rise to the breach of the undertaking of the warranty, represents only a few thousand dollars or a few hundred dollars. My submission is that the interpretation of clause 6, in particular clause 6.5, is to be addressed against the symmetry of clause 5 and clause 6 when looked at together and the way the remedial action is contemplated for a person affected by a vendor breach, the purchaser. To look at the plain wording of clause 6.5, notwithstanding some remarks the Court has made today already, with regard to the plain wording of the clause, 6.5.

As part of the authorities put before the Court for the respondent, there was an authority called *Dimsdale Developments* and I needn't refer Your Honours to it at this stage. It's a question of notice, point, or case but this passage attracted my attention in the judgment in that case. It simply reads, I don't ask Your Honours to refer it, "On the other hand, it appears from the decision of Justice Walton in *Rightside Properties v Gray* that he would find the proposition advanced on another case as totally astonishing." The judgment reads, "The risk of totally astonishing Justice Walton is, I'm afraid, a prospect which I must bear with such fortitude as I can command."

ELIAS CJ:

Is this an Australian case?

TIPPING J:

No, it's English.

MR DAVIDSON QC:

No, it's not, it's got the feeling to it Your Honour, it's got the vibe but there's no doubt. I sense, of course and I understand the –

TIPPING J:

You are willing to run the risk of astonishing us Mr Davidson, that's your point I think.

MR DAVIDSON QC:

I am Sir, that is my point because I think it is easy to forget the point well, put aside the point I first made to the Court with regard to the this is a one size fits all clause, clauses 5 and 6 read together. It provides a compendium of circumstances in which the vendor and purchaser are compelled to do certain things and in a sense when, in a very real sense when, for the purpose of addressing the specific issue which was decisive in the Court of Appeal here as to 6.5 coming into the contractual law in this area and providing expressly that settlement take place.

Now, of course, I was ready for the response of the Court to say that that can't mean, or perhaps can't mean, settle in full. My argument has to be to the contrary, that it does mean settle in full. My reason for advancing that is that, in my submission, there is no other interpretation available under section 6.5. You will not have found, of course, in the submissions filed for the respondent that they are replete with authorities on abatement and there is a reason for that. I accept that the law and equity would in the ordinary course, allow an argument for abatement in circumstances such as this, an argument for abatement but where a contract has specifically provided for contractual steps to be taken and the remedial action to be associated with those, in very broad terms without limitation, then that has a resonance and meaning which in my submission, cannot be ignored by the Courts.

ELIAS CJ:

What does that mean though, in this case?

MR DAVIDSON QC:

What it means Your Honour is, looking at 6.5, accepting –

ELIAS CJ:

Are you arguing that abatement is excluded, abatement and set-off are excluded by the terms of 6.5?

MR DAVIDSON QC:

At the date of settlement for the purpose of the transaction of settlement Your Honour, yes.

ELIAS CJ:

They can only be followed through after settlement?

MR DAVIDSON QC:

That is so.

TIPPING J:

Well, they don't exist because you're going to abate or set-off after settlement.

MR DAVIDSON QC:

You might say that Your Honour but for the wording of 6.5 which in my submission has a sequence to it. Firstly, the first sentence, "The breach of the warranty given here, does not defer the obligation to settle, so the vendor is in breach but the obligation to settle is on both parties." That's the starting point. It's an obligation to settle. Next question I think, in my submission arises, in what way, in what form, must that settlement take place? The next sentence provides the answer. "The settlement, namely the passing of purchased monies, transfer of title, that Act shall be without prejudice to any rights or remedies at or or in equity." In other words a step takes place in the contractual sequence directed by 6.5 but the contract makes sure that the parties are aware that all their rights are preserved. In my submission the expression "settlement shall be without prejudice" means something takes place and all rights are reserved whether it's abatement, damages or otherwise, in law or in equity because without prejudice attached to, a transaction can only mean something which follows.

TIPPING J:

Does that imply that cancellation here is only cancellation after physical settlement? In other words, after conveyance?

MR DAVIDSON QC:

I'm not submitting for that Sir.

TIPPING J:

Well you have to don't you?

MR DAVIDSON QC:

Well I'm going to try and avoid having to accept that Sir in this light.

TIPPING J:

All right, I'll await with interest.

MR DAVIDSON QC:

Well the first point is of course it's striking that the rights reserved at law and equity for emphasis, and my submission is for emphasis, including but not limited to the right to cancel and of course the right to cancel in section 9 rights under the Contractual Remedies Act is the subject of debate as to how far it goes but it's certainly a very powerful instrument. But what it does make clear is that even if the settlement not deferred takes place, then everything is at large associated with the contract as to rights between the two parties, everything is at large.

BLANCHARD J:

But you're not suggesting, are you, that if there's a very, very serious breach which would undoubtedly give a right of cancellation, that the purchaser is obliged to settle in full and then immediately cancel afterwards?

MR DAVIDSON QC:

No Sir. I think that's the flip side or the tag from His Honour Justice Tipping's question to me.

BLANCHARD J:

It is.

TIPPING J:

My brother is more blunt than I am Mr Davidson.

MR DAVIDSON QC:

I got the point Sir. My contention is that there will be circumstances where the breach that Your Honour Justice Blanchard describes, is of such consequence that the purchaser can say, I will not settle.

BLANCHARD J:

But if you've got a – you've either got a right to cancel or you haven't. You can't have a concept of immediate cancellation in some cases, but only a deferred cancellation in others.

MR DAVIDSON QC:

You have the right of a deferred cancellation in circumstances which may emerge after the event of settlement Your Honour. Remembering the –

BLANCHARD J:

But therefore it's without prejudice to your right to cancel before settlement as well as a right to cancel after settlement.

MR DAVIDSON QC:

These –

ELIAS CJ:

That's what you're contending for isn't it?

MR DAVIDSON QC:

I am contending for that Your Honour.

ELIAS CJ:

Yes.

MR DAVIDSON QC:

These, I want to put the factual matrix in place here. The breach we're concerned with here is something which may only become apparent, in fact technically would only become apparent but for anticipatory breach, on the day of settlement or around that, immediately around that time. These obligations under 6.2, for example 6.2(6), are fluid. They run between the period of the contract and the date of settlement. They look forward. They are promised at the moment of delivery by the vendor under the contract. It could be, for example, that the undertaking, or warranty contained in 6.2(6)(a) or (b), take (b), was breached or becomes breached on the day of settlement or the day before the settlement. In other words it's not known until that very time, unless there's an anticipatory breach, whether there is going to be anything to impede the – sorry to impeach the vendor's obligation. That being the case, this contract is aimed at the steps that then take place.

It's not necessarily as this case before you allows because we know here that the purchaser was pressing the warrant of fitness issue and other issues before, some weeks before the settlement date, and it was quite apparent that it would not be resolved by the date of settlement by the vendor. But this contract deals with situations which in general will be examined as at the date of settlement and in my submission, our submission, what it means is that at that date, under 6.5, failure to have a warrant of fitness in place, the obligation to settle continues and conveyance takes place. But that settlement would allow then the purchaser to say, well hang on, I have been done in the eye here for 5000, 10,000, 700,000, whatever the case may be, and the mechanics of this contract, in my submission, are directed, on a plain reading of it, to get a settlement away. Now it's not a case, and indeed one can see the artful dodger's hand at work here. If this clause 6.5 does not mean that settlement must take place, in a circumstance where there is a minimal breach, but a breach, then the settlement is deferred. It doesn't mean what I'm submitting. The settlement is deferred because the purchaser says,

there's something here that's going to cost $3000 to fix or I don't know, I can't tell you, there's something wrong, but I'm not going to settle.

ELIAS CJ:

So are you saying that really that 6.5 means that unless you choose to cancel you must settle. That that's the effect?

MR DAVIDSON QC:

Correct. And I accept the, what is the apparent equivocation to then argue for, as I must, that in cases of serious enough breach that that provision in 6.5 maybe overtaken to the extent that a purchaser says, well I will not.

TIPPING J:

Can I add to the Chief Justice's proposition. Unless you choose to cancel you must settle in full.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

Well that's sort of an additional – I mean he –

TIPPING J:

Well yes, that's what you're saying Mr Davidson isn't it?

MR DAVIDSON QC:

Yes Sir. When I say I have to argue that –

TIPPING J:

You can't avoid that.

MR DAVIDSON QC:

Exactly. I have to argue that. And I do argue it.

TIPPING J:

Yes. I just wanted to make that absolutely plain.

ELIAS CJ:

Yes.

MR DAVIDSON QC:

Now it sounds immediately because of the facts of this case it looks odd. The proposition I advance looks odd. What I am saying is, is that there is an implication available here that if the breach is so substantial, what we call fundamental breach, that you wouldn't have to take that step. But if you do, if it's read the way I'm submitting to the Court, then after or immediately on the settlement taking place, and no doubt there would be all sorts of things done to intervene on the part of the purchaser to protect them, if they have to settle in my submission they would take other steps ancillary such as seeking an injunction to restrain the disposition of the settlement monies, in this case 1.5 million dollars, and one would – we're now so used in practice to the distress and chaos in the commercial market, that sort of thing happens as a matter of course, if I may say so, from the bar now. It could be a single purpose, single venture company, as the vendor for example. It could be a company known to be close to insolvent, that's the way the commercial market works. The purchaser here who says, how can you make me disgorge 1.5 million when I have a claim under – for damages in equity or common law, how can you take that from me without some protection? You'd seek an injunction to restrain the disposition of those monies. Indeed you may seek to charge those monies under the principle of equitable set-off. But you wouldn't sit idle and so what I'm – the reason I'm making this submission to the Court is that it's not a situation which is bleak as the consequence – my primary proposition suggests. But contrary of the party who wishes to use the alternative position of clause 6.5, the version of it, to say, well I'm going to make the point here that there's something defective in terms of the warranty, I will not settle, over a very small sum of money, you bring proceedings. You judge my basis for refusing to settle or whatever, is an equally amorphous and uncertain situation. I am submitting for certainty –

TIPPING J:

You'd have to get an injunction ahead of settlement because someone might disperse the money a second after you've wired it.

BLANCHARD J:

To the mortgagee.

TIPPING J:

Yes.

MR DAVIDSON QC:

Yes. You'd be on the phone.

TIPPING J:

I think what you're saying Mr Davidson apropos of the question of cancellation is perhaps identified in this way. Are you saying that we should read the expression "settlement shall be without prejudice" as if it said the "obligation to settle shall be without prejudice to the right to cancel", then it sort of makes a bit more conceptual sense because the obligation is without prejudice rather than the physical act of settlement in that settlement there is really a reference back to the obligation.

MR DAVIDSON QC:

Yes.

TIPPING J:

I know you haven't put it that way but that I think would make it work the way you would want it to work apropos of this question of cancellation which prima facie is awkward.

MR DAVIDSON QC:

Well to the extent Sir that the obligation to settle is immediately followed by the word settlement –

TIPPING J:

Yes.

MR DAVIDSON QC:

– I can understand the linkage. It doesn't do any disservice to my argument I don't think to adopt -

ELIAS CJ:

Well I wonder about that. I wonder whether it does do a disservice to your argument because on your argument it is possible that cancellation, the election to cancel rather than settle remains because that's an option that's available. It's if you affirm the contract that you must – well that you have the obligation to settle. If you don't have the strength of your conviction about cancellation and then it is the settlement that you enter into, subject to your obligation, that is without prejudice to other remedies.

MR DAVIDSON QC:

Your Honour can I put it there. I take that, and this is how I first advanced the proposition I must acknowledge –

ELIAS CJ:

Yes.

MR DAVIDSON QC:

It's the fact of settlement –

ELIAS CJ:

Doesn't affect your remedies.

MR DAVIDSON QC:

It doesn't – the fact you're going through a process of changing –

ELIAS CJ:

Yes.

MR DAVIDSON QC:

– pulling your money over and so forth, leaves you with all your rights and that's what I meant but it is, the act of settlement is derived from the obligation.

TIPPING J:

Well I thought I was actually helping you Mr Davidson but maybe I wasn't because I could see that as a way of reconciling the problem with the extraordinarily unlikelihood of cancellation arising after settlement. But I don't want to muddy your water, please, I thought I might have been actually assisting it.

MR DAVIDSON QC:

Well Sir I, I prefer at this stage to rest my argument on the basis that one, the first point, there's no deferral of the obligation. Whatever the obligation to settle is under the contract, the settlement takes place.

BLANCHARD J:

Well what is the obligation to settle? You're begging the question, with respect.

MR DAVIDSON QC:

Well no Sir, may I go to the next part of the clause? My submission is there's an internal dictionary in terms of 6.5. What is the obligation to settlement, to settle in – what is the obligation to settle. The next sentence tells us that following the settlement, following the settlement, there are rights reserved and those are all –

BLANCHARD J:

Well I think that can be just as easily read as a prospective statement which would apply from the point when the breach of warranty has been identified. It could apply both before and after physical settlement.

MR DAVIDSON QC:

Yes but that, Sir the answer to that proposition is that whenever settlement takes place, whenever it takes place, the rights are reserved but clause .5 is directed to make sure the settlement does take place.

BLANCHARD J:

Well it's a question then of what settlement means and settlement requires payment of what is due in exchange for the documents and what is due must bring to account any abatement or set-off to which the purchaser is entitled.

MR DAVIDSON QC:

If that is correct Sir then it is the answer to my argument. My submission is that it is not correct, with respect, because of the fundamental interpretation of 6.5 there is no need to have a second sentence in the circumstances that Your Honour describes. If the rights are simply those that one has at law or in equity prior to settlement and at settlement, that's all it means, then there is no need for the second sentence whatsoever.

TIPPING J:

Your argument maybe assisted by the definition in the contract of settlement which is 3.7, not the direct definition but it says what happens on settlement date and it says, "The purchaser shall pay or satisfy the balance of the purchase price…" et cetera as one would expect, as a general proposition.

BLANCHARD J:

"To you, as provided in this agreement…"

TIPPING J:

Yes. "Do you as provided in this agreement…" so I suppose in a sense it's circular.

MR DAVIDSON QC:

It is circular but it is complete.

WILSON J:

Mr Davidson, isn't the answer to your proposition that the purchaser has got the option of exercising their remedies either prior to or after settlement?

MR DAVIDSON QC:

Well I have to say no Sir because there's a right, in my submission, for the serious enough breach to say the contract is over. Otherwise it would be, it does not make sense, in my submission, to create expressly an obligation to settle, no deferral of the obligation to settle, there's no delay in the settlement. It will go ahead but all rights are reserved for the future including that which you may have exercised previously including cancellation. Now they are, it's a matter Your Honour adverted to earlier in the day. It's an extraordinary proposition and it's extraordinary to the degree that it can't be ignored. There is simply no, in my submission, need for such a provision. If all we're talking about here is breach of any warranty does not defer the obligation to settle, it would only mean, well all the rights you have for abatement and so forth exist. I mean what's the point of it. More to the point, what's the point of the second sentence?

WILSON J:

I suggest to you at least arguably the point of the second sentence is to prevent the vendor from contending that the fact that the purchaser may not have sought to exercise any rights of abatement or set-off prior to settlement, doesn't deprive them of their remedies in that respect post settlement.

MR DAVIDSON QC:

Which must have some meaning, Your Honour, that answer must have attached some meaning to the provision that this does not defer the obligation to settle. I mean that has to have some meaning.

ELIAS CJ:

Well isn't it the case that there are two options. The purchaser, particularly if the defect is so substantial that it's going to affect his finance, may opt to cancel.

MR DAVIDSON QC:

Yes. Yes.

ELIAS CJ:

Or he may opt to settle, which on your argument would be tendering the balance of the purchase price, and may preserve all remedies including post settlement cancellation.

MR DAVIDSON QC:

Yes. There are options and I realise the first of those options comes up against the argument, well if you have that right, what does the first sentence mean. It doesn't defer the obligation to settle but you can still cancel.

ELIAS CJ:

Well that's if you want to, if you want to –

MR DAVIDSON QC:

Proceed.

ELIAS CJ:

To proceed.

MR DAVIDSON QC:

Yes. That's what – I'm picking up Your Honour's point.

ELIAS CJ:

And that position would argue – would meet some of the arguments which are advanced against you such as the inability to finance and also the purchaser who, for a trivial reason, defers settlement to obtain abatement.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

And abatement comes in not under this contractual regime but by reference to the general law and your submission must entail its exclusion except in accordance with the preservation in 6.5

MR DAVIDSON QC:

Correct Your Honour. And I suppose in trying to find an expression which encapsulates the proposition, the vendor by its conduct cannot compel a breach by the purchaser by which the vendor could then seek to take advantage.

TIPPING J:

But if you have a right of abatement or set-off, that right cannot be exercised other than on settlement.

MR DAVIDSON QC:

Ah. Your Honour my submission again is no. If you have – this right, that equitable right of abatement is that which is preserved post-settlement.

TIPPING J:

No. That it can't be called abatement or set-off.

MR DAVIDSON QC:

Well you mightn't call it abatement –

TIPPING J:

Yes it would be damages.

MR DAVIDSON QC:

You can call it damages in equity –

TIPPING J:

It would be damages.

MR DAVIDSON QC:

– or damages

TIPPING J:

No well this is where you've got to be quite precise. If it is conceded that there are in general terms rights of abatement and set-off, as I think you have, except law and equity, we all realise abatement and set-off, then those rights cannot exist post-settlement by definition.

MR DAVIDSON QC:

Correct but Your Honour the remedial effect of the relief that may be sought by that preserved right would have the equivalent, or should have the equivalent value.

TIPPING J:

I'm now going to use the concept of obligation to settle against you whereas previously I thought it might be helpful to you. If you do read settlement in this context as really meaning the obligation to settle, is without prejudice to any other rights you've got, then clearly it allows you to abate or set-off because you have the obligation subject to that right.

ELIAS CJ:

But that's why the argument has to be that settlement in the second sentence is a reference to settlement.

TIPPING J:

The physical –

MR DAVIDSON QC:

I'm pleased I was rescued by the Chief Justice.

ELIAS CJ:

That was the point I was making earlier.

MR DAVIDSON QC:

Yes and I have moved back to that –

ELIAS CJ:

When I thought you were falling into a trap.

MR DAVIDSON QC:

I was being seduced off to a position that I couldn't see the answer to Your Honour. I can now.

TIPPING J:

Well I'm wondering whether to harmonise these two sentences in a way that allows the context of cancellation to operate in a natural way rather than in a very, very unnatural post-settlement type of cancellation. You do have to read settlement as the first word in the second sentence as really meaning the obligation to settle because otherwise cancellation is confined to cancellation post-settlement.

ELIAS CJ:

Unless you elect to cancel.

TIPPING J:

I'm not sure.

BLANCHARD J:

I must say I just see it very simple. Settlement of clause 6.5 is the prospective settlement and then if, and once that has occurred it's the settlement that has occurred.

TIPPING J:

Meaning that it doesn't define, it doesn't mean settlement in full.

BLANCHARD J:

It doesn't define what's been paid.

TIPPING J:

It doesn't necessarily imply settlement in full.

BLANCHARD J:

Mmm.

TIPPING J:

Yes, well I'm of that view too.

BLANCHARD J:

It seems to me it's the natural meaning.

MR DAVIDSON QC:

Well the natural meaning Your Honour, this is a point you raised earlier in the morning, I hate using the expression I have to argue, but I have to argue because of my submission the second sentence leads to a different conclusion and I'm not resiling from that. There's something about 6.5 which after all has come into the law, has come into the contract, come into the law in recent times, relatively recent times that creates a set of rights in the second sentence which really are not necessary unless the whole clause has the meaning I'm submitting for.

BLANCHARD J:

Clause 6.5 probably wasn't necessary in fact.

MR DAVIDSON QC:

No well that's right Sir because what does it say in terms of – if you only had the first sentence, the vendor is in breach with regard to warrant of fitness, that fact does not defer the obligation to settle. The party has got to go ahead and settle.

TIPPING J:

Well that literally means you can't cancel on account of any breach of warranty under – so you've got no room to sort of start talking about cancellable breaches of warranty and non-cancellable breaches of warranty.

MR DAVIDSON QC:

I've tried to use the exit road Your Honour by saying that –

TIPPING J:

Well you either read this literally or you don't because frankly I think the way it's constructed, with great respect to the draftspeople, isn't all that tight.

BLANCHARD J:

They may be quite glad if we don't quote them.

MR DAVIDSON QC:

I wasn't going to quote them Your Honour because I don't –

TIPPING J:

But surely breach of any warranty, any or undertaking contained in this clause does not defer the obligation to settle so if there's a breach you must settle. You can't cancel and that's somehow or rather got to be reconciled with the idea that you can cancel after settlement which frankly seems like an absolute dogs breakfast to me.

MR DAVIDSON QC:

And it is and of course the reconciliation, contrary to the submission I've made, is easier, as curious as it may be, to think that the fact of, the act of

settlement takes place, this clause plainly says that after that the right to cancel is preserved.

TIPPING J:

Yes.

MR DAVIDSON QC:

And a Court could endorse that cancellation.

TIPPING J:

Well you've got to have a right to cancel at some stage.

MR DAVIDSON QC:

Yes.

TIPPING J:

What I'm saying is that the right to cancel can hardly apply before settlement because you've got an obligation to settle.

MR DAVIDSON QC:

And that's my second – my fallback position I have to say that. I've tried to argue that in certain circumstances such a breach of such a fundamental nature that the purchaser would be entitled to cancel pre the settlement. If I'm wrong about that it only applies post-settlement but it means that the whole battery of remedies available at law and equity are available, notwithstanding a purchaser settling under high protest. Now as curious as that may seem in my submission it's what the clause says and if it only says well in the first sentence it doesn't defer the obligation to settle and that obligation is defined as we know the law now by abatement, a reasonably offered abatement sum, if that's all it means, why is it there at all? The clause is left with no meaning at all. So settlement has to take place and although I recognise it's not on the same point Your Honour Justice Tipping in a case which is before the Court in *Holmes v Booth* and your dissenting judgment.

TIPPING J:

I was hoping that wouldn't be –

MR DAVIDSON QC:

Well I was going to call it in aid Your Honour so –

TIPPING J:

Oh really, I'll sit up and take some notice then.

BLANCHARD J:

It's the refuge of the desperate.

MR DAVIDSON QC:

Well I was hoping for a more positive response.

TIPPING J:

Well you may get one from me but not necessarily from …

MR DAVIDSON QC:

Yes well if I could just –

TIPPING J:

This is tab 11?

MR DAVIDSON QC:

Tab 11 Sir.

ELIAS CJ:

Sorry, whose bundle is this?

MR DAVIDSON QC:

This is in the appellant's bundle Ma'am. Now the – may I just go to the holding first where Your Honour firstly held that the breach in question of course was there was a three year tenancy. Dr Holmes appeared to be highly

resistant to the notion that there was anything of that order and the vendor did not clarify the position. In holding paragraph 11 the purchaser was bound to settle subject to the right to compensation or damages. Because what we were concerned with there was a misdescription of title. There was no ability to convey the freehold title. The effect of 5.3 was that there was compensation available only if demand in writing before settlement and that's a point which Associate Judge Christiansen in this case found was not effected properly. Now if the question of misdescription has gone by for the purpose of this appeal in the sense that it doesn't seem to be a very significant point any more, so to is His Honour's comment or decision in that regard. But nevertheless there was an obligation to demand in writing before settlement and I haven't addressed this point in my argument so far.

TIPPING J:

Well I wasn't there saying you had to settle in full.

MR DAVIDSON QC:

No you weren't. What you were saying Your Honour is that a party, where a purchaser materially breached the contract, holding 17, by failing to settle the vendor was entitled to cancel. You weren't saying without rights on the part of the purchaser but you used the expression which jumps from the judgment at 191, 649, this is a case where the purchaser wanted the contract to continue and Your Honour had discussed at 191, 648 the fact that you held that there was no via media available to the party. They must decide what to do faced with a breach of this kind. You can't sit and wait for something to happen.

BLANCHARD J:

Isn't that what the first sentence of 6.5 is saying? I think it's just picking up what Justice Tipping is saying here.

MR DAVIDSON QC:

But that paragraph I'm referring to Your Honour is my judgment the purchaser Booth –

ELIAS CJ:

Sorry where are we?

MR DAVIDSON QC:

This is 191, 649 Ma'am, the bottom right-hand paragraph.

ELIAS CJ:

Right, thank you. "Fork in the road."

MR DAVIDSON QC:

"Came to a fork in the road…" That's the phrase I was looking for because I think it is apposite here, "…on the date for settlement or at the latest on the expiry of the settlement notice. He was faced with two possible routes. The signpost to one read cancellation; the signpost to the other read performance. The potential to claim damages was inherent in both roads." He chose the performance road, as Property Ventures has here. They've contested the cancellation. "He did so both actively and by dint of not having chosen the cancellation route." Property Ventures the same here. They've not accepted the cancellation. "… no intermediate road available … bound to perform when called upon to do so. He could not, in my judgment, suspend his election any further, without putting himself into default. This is where, with respect, I differ from the views of the other members of the Court." And then –

TIPPING J:

But that – the key point in there is couldn't suspend the election.

MR DAVIDSON QC:

Correct but –

TIPPING J:

Other than sort of sit on his hands and wait for something to happen as you said.

MR DAVIDSON QC:

Yes and that's at 191, 650 on the right-hand column where you differ from His Honour Justice Fraser and about 10 lines down you refer to the fact "… when the purchaser, either by dint of general condition 5.3 or by dint of his own election to keep the contract alive, was obliged to opt or voluntarily opted for performance plus damages. Once this happened the purchaser was bound to proceed to settle taking what the vendor could convey and the vendor's inability to fulfil the warranty as to tenancies ceased to be material as regards settlement, although of course remaining material as regards compensation or damages."

TIPPING J:

Yes well that may not have been as tightly expressed as at present advised it might have been.

ELIAS CJ:

Well fork in the road is really what I was suggesting. That there is a right of cancellation. If you don't cancel and you proceed then 6.5 preserves post-settlement the remedies.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

And on that argument one would have thought there was a respectable argument that abatement and set-off are channelled by 6.5.

MR DAVIDSON QC:

Yes. And that Your Honour the way you put it to me leads to –

ELIAS CJ:

You don't get it in settlement which is perhaps consistent with the definition of settlement that Justice Tipping drew attention to.

MR DAVIDSON QC:

If settlement is going ahead, it's not deferred, it's proceeds.

ELIAS CJ:

In terms of the contract.

MR DAVIDSON QC:

Yes. But if settlement is not – sorry. There's a problem. The whole thing is predicated on breach.

TIPPING J:

The one thing in 3.7 that slightly troubles me is that the ability to give or seek credit, that's the bracketed bit at the end there, of 37(1), you see where I am Mr Davidson?

MR DAVIDSON QC:

Sorry Sir, where are you?

TIPPING J:

I'm looking at 3.7 of what has to happen on the settlement date.

MR DAVIDSON QC:

Yes.

TIPPING J:

And it says the purchaser shall pay or satisfy et cetera due as provided in this agreement credit being given for amounts payable by the vendor under subclauses 3.9 or 3.10. it doesn't have any reference to compensation or damages if you like.

MR DAVIDSON QC:

No.

TIPPING J:

But I'm not sure that that's a particularly significant point.

MR DAVIDSON QC:

I suppose Sir the answer, if I was going to try to find an answer against myself, it's before the sum due as provided in this agreement.

TIPPING J:

Yes.

MR DAVIDSON QC:

So I suppose it may beg the question as to what that means.

TIPPING J:

I think that's right.

ELIAS CJ:

Well it is but it does not, at first blush, look as if it's a reference to due according to law which is what it would be if one were required to take into account abatement and set-off.

MR DAVIDSON QC:

Yes.

ELIAS CJ:

In its terms it looks as though it is what is due as provided in this agreement.

MR DAVIDSON QC:

Yes and what is provided is absent cancellation that which the contract provides for –

ELIAS CJ:

Yes.

MR DAVIDSON QC:

All the other side winds of remedy for –

ELIAS CJ:

Are preserved.

MR DAVIDSON QC:

Are preserved. That's what it's about and the reason – there's another element of this which I do want to put to the Court. Clause 5, which deals – whether or not it deals with a misdescription, plainly in *Lingens* the Court held that the representation with regard to building permits was both, it fell within clause 6 and clause 5. It was capable of being a misdescription of the property. But the remedies available under clause 5 are quite express with regard to the requisitions or objections in 5.2(1) and issues of plans and how the vendor must respond. That's express, 5.2(3) and 5.3 in relation to the cross-lease title, there maybe a requisition under 5.3(1) for two reasons. Requiring the vendor to deposit a new plan and so forth. But when it comes to the relief under 5.4 this whole clause 5 precludes annulment of the sale. The fact of the error, omission or description of the property or title, doesn't annul the sale. The compensation if demanded in writing, but before settlement, but not otherwise, should be made or given as the case may require. Now immediately a huge question gets begged as to just what that actually will mean in practice. We don't have in the contract a satisfactory way yet of dealing with claims for abatement and so forth.

TIPPING J:

Doesn't that imply that it has to be adjusted on settlement because –

MR DAVIDSON QC:

Yes. That's my point.

TIPPING J:

So you're saying it does have to be adjusted on settlement in 5.4 but not in 6.5

MR DAVIDSON QC:

Exactly Your Honour and that's what I meant by symmetry between the two clauses.

TIPPING J:

Well it's not symmetry, it's lack of symmetry.

MR DAVIDSON QC:

Well no in my submission –

TIPPING J:

Studied lack of symmetry.

MR DAVIDSON QC:

Well studied lack of symmetry then Your Honour but the point remains that this –

TIPPING J:

Well that's a very odd distinction to draw. For the draftsman to say if it's a misdescription you can adjust the price but if it's a breach of warranty you can't.

MR DAVIDSON QC:

That's what it says Your Honour.

TIPPING J:

Well that's relevant surely to whether that's its true meaning.

MR DAVIDSON QC:

Well the Court of Appeal of course has doubted whether in fact it goes beyond title and boundary issues.

TIPPING J:

Well leaving all that aside, if it's capable of going wider than that sort of thing, and you can have some sort of qualitative misdescription, it would be peculiar in the extreme if you could elect which one to call it.

MR DAVIDSON QC:

No Sir, in my submission you don't have, it's not an election as to what you call it. This is expressly the remedy for these things. You will not have, in my submission, something as in *Lingens* which can fall under both.

TIPPING J:

Is that –

MR DAVIDSON QC:

Because and the reason for that is that clause 5 relates to matters which can expressly be the subject of a claim or demand before settlement. They're not things arising on settlement. There's time.

TIPPING J:

Subject to requisition.

MR DAVIDSON QC:

Yes and so unlike the promise contained in clause 6 at settlement and this – clause 6 of course is divided neatly into 6.1 the date of the agreement, 6.2 giving and taking possession, 6.3, at settlement, 6.4 on or immediately after possession. This is a very careful break out which for these purposes of this case is a promise with regard to taking possession.

TIPPING J:

So the subject matter of 5.4 and 6.5 are mutually exclusive?

MR DAVIDSON QC:

Yes.

TIPPING J:

Is your submission?

MR DAVIDSON QC:

It is Sir, yes. There are things that are apparent prior to settlement. Issues of title boundaries and misdescriptions.

TIPPING J:

But you see the drafters have not helped by talking about breach of any warranty contained in clause 6. Some of them are on settlement warranties, some of them are on contract warranties.

MR DAVIDSON QC:

That's right, that's right.

TIPPING J:

So the drafter hasn't seemingly made that sort of distinction that you're skilfully endeavouring to introduce.

MR DAVIDSON QC:

The draftsman hasn't made that distinction Your Honour. It's not a very good answer but it's my answer. It is not. But what we do know is that by raising clause 5 in this way is to emphasise the fact that there is a category of vendor defaults.

TIPPING J:

Is this form, I'm not as familiar with it as others within this room, but has this form sort of grown like toxic and bits have sort of been stuck on and added in and amended without any sort of great coherence of the whole?

MR DAVIDSON QC:

Given the people that are in the room I don't think I should answer.

TIPPING J:

It looks a bit like that to my untutored eye.

MR DAVIDSON QC:

It looks to me Sir as though there's a sort of attempted surgical distinction between breaches with one common remedial provision and then a totally different scheme in relation to the clause 5 defaults by vendor. That's what it looks like to me.

TIPPING J:

Yes.

MR DAVIDSON QC:

But the reason I want to emphasise 5.4 is that it is prescriptive. The words, "shall not annul the sale" –

ELIAS CJ:

What on earth does that mean though? That it's not null or it's not – does that preclude cancellation, it couldn't?

MR DAVIDSON QC:

I think it just means it doesn't put it aside of itself.

ELIAS CJ:

Yes.

TIPPING J:

It's not as self-fulfilling.

MR DAVIDSON QC:

Correct.

ELIAS CJ:

No.

MR DAVIDSON QC:

Yes exactly but there maybe something about it which allied with other elements in the contract gives it more life than that fact.

TIPPING J:

That goes back, I suspect, to the sort of very early days of equity jurisprudence. That sort of form of words because the word compensation of course is an equitable concept but I don't know quite where this gets us Mr Davidson. You're really saying that this is all in aid of the proposition in the end that's obligation to settle in 6.5, first sentence, means obligation to settle in full?

MR DAVIDSON QC:

It is Sir.

TIPPING J:

I'm not depreciating it by putting it down in those simple terms.

MR DAVIDSON QC:

No, no. I'm saying that Sir.

ELIAS CJ:

And that there isn't overlap between clause 5 and clause 6.

MR DAVIDSON QC:

Yes. Well we have *Lingens* where the Court of Appeal found that the, no reason they shouldn't find a condition under both heads, you recall Your Honour. I have real difficulty with that because one is a clear promise, one is taken by the court to mean well we're saying at the time we make the contract that everything is fine. Because things can be regularised between the date of the contract and the date that settlement takes place, that's why I have difficulty with that proposition of the Court. But by getting in *Lingens* the representation or the warranty with regard to the building permit, in play, the

question that the Court was able then to – in fact that was the reason the Court was able to find for the purchaser.

But my point about 5.4 before I leave it is that it is prescriptive apart from the annul point compensation if demanded in writing before settlement but not otherwise should be made or given as the case may require. So there's a procedural hurdle here. If you don't make the demand, you get nothing, and it's consistent with a scheme of construction of a contract for such an express provision as that which seems pretty harsh in some respects. You make your claim. You don't make it in writing, you're maybe the sort of person trying to do the job yourself, bad luck. So many cases in conveyancing law have derived from people trying to act for themselves. It doesn't need that example but it demonstrates the point.

Now this contract has provisions such as that and then it has this provision of 6.5. So unless cancelled the 6.5 settlement takes place and who's hurt by that? In my submission nobody because the purchaser can say this is a default of such consequence on the argument I'm now advancing then I will cancel this contract but if I am proceeding then the obligation to settle is on me. I will calculate whether I can make that, finance and otherwise, and I'll calculate then the consequence and timing of the relief I may get at law or in equity. In my submission that is a consistent package. Tenable and exactly what happened here. And on the facts of this case, although it's been very carefully set out by my learned friends, I haven't bothered to try and repeat it at all, I may just take you to one or two of the documents in volume 3 of the case.

ELIAS CJ:

Would it be convenient to take the adjournment now?

MR DAVIDSON QC:

Yes Ma'am. May I just enquire of one matter before we take the break?

ELIAS CJ:

Yes.

MR DAVIDSON QC:

A good part of the submissions that we have put before you relate to the misdescription point. I apprehend it's not a matter I need to spend a lot of time with, with the Court.

ELIAS CJ:

Well it maybe that the Court after lunch will indicate to you whether you do need to take us to that.

MR DAVIDSON QC:

Thank you Ma'am.

COURT ADJOURNS: 12.57 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:

Thank you. Mr Davidson we don't – if there are matters in your written submissions you want to enlarge upon we don't want you to deter you from doing that on the misdescription point.

MR DAVIDSON QC:

Thank you. I don't wish to make any further submission on that. I think the point reduces to one and that is that it is a promise. It's not a misdescription of the kind that the clause 5 contemplates. Slightly more developed reasoning than that is contained in my written submissions.

TIPPING J:

That's the essence of it.

MR DAVIDSON QC:

It is the essence of it Sir. There's no way this can get up to being, quite apart from expressly clause 6, there's no way it can convert in the way that *Lingens* did into a misdescription essentially at the time of the contract.

We have also reflected on just where we are in the case at the moment. The significant issue of course is that which we have been debating because with that indication from the Court and my response the critical question is whether clause 6 applies in the way we contend for here. If it does, then the notice at least theoretically is valid. If it's not then the question of the time given under the notice falls away. The primary point is clause 6. It also means we're not concerned with clause 5 and everything that flows from it in terms of the question of demand made so there are two issues alive from the vendor's perspective. The point that was discussed this morning as to clause 6 and if that's answered in favour of the plaintiff then the question whether notice was adequately given for the purpose of the contract, whether under clause 9 or otherwise. The section of the evidence which deals with this is at – sorry the submissions that deals with this is set out at page 12 onwards. It is discursive, I acknowledge, and I'll try and tighten it in the next 10 minutes or so in asking the Court to consider it.

I can speak to the submission in this way. The essential point we wish to advance is that under clause 9 the right to issue a settlement notice exists in accordance with the clause and it is only effective under clause 9.1(2), this is at page 77 of the case, volume 3 of the case, if the plaintiff, party suing is ready to proceed and we say the plaintiff was here in terms of clause 6.

The obligation in issue is that at 9.2. the obligation is to settle on or before the 12th working day after the date of the service with some exceptions in respect of the holiday period. My friend Mr Forbes is correct in referring to 9.4 this morning, if the purchaser does not comply with the terms of the settlement notice then without prejudice to any other rights or remedies the vendor may. And his focus on that, as I understood it, was to submit that the reference to without prejudice or any other rights or remedies means just that at that time in terms of compliance with the terms of the settlement notice. In other words

the breadth of the expression without prejudice to any other rights or remedies as I understand the submission was that it doesn't, it's not a charter to say clause 9 sits alongside the general law.

Now the facts of this matter of course are that, I'm going to take Your Honours to paragraph 50 of the respondent's submissions at page 18, this is the extended version where we included the citations. We first of all had the notice in 2005 which we accept fell away. It wasn't, in terms of paragraph 50 of the submission, it wasn't until 30 March 2006 that Regalwood required settlement by 7 April and that's at page 171 of the case, volume 3. And here is Mr Reid of Goodman Steven recording – referring back to the settlement notice of 17 May 2005 and then to the fact that Regalwood has consistently maintained the contract was unconditional and Property Ventures was advised to settle forthwith. He refers to the 17 May 2005 notice of non-compliance and says that's in default and the remedies set out in clause 9.4 therefore apply.

In the last paragraph he refers to the fact that the building warrant of fitness has been obtained, is enclosed, and calls on settlement on Friday 7 April and you can see from the date stamp on the top right, received 31 March and so it was calling for settlement seven days later, five working days. So the issue in this Court in my submission turns on the fact that the first notice in 2005 had gone but it sat there and all this is predicated on the fact there's a breach. There's a breach or the notice is completely irrelevant. If there was a breach in 2005 the settlement notice had plainly fallen away because so much time had passed but what we're submitting in this Court is that by this letter, 30 March 2006, calling for settlement on Friday 7 April, failing which specific performance was the then current instruction. The next page 172 –

TIPPING J:

Just before you move on Mr Davidson. Is there anything in the fact that this notice does not purport to make time of the essence again?

MR DAVIDSON QC:

It doesn't expressly say so Sir.

TIPPING J:

And it says that default will lead to specific performance not cancellation.

MR DAVIDSON QC:

It says it would instruct them to commence proceedings Sir so presumably the instruction could change.

TIPPING J:

Well it could but it doesn't –

BLANCHARD J:

You didn't need to give any notice before doing that.

MR DAVIDSON QC:

True.

BLANCHARD J:

So it's a highly misleading letter.

MR DAVIDSON QC:

Well the highest I can put the letter is that it's referring back to the fact of what, for this purpose of argument, to be a breach in 2005. It's giving a notice to settle by Friday 7 April. Now it's plainly not in terms of clause 9 and it got the response one might expect at 172 of the case, next page.

BLANCHARD J:

It lost.

MR DAVIDSON QC:

Yes it lost. Commendably brief but something's going on by the last – second paragraph and then it's followed up at 173 with a letter on the 7th of April which of course is, as it were, the due date by the earlier letter. Not satisfied

you're in a position to comply and interesting the clause 6.2 issues, warrant of fitness doesn't comply et cetera and talks about the problem with the warranties particularly the seismic strengthening in the third paragraph, therefore you're not able to go ahead. Now of course if we're right about all that and we're wrong about clause 6 then again that's the end of the case.

TIPPING J:

Well if you're wrong about clause 6 we're not into –

MR DAVIDSON QC:

We're not at any –

TIPPING J:

- this territory at all.

MR DAVIDSON QC:

No.

TIPPING J:

So this is on the hypothesis that you were –

MR DAVIDSON QC:

Right.

TIPPING J:

– right on that.

MR DAVIDSON QC:

Yes. I just go then to 12 May because what's happened is we've gone past that 7 April date, page 175 of the case. This time, second paragraph, unless you complete settlement by Friday 19 May we're switching course here we'll exercise the clear entitlement to cancel the contract.

TIPPING J:

Again it doesn't make time of the essence.

MR DAVIDSON QC:

Not expressly Sir.

TIPPING J:

Well doesn't it have to?

MR DAVIDSON QC:

Well –

TIPPING J:

If time has ceased to be of the essence because the previous notice has lapsed and the – unless there's something in the contract which says that you don't have to make time of the essence, the ordinary law would require you to do so wouldn't it?

MR DAVIDSON QC:

Yes, the question Sir I suppose is whether, is whether this is sufficient to raise time as being of the essence on the basis that it hit that date 19 May we'll cancel.

TIPPING J:

Yes?

MR DAVIDSON QC:

And it's the inference to be drawn from that. in my submission if it's patently clear that on a certain date by a certain time something's not done, the contract will come to an end. That is clearly making time of the essence otherwise you couldn't take that step.

TIPPING J:

So you say it implicitly makes times of the essence?

MR DAVIDSON QC:

Yes, yes I do Sir. It's very clear what it means and my submission is not coated with another construction.

TIPPING J:

There are cases, aren't there, which are quite strict on this but perhaps it's not necessary to go into the intricacies any further because –

MR DAVIDSON QC:

It's a question of construction of the letter Sir, I think, in my submission.

TIPPING J:

Yes.

MR DAVIDSON QC:

As I think, well submit, there's only one construction available and that should suffice the period aside because of course it's not a 12 day period. What we've submitted in paragraph 50 is that the Court and thus the party here is entitled to bring to account all the circumstances in what is a reasonable period of notice. If we're stuck with a 12 day period, that's that. We haven't given a 12 day notice as such, at all. If we're not stuck with it, and I'll come to that, then we call in aid, and the plaintiff calls in aid, the background which is a default in 2005 for which a notice was given and as it were fell away. another letter, inelegantly sent on the 30th of March, putting the squeeze on, which was not acted on. And then quite some weeks later another notice, a settlement on 19th of May. Now if we can, as a matter of construction in law, accumulate these events to contend for reasonableness in my submission that is a reasonable period having regard to the authorities I'm going to come to and the other factors in this part of our submission.

I'll start on that latter head by turning to page 19 of the submission. Looking at what is reasonable the Court would, in my submission, look closely at just what was going on in the position of the purchaser. So if for example there

was information about finance or something that was problematical and every day as it were, were needed, that maybe a case for saying the full 12 day indisputable period has to be given. But in this case, paragraph 51, there's never a challenge from Property Ventures for failing to provide a reasonable time to settle and there was a reason for that because they say they didn't have to. It just didn't weigh in the calculation of what was reasonable. They were simply saying there shouldn't have been a notice at all and so paragraph 51 records a fact, last three lines, Property Ventures at no stage through itself or through Cousins & Associates, question the notice as to time. In my submission that's a consequence in terms of measuring what is reasonable, if we can escape the bounds of clause 9.

TIPPING J:

Are you coming onto how you escape from those bounds in a minute are you?

MR DAVIDSON QC:

Yes, it's the hardest bit Sir so I'm leaving it until last.

TIPPING J:

I thought it might be.

MR DAVIDSON QC:

It is the hardest bit. So I'm now going to slightly backtrack. I'm trying to get into the – my submission is that we get outside the bounds of clause 9 in all these circumstances this is reasonable. So what have we got back at page 12, we address this question. Some of us acknowledges a bit amorphous to be helpful on a specific issue. The general principle with regard to purpose of a settlement notice at paragraph 39 probably doesn't take us very far. And putting up as we must both the good and the bad I've referred to *Delta Vale* which my friend Mr Forbes has referred to as well at paragraph 40. *Delta Vale* the passage cited there perhaps is almost too obvious to require the sort of citation. The last six lines of the citation the condition in the contract in this case "… does not, in my view, preclude the party who invokes it from granting an additional period of grace if its intentions are sufficiently

clearly expressed. The position would, of course, be quite different if a notice purported to abridge the prescribed period of 15 days; no such notice could be said to be 'in accordance with' or 'in conformity with' the condition."

So that's on the face of it in principle against us. But the argument is developed at paragraph 41. Clause 9 does not provide that only, only a notice of certain duration shall be required to make time of the essence. So the submission is the general law can apply. The question is whether clause 9 is additional or comprehensive and I think I have to acknowledge the strength of the submission made by my learned friend when clause 9 has this reference, "Without prejudice to any other rights or remedies…" it comes after the expiry of the notice. It doesn't – I'd much rather it was at the tope of clause 9, "Without prejudice to any other rights or remedies…" and then led to the clause 9 procedure but it doesn't say that.

However, although I used the judgment in *Dimsdale* for another purpose earlier in the day, I do ask Your Honours to consider it at tab 2 of the respondent's case. This is a judgment given by a deputy High Court Judge and I think it's tab 2. The question was whether a combination of national conditions of sale and a condition of the contract, how that bore on the question of preparative notice and the holding at paragraph 2 addresses the fundamental point.

"Even if the notice to complete was to be treated as a notice requiring completion within a period shorter than described by condition 22 of the National Conditions of Sale, it was a valid notice not under condition 22 itself but as an ordinary notice to complete under the general law as it was not, in the circumstances, served unreasonably soon nor unreasonably short. A provision such as 22 provided for special notice to complete was not intended or offered up to exclude the right of the party under the general law. At page 3 of the judgment the condition 22, special notice to complete is set out at the bottom. The first clause is the provision allowing notice to be given requiring completion and the second party shall within 28 days after service without prejudice to rescind the contract in the meantime.

Now the issue then divulged at page 4, top of page 4, contract provided for completion October 28 not complete on that date. Defendant shall need to complete on that date. Told the plaintiffs and the plaintiff's list is not prepared to commit to completion. There is then quite an extended period of delay and at page 9 the question before the Court was firstly the calculation of the 28 days and the Judge was against the period being sufficiently allowed. At the last paragraph of page 9, if I'm wrong, does it follow the notice is altogether invalid? It is not. Even if the notice be treated as a notice requiring completion within a period shorter I'd be prepared to hold it valid notwithstanding condition 22 being a special notice to complete under the general law.

TIPPING J:

That might have depended on the word "special".

MR DAVIDSON QC:

It could Sir but the condition is set out here as to –

TIPPING J:

But otherwise it seems to me, with great respect, to be very dubious that if the parties have set out an elaborate mechanism that you can actually adopt some other mechanism under the general rule.

MR DAVIDSON QC:

Well the first point it makes in reply is that what clause 9 does is creates certainty. You follow clause 9 –

TIPPING J:

And what your argument does is create uncertainty.

MR DAVIDSON QC:

No it casts those who seek to take advantage of the argument into a position of having to prove the reasonableness Sir. Yes it does. It creates the debate.

TIPPING J:

It creates room for argument.

MR DAVIDSON QC:

It creates –

TIPPING J:

Which presumably this whole thing here was designed to avoid.

MR DAVIDSON QC:

Yes and if that's, if that's the answer that's the answer Sir. I'm just wanting to get before the Court the – on the basis that clause 9 does not expressly say this is the only way things will be done, that there is an alternative route available. If the Court concludes that this is the code, and only code, that's an enter. Of course we face the interesting prospect if the respondent here were to succeed on the clause 6 point, as to where the parties end up commercially. Either with something successfully cancelled quite some time ago or a contract alive, not successfully cancelled, but cancellable, depending on this Court's approach to clause 6.

BLANCHARD J:

Well in those circumstances I suppose you might be able to give a notice in terms of the contract.

MR DAVIDSON QC:

Probably a 12 day notice Sir. That is so and hence the absolutely critical nature of the first primary issue here and the real issue in the case now. So Your Honour Justice Tipping I understand the point of course. It would be wrong not to finish *Dimsdale* with reference to the passage I cited earlier this morning for a different reason at page 10, which is where the learned Deputy Judge took on Justice Walton in *Rightside Properties v Gray*. In my

submission it's squarely in point he is saying there is a basis, unless excluded then there is a basis to go to the general law.

TIPPING J:

Well was that a proposition that Mr Justice Walton had described as astonishing?

MR DAVIDSON QC:

Yes it was Sir.

TIPPING J:

I'm not astonished.

MR DAVIDSON QC:

Well I probably won't read that passage again Sir. However, I have the same issue as counsel, that this Deputy Judge had, in delivering his judgment, I have to tackle that point head on.

TIPPING J:

Yes, indeed.

MR DAVIDSON QC:

So I'm reaching for assistance and I've at page 13 referred to *MacIndoe v Mainzeal Group* which is behind tab 6. There my learned president was at page 287 of the judgment, lines 19 to 24. Ms Smith is just pointing out to me that the passage I think I'm looking for is at page 281, towards the bottom, yes, lines 45 onwards. "Cancellation for breach cannot be in a materially different position. Clause 8 gives various remedies, including the 12 working-day notice…will avoid any question as to whether notice has been reasonable; but the existence of these remedies can stand together with the…ordinary remedies…under s 7 of the Contractual Remedies Act. Clause 8 remedies are additional. There is nothing in the clause inconsistent with s 7 _ "

TIPPING J:

But if the parties have expressly agreed by means of the notice machinery as to what a reasonable notice will be, how can the Court come along and say well another period is reasonable?

MR DAVIDSON QC:

There's only one answer I can give and that is that the parties yes they have agreed it's reasonable and that's the end to it. But if parties choose to, if parties choose to try and make another period of notice a reasonable period, they're not precluded from doing so.

BLANCHARD J:

What had had happened in *MacIndoe*?

MR DAVIDSON QC:

I'm going to the holding at page 273. Clause 8 gave the vendor remedies additional to those under the Remedies Act and the vendor was able to make time of the essence for payment of an instalment and cancel the contract.

TIPPING J:

This was a position, I think, that was not expressly provided for in the contract wasn't it?

BLANCHARD J:

It's payment of an instalment.

MR DAVIDSON QC:

Yes it was an instalment and it wasn't –

BLANCHARD J:

You couldn't give a settlement notice.

MR DAVIDSON QC:

No it's not a settlement notice case. It's really the point that where the parties have agreed something expressly the general law still will have an application.

TIPPING J:

Well they'd agreed something expressly in certain circumstances but not for the circumstances before the Court ergo that was at large and the general law applied to it would seem to be the –

MR DAVIDSON QC:

Yes.

TIPPING J:

– probable rationale of this.

MR DAVIDSON QC:

I think there's an exorable logic about that proposition Sir.

TIPPING J:

Unfortunately.

MR DAVIDSON QC:

I think – that is so. So I'm going to ask the Court to look at tab 7, the, I think it's pronounced *Monzer Tabbouch* and this case there's an editorial comment on the right-hand page and the question was the validity of termination of a contract. There had been a notice given which had fallen away because the parties had arranged to make a settlement after the notice expired and that can be seen in the first paragraph of the editorial comment. That arrangement summarised is not making or maintaining time of the essence. A new notice to complete is required prior to the purchaser terminating the contract. Such a notice may not have required 14 days to complete provided such shorter period was reasonable in the circumstances.

And at the penultimate paragraph at the right-hand column of that page the practical implications are discussed. "In most circumstances full 14 day period from service should be allowed for completion before further action…" and there's a reference there, …3 pm on the 14th day doesn't do the trick. An

agreement to settle after the last day does not mean that time continues to be of the essence and so a further notice to complete is required.

The judgment of Justice Einstein then follows and that short background leads to a discussion which really proceeds on the basis that there maybe another time given and that the contract provides, I'll come to that, and at page 370 of the judgment, in the right-hand column, there's a quick discussion there about the reasonableness of the notice to complete. "Essential question is nothing to do with what the purchaser in fact needs and has not done. A party is not entitled to rely upon his own wrong or default." The assumption is, and I do call this in aid if we get past this stricture of clause 9, at the bottom of this paragraph, "A reasonable time's elapsed. The fraction of the notice specifying time for completion is prima facie to enable a party assumed to be in an appropriate state of readiness to perform obligations to do those things, have the documents ready to go."

TIPPING J:

This case is not cited in support of getting you out of clause 9 is it? If it is in what way does it assist in that endeavour?

MR DAVIDSON QC:

I'm looking for, I'll just be a moment Sir. Yes in the decision at page 372, paragraph 32 onwards, at paragraph 34, "All that one can read into the arrangement is that there was intention by both parties that settlement would take place on 23 December. That arrangement is entirely consistent with a need. Settlement didn't take place on that date and time. Mr Tabbouch by a new notice to make time of the essence. Such a further notice may well, in light of the anterior delays and the purchaser complying with special condition, not have required to give a period of 14 days in which to complete. The issue is always about reasonableness of time."

So it doesn't seem as though the Judge was particularly troubled by the fact that there was a contractual period of notice contained. Once we got past that, what he calls the anterior circumstances, then the contracts – move on,

on the contract. We have the background of default already having occurred and we have the default now of some antiquity and so in those circumstances that His Honour saw the ability to measure time again. I accept that the wording of this clause 9 is comprehensive, effectively the code on the topic. This would make no difference at all but there's a logic in my submission. In an interpretation or construction of the contract which says once a party has been in default and the breach is antecedent, yes the essentiality has gone. But what then is a reasonable period of time to impose, and again making time essential, must bear some reference to the circumstances in which it's given. Here we have a year going by, well, close to a year going by and the assumption of course underlying my submissions is that we're in default throughout. An easy answer is to say well start again as indeed –

TIPPING J:

The longer the time that goes by, could be argued against you, the more is the need to give the contractual period.

MR DAVIDSON QC:

It might be the case Sir but for the point that really the purchaser is saying, forget it anyway. It wouldn't matter if it was 10 minutes notice.

TIPPING J:

Well that goes to futility I suppose. It's a different issue.

MR DAVIDSON QC:

Yes, reasonableness Sir.

TIPPING J:

Well I don't know of any doctrine which says that if you've been told it's not going to be any good whether you tender or not you can nevertheless give sort of five minutes because it's not going to happen.

MR DAVIDSON QC:

I think there is authority referred to here.

TIPPING J:

What you mean it's reasonable to give five minutes because if the other party has signalled they're not going to perform?

MR DAVIDSON QC:

Yes.

TIPPING J:

That sounds counter-intuitive to me. It gives you a locus paenitentia doesn't it, this –

MR DAVIDSON QC:

Yes.

ELIAS CJ:

What?

TIPPING J:

An opportunity to repent of your intransigence shall we say. It focuses the mind.

MR DAVIDSON QC:

Yes and I have to acknowledge that too and would have. There's a reason for a period of time to be assessed against the whole matrix of facts but if someone is intransigently saying I will not settle, you are completely on the wrong foot here in asking me to do so and that's maintained over a long period of time. The distinction between 12 and seven days or five working days in my submission is nugatory

TIPPING J:

It may be in fact but the crucial issue is whether the contract itself contemplates an ability to do that. That's where I think the problem lies.

MR DAVIDSON QC:

Well all I'm doing in referring to these authorities is showing some judicial exploration of when circumstances may change. Going back to clause 9 the thing that's against my proposition is there's nothing in there, there's no escape valve expression in clause 9 to say general law applies except in the body of the document at 9.4. But the other way of looking at it is to say clause 9 is something that both parties, if they choose to do it, that's a may, provides contractual certainty. No one can debate it. This is adequate notice. If you choose to go outside it, apply the general law, you're at risk of someone not just saying you can't, as here, but what you've done is unreasonable.

So taking that further and putting up the case against myself one answer could be to say, well the clause is there to prevent, not just to provide certainty but to prevent the litigation which follows from uncertainty and there's something to commend that.

TIPPING J:

Well if you look at 9.2 it talks about upon service of the settlement notice, i.e. the notice contemplated by the contract, the purchaser shall settle on or before the 12th working day so that gives them a contractual right to settle on the 12th working day.

MR DAVIDSON QC:

Yes.

TIPPING J:

Now you have to say don't you that the contract implicitly anticipates that there will be the capacity to serve some notice other than the settlement notice as specified and that's a very long step.

MR DAVIDSON QC:

Yes it is. But what it does is looked at and this is through the prism of saying this is something on which the parties can rely. This is in the contract, we can rely on this, follow these steps and you are secure and which you do. Not the same thing as saying it is all you can do. Allow certainty that does not dictate it is the essence of the submission that I make. Your Honours I can't take this point any further. It is not exactly make weight but it's very secondary to the principal point which are being considered today. Your Honour I don't have any more submissions to make unless there's a question to put to me?

ELIAS CJ:

No thank you Mr Davidson. Yes Mr Forbes.

MR FORBES QC:

If Your Honour pleases. My friend suggests Your Honours that a likely, probably, as it would have appeared to anyone exercising their rights on settlement in a case like this that one remedy might be to immediately get an injunction to freeze the proceeds of sale. It's going to be an immediate problem, isn't it, if the vendor requires the proceeds of sale to discharge a mortgage in order to give the purchaser title. They won't be there.

BLANCHARD J:

What's the basis on which you get the injunction?

TIPPING J:

What's the cause of action, exactly.

MR FORBES QC:

And –

BLANCHARD J:

You're obliged to pay the money over.

MR FORBES QC:

Exactly.

BLANCHARD J:

You'd be getting an injunction of some kind in order to stop dispersal of funds which you said you needed to have available in order to satisfy judgment you hadn't yet got for damages, quite apart from the mortgage problem.

MR FORBES QC:

Yes and at page 601 of Burrows dealing with section 8(3)(b) Your Honours of the Contractual Remedies Act the authors refer to a decision, don't unfortunately tell us the Judge, *Mayall v Weal* [1982] 2 NZLR 385, "An innocent purchaser after cancellation for misrepresentation had no right to an injunction to stop the vendor dealing with monies he had paid. Section 8(3)(b) contributed to the conclusion that the purchaser did not have any accessory proprietary interest in the money and likewise if real property was transferred after cancellation the vendor would have no equitable interest in the property to sustain a caveat." So I don't think that's in any way a solution.

BLANCHARD J:

What was the citation again?

MR FORBES QC:

Sorry Your Honour. It's in – I should – it's Mayall, M-A-Y-A-L-L and Weal W-E-A-L [1982] 2 NZLR 385. I should add the footnote 210 does compare, however, *Trustees Manchester Unity Friendly Society v First Medical Corporation*, unreported decision in May 1994 of Justice Anderson suggesting that he may have had at least some reservations about that decision.

BLANCHARD J:

What's the Burrows reference?

MR FORBES QC:

Page 601, chapter 18.3.5(b), dealing with section 8(3)(b) of the Contractual Remedies Act. Now the Contractual Remedies Act itself taking out I trust ideas being floated by Her Honour the Chief Justice does provide remedies or

relief consequent upon cancellation including that any property transferred pursuant to the contract which is the subject of the application for relief to be re-transferred. Now no issue of transferring the property back here. What a party like Property Ventures would be left with is simply no more or less than what Justice Tipping has referred to as a claim for damages.

BLANCHARD J:

Unsecured creditor.

MR FORBES QC:

Unsecured creditor and dressing it up as relief under section 9 doesn't give one iota of any security at all. It just gives you the right that the vendor in view of the non-compliance with the breach – if a warranty required under clause 6.2 is required to pay the following amount by way of compensation to the purchaser. Well in more cases than not I suggest it may not be worth it. So I will for that purpose accept that if a contract provides that your right to settle is without prejudice to your rights at law and equity you may well have a right of cancellation. But as I said before, section 3 itself says that per se cancellation only relates to any unperformed obligation, it relieves the parties of that, and it doesn't of itself divest any property, any party of any property transferred or money paid pursuant to the contract, you have to trigger the powers, the right to relief which will be a claim for damages.

TIPPING J:

One of the concerns I had was that assuming what you've just said is correct, and accepting it for present purposes, it in effect puts the purchaser in a position of having to cancel or hazard himself upon an unsecured claim for damages.

MR FORBES QC:

And that's why I said in opening in the general propositions Your Honour that effectively the purchaser is being forced to take the option of cancellation

because the other option is of no benefit to them in those cases or is likely to be.

TIPPING J:

Well it may be perceived as being too dangerous.

MR FORBES QC:

Too dangerous to, yes. But you could be wrong.

TIPPING J:

You might want the place but you're not prepared to pay over the full amount –

MR FORBES QC:

No.

TIPPING J:

– on the premise that you may never get what you need back.

MR FORBES QC:

So that is, I also endeavoured to submit, is tantamount to the vendor taking advantage of his own wrong. He could cynically say, well who cares about the building warrant of fitness, either cancel or you're going to have to settle in full. And it doesn't matter if that breach is a 5000, 50,000 or 500,000 or more. You come up with the money and then pursue your remedies if you want to. Now a cynical attitude like that could have significant practical applications for a purchaser such as, and I'm not suggesting Regalwood in this position, I'm putting it up to test the proposition of course, for a purchaser like Property Ventures.

And I would have to take issue with the suggestion again from the Chief Justice that in some shape or form your right to abatement or set-off

survives settlement. I wasn't sure if Your Honour was suggesting that, it was channelled.

ELIAS CJ:

No, well I mean I did mean, but it goes and you're cast on your other remedies. I'd accept that.

MR FORBES QC:

So settlement putting it directly is you've lost the right to abatement, you've lost the right to set-off, you've got a claim for equitable damages which is all you have and it's your money that you're seeking to recover because on that analysis you have overpaid – it compensation is subsequently awarded, you have overpaid the vendor but the contract has required you to do that and to accept the attended risks in the meantime including the risk of being able to secure recovery.

Now clause 6.5 in my submission does not need to be read that those rights are eliminated and that the only option that you've got prior to settlement is cancellation. Which I again say internally creates a semantic and grammatical inconsistency because on the one hand on the argument for Regalwood you must settle but then the clause specifically allows you to exercise at least one option where you don't have to settle. It does defer the option to settle. If you cancel it defers it permanently.

TIPPING J:

The word "defer" may be quite significantly chosen here because it seems to me to be directed at time and far be it from me, maybe at the sort of fork in the road point, whereby you can't just sit on your hands and that I think perhaps is consistent with what you're suggesting. The word "defer" perhaps has some significance in the mix here.

MR FORBES QC:

Well I think you interpret it in a sense depending on where your starting point is. Is this likely to have been intended to be the consequence in a way you

can mildly cause to fit the result that you want to achieve or you think must have been intended because on each side there are improbabilities that strike you as being a little unusual. But I submit that those improbabilities weigh fairly heavily in my favour, my client's favour.

There are in fact, another point that's arisen in my friend's submissions is, there are in fact a number of clauses in this agreement that are not strictly necessary but are there to, if you like, record what the legal position is and could I refer you to, for instance, clause 3.5 and these are relatively random examples. The purchaser shall prepare the transfer and execute it if necessary and tender it. Now there was authority that's the purchaser's obligation anyway. 3.6, vendor to prepare a statement of apportionment showing outgoings, likewise. 3.7, on settlement date the purchaser shall pay the purchase price. Well he's got that obligation anyway but that's the point I'm endeavouring to make. That in some respects this agreement intended to be self-contained. You don't have to look outside it. That your rights and obligations are spelled out at the risk of merely repeating what the legal position is.

6.4 provides another example that you warrant, that outstanding charges will be paid and pay the amounts of the outstanding charge. Now it doesn't really have to say that because when the purchaser takes over that contract the purchaser's contract with the appropriate supplier will be a new contract. He's not responsible for past amounts anyway but again it's, if you like it's a checklist. The parties can look at the contract by and large and say well this sets it all out and those notes, explanatory notes on the cover page likewise tell you these are the various things that you're going to have to check off in terms of this agreement to ensure that you comply with it.

8.7(2), but the parties for whose benefit a condition has been inserted must deal with all things that may reasonably be necessary to enable the condition to be fulfilled by the date of fulfilment. There is a lot of authority to say that that's the very obligation you've got anyway. That the drafters have chosen to put it in so that parties know and you don't have to look outside the

agreement. So clause 6.5 particularly if the drafter statements that we weren't intending to change the law here and we were intending to reinforce *Lingens* is to be taken account of at all, the clause 6.5 can then be read in that light. No change to the law was intended. It was intended to reinforce *Lingens*.

Another point that arose I think through again, from under the Chief Justice, 3.7 and Justice Tipping touched on this as well, refers to what's required to be done on settlement with credits to be given in terms of clause 3.9 and 3.10 suggesting that that's the only credits that settlement was intended to allow for. Well with respect that can't be right because clause 5.4 itself allows for compensation in a case where you clearly are within a misdescription category. So that clause can't be exclusive as to the credits that maybe required to be given on settlement.

And another, and I submit this again an important point in terms of my friend saying that the contract, or submitting that the contract intended to cover all situations. Under clause 9.1 a notice, a settlement notice will only be effective, this is 9.1 – sorry, 9.1(2). Only be effective if the party serving it at the time of service is either in all material respects is ready willing and able to proceed in accordance with the notice or if not so is only not able to do so because of the default or omission of the other party. That, and McMorland in Dr McMorland's text deals with materiality at page 402. Indeed the usual test for materiality is would something that – something had been material if it gave the other party the right to cancel so it's got to be a reasonably serious breach. So minor matters, de minimus, it is not a ground for the purchaser to refuse to settle because he knows there's outstanding rates of $500. That is not a material default. So that overcomes those run of the mill type excuses that a purchaser might try to put up. All together different when the non-compliance is of the nature and extent that Regalwood was contending for against – sorry, was a history soon to be guilty of.

ELIAS CJ:

Sorry what's the reference to materiality that you're invoking here?

MR FORBES QC:

Well I'm replying to my friend's submission Your Honour that the contract is intended to cover all situations and in other situations the extent of the breach by the vendor may be relatively minor.

ELIAS CJ:

But you're not trying to suggest that clause 6 relates only to materiality

TIPPING J:

No the reference was to 9.1(2).

ELIAS CJ:

Sorry that's what I was –

TIPPING J:

Which means that you are ready willing and able if –

ELIAS CJ:

Sorry, that's what I was after, yes.

MR FORBES QC:

If it's immaterial you can still go without a settlement notice and materiality has got quite a significant connotation. As I said the usual test is seen as would it justify the purchaser in cancelling.

TIPPING J:

Has it gone that far now?

MR FORBES QC:

Well that's what Dr –

BLANCHARD J:

I'd be a bit surprised about that.

TIPPING J:

Well anyway we don't –

MR FORBES QC:

Well I thought –

BLANCHARD J:

Because otherwise a purchaser could give a notice even if the purchaser was a few hundred or a few thousand dollars perhaps short of the purchase price.

MR FORBES QC:

Well I just, I didn't - if the default, this is at page 402 of Dr McMorland's text, the default by the giver of the notice does not give the other a right of cancellation. The other must proceed with the bargain and rely upon their remedy in damages. But I may have overstated it as to the –

TIPPING J:

You may have got it slightly out of context, with respect.

MR FORBES QC:

Yes. The test of all material respects may not be as high as that. I don't think that detracts from the point I'm endeavouring to make, I've just put it too high. I also just wanted to bring home, neither *Holmes v Booth* or *Lingens v Martin* were really cases that were concerned with the equitable principles of abatement, not referred to in *Holmes v Booth*, the case was dealt with in the context of the compensation clause. *Lingens v Martin*, the equitable document of abatement is referred to by Justice McKay, if you like, through the eyes of Justice Higgins in *King v Poggioli* but the judgment then goes again to deal with it in the context of the compensation clause.

The issue that's before Your Honours in this case, what are the rights of a purchaser who relies, or seeks to rely, on those principles independently of the compensation clause, 5.4 and indeed, at least provisionally suggesting

that I have to be in that position, that's a different proposition to what was before the Court in either of those cases. Neither decision really explores the nature and extent of the right to abatement or set-off and, of course, neither case had a clause 6.5 before them.

My next point was that and Justice Tipping at least touched on the same point at one point of my friend's submissions, "Breach of any warranty or undertaking complaint in this clause, does not defer the obligation to settle." Where does that leave a breach of 6.1 which is a warranty given but at the date of this agreement the vendor has not. Now assuming, just assuming and it's not an untenable submission in my respect, that such a breach under clause 6.1 that is, "That there is an outstanding requisition imposed by the local authority or under the Resource Management Act or given by a tenant, constitutes a misdescription of the property." Are you entitled to rely on clause 5.4 or are you not, when the clause says, "Breach of any warranty does not defer the obligation to settle"? Have you still got the right of cancellation, or does 5.4 take it away and say that it doesn't annul the sale but compensation must be given?

There will be a point, I accept, where the breach is of such an extent that in terms of *Bain v Foggerhill* I think have called –

BLANCHARD J:

I hope not. That's been got rid of.

MR FORBES QC:

In the Property Law Act Sir?

TIPPING J:

Flight v Booth.

BLANCHARD J:

It was got rid of during the 1990s in the Property Law Act. It's gone.

TIPPING J:

I think you're referring to *Flight v Booth.*

BLANCHARD J:

Flight v Booth probably.

MR FORBES QC:

Oh it's *Flight v Booth*, sorry, yes, sorry, you're quite right, *Flight v Booth*. It's of such a nature that irrespective you can cancel for a significant breach but it again indicates that clause 6.5 has a tension if even a warranty given at the date of the agreement falls to be considered only under clause 6.5. Where does it stand with clause 5.4? I would submit, that if it's a misdescription, 5.4 must still be available.

TIPPING J:

So you're saying that 6.1 breaches could be coextensive with misdescriptions?

MR FORBES QC:

Yes, it doesn't help me I know.

TIPPING J:

No.

MR FORBES QC:

The idea that the two are mutually exclusive gives rise to pause for thought. Finally, my friend and I will only mention very briefly, apart from Justice Walton said about the proposition that a fresh notice did not have to comply with a contractual requirement, at least in England, in *Dimsdale*, in fact when you read the decision – sorry, I'll just make sure I've got that right reference. It's *Tabbouch* sorry, what was that authority, the New South Wales Court of Appeal. When you read through it, in fact it's not clear where Justice Einstein stands on the issue of whether the fresh notice can be less than the contractual. He says, at page 374 –

ELIAS CJ:

Sorry, I have lost the place.

MR FORBES QC:

Sorry, it's tab 7, it's *Tabbouch v Devlin*, the 2008 decision of the, it's not the Court of Appeal, it's Justice Einstein in the Supreme Court, New South Wales. At page 374 of the report, at paragraph 35, "Theoretically, of course, a special condition, that is setting the 14 days, although obviously likely intended by the parties to be utilised was not an exclusive method of binding either party in terms of the perceived otherwise entitlement to give a notice to complete." Then compares it with a decision, not clear whether he's saying that *Byrne* might be the other way or supports, but in this case the circumstances would not have justified the giving of any notice to complete, reached the limit of time left and that was required by the special condition and then goes over on the next page, the left-hand column and mine hasn't got a number on it, quite clear that would be 375, at paragraph 50, he's referring to a decision of Justice McLelland in *Hazelton Proprietary v Woodfield*, where he said and I'm reading at 50 from Justice Einstein's judgment, towards the end, "In other words, citing Justice McClelland, I think it is implicit in this provision that a notice to complete in the circumstances postulated must allow a period of completion of not less than 14 days" and he's talking about a fresh notice.

So it's, if you like, not a strong authority for the notion that a second notice is not governed exclusively by the contractual provisions but can in fact take the benefit for relying on a shorter period from the general law. Those are the points in reply Your Honour.

ELIAS CJ:

Thank you very much Mr Forbes. Thank you counsel. We'll reserve our decision in this matter. Thank you for the argument.

COURT ADJOURNS: 3.17 PM