IN THE SUPREME COURT OF NEW ZEALAND SC 5/2013

[2013] NZSC Trans 10

BETWEEN **PLANET KIDS LIMITED**

Appellant

AND **AUCKLAND COUNCIL**

Respondent

Hearing: 27 June 2013

Court: Elias CJ
McGrath J
William Young J
Glazebrook J
Gault J

Appearances: G P Blanchard and J P Nolen for the Appellant
J A Farmer QC and L A O'Gorman for the Respondent

CIVIL APPEAL

MR BLANCHARD:

May it please the Court. Blanchard for the appellant and I appear with Mr Nolen.

ELIAS CJ:

Thank you Mr Blanchard, Mr Nolen.

MR FARMER QC:

If the Court pleases I appear with my learned friend Ms O'Gorman for the respondent.

ELIAS CJ:

Thank you Mr Farmer, Ms O'Gorman. Yes Mr Blanchard?

MR BLANCHARD:

As the facts are not in dispute, unless the Court has any particular questions about the facts I propose to go straight to the law.

ELIAS CJ:

The only question I have about the facts is, there's an indication in the affidavits that there was a settlement statement provided by Planet Kids at one stage. Was that ever followed through on?

MR BLANCHARD:

I don't know. I'm not aware of –

ELIAS CJ:

Well, it's not anything that the parties are using at all –

MR BLANCHARD:

No.

ELIAS CJ:

– so it's probably irrelevant to the argument that you're advancing, but I just wondered whether there had been an attempt to tender performance or part performance. I can't, standing here now, her answer that but I'll ask Mr Nolan to have a look at it and come back to you later on this morning.

MR BLANCHARD:

So I'll move to paragraph 31 of my submissions, and I think what I say in the, in the section under the heading, "Fundamental or radical change test" is really not in dispute. I think both parties see the, the test as laid out by Lord Radcliffe and Lord Reid in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) in a similar way. And it's, it's a well-known test for – of course the most well-known and most used test for frustration.

I should mention that paragraph 35, that Professor McLauchlan's article now has been published online. It was unpublished at the time we sought leave. It's now online, I believe.

And of course the radical change test has been applied in New Zealand by the Court of Appeal in the *Powerco* case and referred to by two members of this Court under *Dysart Timbers Limited v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160.

The next part of my submissions deal with the point that frustration has a high threshold. I think this is an important point and I guess I have a sense about this case that it's almost, it almost seems back to front. In a normal frustration case the party relying on frustration has to make the running; the party that's resisting frustration generally has, has the easier ride, and normally the party who, who is alleging frustration has a hard time convincing the Court that frustration has arisen and even when there are quite, very serious consequences for that party often frustration doesn't come into play.

McGRATH J:
The reason that is the norm, I suppose, is it is that party that is usually suffering the hardship, the party that is alleging frustration.

MR BLANCHARD:
That's right. And, and normally hardship is, it's almost a given. Later in my submissions I refer to the words of Lord Radcliffe in the *Davis Contractors* case and it's implicit in those words that he's taking, His Lordship is taking hardship as a given, and – but, but what I'm saying is you've got to go – what I'm clearly saying in my submissions is you've got to go a lot further than hardship. But it's a strange thing about this case and when people come to look at it they seem to almost see it the wrong way round and it's, it feels as if my clients have to make the running, whereas of course in a frustration case it should be the other way around. And I've thought about that might be the case and I think it's because the, the fact that my client can't provide the surrender tends to make you think in terms of perhaps the Contractual Remedies Act 1979 and, and contracts coming to an end because something that seems to be significant, at least in, on one level, can't be provided. So I think our – your, your instinctive – some people's instinctive starting point with this case is to think about, well, the fact that the surrender can't be provided and that, it, and that leads to think, well, this contract should come to an end unless something comes in to stop it. But –

ELIAS CJ:

Can I ask you, because you mentioned the Contractual Remedies Act, whether you have given any consideration to the relationship between the doctrine of frustration in New Zealand law and the Contractual Remedies Act?

MR BLANCHARD:
Absolutely. I have and I'll, and I – there are two points really. The first is the point that I'm making that, that this is not a case where the Council's relying on the Contractual Remedies Act and, and attempting to cancel the contract, and I say they can't cancel the contract because there's been no breach. My client has, has, has been relieved of the need to perform the contract and the Council's not in a position to receive performance and so there's no question of the Contractual Remedies Act applying.

Secondly, one of the criticisms of my approach is that I focus on the benefit and the burden and the, and I, and I say, look, when you're trying to apply the fundamental and radical change test you don't want to do it in a vacuum, you don't want to do it in a sort of a technical way. You need to look at the consequences on the parties. And one of the criticisms of my approach from, from the Council's point of view is they say, well, that my benefit/burden analysis is dangerous because it's not, not the way should, things should be done in the frustration world. Well I say, well look at the Contractual Mistakes Act 1977, look at the Contractual Remedies Act. We have an approach based on benefit and burden that seems to work well in practice and doesn't create great big problems.

ELIAS CJ:
Can I just ask you, you say that counsel could not have cancelled the contract because there was no breach, but what about the prospect of – or the – it being clear that a term would be broken under section 7(3) of the Contractual Remedies Act?

MR BLANCHARD:
Well, I guess you have to look at what these breaches are, and if you break it down the breaches could be the destruction of the chattels and the plant meant that my client couldn't provide the chattels and the plant, so I say that was an essential. The Council didn't really want that stuff. That's a damages issue. We're giving a credit for those in our claim. We've provided them with the value of those amounts by deducting them from our claim, so then you look at the surrender of the lease and

you say, well, the first question, is there a breach, because the Act doesn't claim into play unless there's a breach and I say there's no breach here.

ELIAS CJ:
Well, won't – isn't it clear that a term in the contract will be broken because you can't provide the lease?

MR BLANCHARD:
But the Council's not in a position to receive performance. It has the lease and so I don't think my client is in breach.

GLAZEBROOK J:
Well, they can't provide the document or any meaningful document, but you say they have provided the state, effectively, it's been provided by operation of the lease itself. Is that the argument?

MR BLANCHARD:
Absolutely. It's been provided. It's a very strange case. There's no other case like it where the alleged event has actually achieved performance of the contract. There's another point that I can make here, and that is that in these situations where you have an interest in land being transferred, the normal position is that when the agreement's signed, the equitable title passes to the purchaser. So I submit that in this case as soon as the contract was signed the Council had a right to specific performance. It had a right to an equitable injunction stopping my client from dealing with the interest that it was taking. So therefore the equitable title to the lease had actually passed to the Council before the frustrating event occurred and my understanding of the law in this area is that once equal title is passed the vendor is effectively treated as a constructive trustee and so, for example, the constructive trustee position that the vendor has means that there's a duty on the vendor to maintain the property pending sale. So one of the –

WILLIAM YOUNG J:
That can't be right, that there's a duty on the vendor to maintain the property. What do you mean by that?

MR BLANCHARD:
Well, I've taken it from Dominic Moreland's book, *Sale of Land* in chapter 10.

WILLIAM YOUNG J:

A duty to who?

MR BLANCHARD:

To the purchaser.

WILLIAM YOUNG J:

Oh, I see. I understand.

McGRATH J:

The proposition that equitable title passes before the event occurs, could you just develop – is that in your submissions?

MR BLANCHARD:

It's not something – it's something that occurred to me when I was thinking about the Council's submissions and I read chapter 10 of –

McGRATH J:

That's all right, but you could tell me, be a bit more precise what it is that caused equitable title to pass?

MR BLANCHARD:

Well, it's well-accepted in conveyancing law that when you have an agreement to purchase an interest in land that if the purchaser has a right of specific performance that's an equitable right, and if they also have – they will also have the right to an equitable injunction. Those equitable rights together make them the legal owner, the beneficial owner of the property.

McGRATH J:

So the equitable right that arose on execution of the contract is what you're talking about?

MR BLANCHARD:

That's right. The part that – I'm looking at the latest edition of *Sale of Land*, third edition, 2011.

ELIAS CJ:
What's the context of that discussion?

MR BLANCHARD:
It's a chapter on the position pending completion, pending settlement.

ELIAS CJ:
And what's – is it to do with risk?

GLAZEBROOK J:
Well, I think normally risk passes to the vendor, doesn't it, which is why you put in those clauses saying that it doesn't?

MR BLANCHARD:
Absolutely, clause 8.

GLAZEBROOK J:
Yes, because those are standard clauses in conveyancing contracts for the very reason that – I forgot to look it up, but I think otherwise risk passes because the equitable interest in the land has passed, although this itself is not a registered interest, not a registered lease, is it?

MR BLANCHARD:
No, no. Here there's a separation of the equitable interest and the risk because the contract under clause 8 provides that risk passes on settlement, whereas the equitable title, the ownership interest, passes prior to settlement. And I'll come to it, but the Council relies on clause 8 to suggest that the risk somehow lies on my party. In my submission, that can't be correct. What clause 8 is actually intended to achieve is that if something happens to the assets prior to settlement the purchaser can rely on the contract. It's not supposed to bring the contract to an end. But that's an aside.

ELIAS CJ:

I'm just trying to work out where your submission goes. It doesn't go as far as saying that there was no need to perform in the way stipulated in the contract by surrendering the lease because the Council already had the lease. You're not going that far, are you?

MR BLANCHARD:

No, I'm not going that far. What I'm saying is that we're trying to work out whether there's been a fundamental or radical change. Surely something that's relevant is that actually beneficially and equitably the Council already had this leasehold interest and that all that was going to happen on settlement is that the legal title was going to pass. It's something that has to go into the mix because you'll see from my submissions I'm saying the Court should take a multi-factorial approach and stand back and look at everything and to make a determination whether frustration has occurred, and I'm saying that this is part of the mix that the Court should take into account.

GLAZEBROOK J:

The legal title would merge into the freehold, though, wouldn't it, strictly?

MR BLANCHARD:

Yes. The Council –

GLAZEBROOK J:

Although you can lease to yourself, I think.

MR BLANCHARD:

They could have taken the leasehold interest and then merged them together themselves but they chose to do it this way. As an aside, one of the criticisms of my case from the Council is that you need to keep the Council's two roles separate. The role is the taking authority and the role is the leaseholder, the freeholder. In my submission, the Council themselves haven't kept the two roles distinct because of structuring it as a surrender of lease. But where I'd got to was that I was saying that I think this case is back-to-front, and I think there's a tendency to look at it the wrong way round. This is not a breach of – this is not a case where my client is in breach such that the Council can cancel under the Contractual Remedies Act. This is a

frustration case and the Council has to make the running, not my client. The Council has to persuade – it has the onus of proof and it's a heavy onus in frustration cases.

ELIAS CJ:

Well, I'd just like to flag, and you don't need to deal with it now, that I still have a query about the ability of the Council to have invoked section 7(3)(c) of the Contractual Remedies Act. But certainly in their early text on the Act, McLauchlan and Dawson said that that language would seem apt to cover impossibility as well as prospective willed breach, and so I am interested in this relationship between the Contractual Remedies Act and the doctrine of frustration in New Zealand law. Maybe there's a ready answer to it. But I'm not so sure why you are so resistant to application of the Contractual Remedies Act in this case because one would have thought that that is a portal which gives you the ability to get more discretionary relief.

MR BLANCHARD:

Yes, yes.

GLAZEBROOK J:

Can I also raise an issue that's been concerning me in that it seems to me that – and it probably arises from your submission that you actually need a detriment, effectively, because in this case it seems to me that the party that would normally have been the party wanting to argue frustration, say in a case where it wasn't a circumstance that you landed up with it going to the landlord, effectively, was the party who actually couldn't perform the obligation that was under the contract, i.e. to provide the surrender of lease, and in fact the other party would normally be able to cancel the contract for that and the reason you have frustration is that you can get around all of those difficulties of cancelling contracts and the damages that might arise in respect of losses from that. So in fact it's the party, in terms of frustration, it's the party who has suffered the detriment that can argue frustration. The other side either cancels under the Contractual Remedies Act or under a construction of the contract and if you read the submissions of the respondent they are arguing that there's a construction of the contract that says, possibly, that in fact if you're not getting a Public Works Act interest, then you're not actually getting, under the contract itself, there's no obligation to pay.

MR BLANCHARD:

Yes, well I –

GLAZEBROOK J:
But so that the Contractual Remedies Act is for the party who has suffered a breach by the other party. Frustration, if the Chief Justice's analysis doesn't work in respect it is only for the person who can't perform.

MR BLANCHARD:
Yes, well that's right, that's why to me this case is back to front, I can't, it seems strange that the Council's relying on frustration.

McGRATH J:
Isn't the, this is your claim, isn't it, your summary judgment –

MR BLANCHARD:
Yes.

McGRATH J:
– application, you're saying the contract was not frustrated?

MR BLANCHARD:
Well, the defence to the summary judgment claim was that it was frustrated. We sought summary judgment and the Council said, "You can't have summary judgment because the contract's been frustrated".

McGRATH J:
So you're saying it's the, okay, so you're saying the issue has been raised and the initiator and pursuer of it is the Council, right, I understand that.

MR BLANCHARD:
Well we have to, well the, of course the High Court and the Court of Appeal have accepted the contract was frustrated and we've argued that it's not and –

McGRATH J:
Yes, I see the basis of your claim is this is a simple –

MR BLANCHARD:

Yes.

McGRATH J:

– claim to enforce a contract –

MR BLANCHARD:

Yes.

McGRATH J:

– and you've put it on them to come up with their defences and the one they have come up with is frustration?

MR BLANCHARD:

Yes, and I say this is not a frustration case and nothing else has been pleaded –

McGRATH J:

No, that's clear enough, yes.

MR BLANCHARD:

– and that were argued. I mean it appears from the first time from reading the Council's submissions that they might be planning on going back to the High Court and arguing the Contractual Remedies Act now. So perhaps if I go back to the Chief Justice's point, I accept certainly that a possibility can lead to cancellation under the Contractual Remedies Act but I say this is not an impossibility case because in a normal impossibility case, the party that's cancelling or wants to cancel is sitting there waiting for performance, they're saying, "Hey, I'm ready, I'm ready to receive what I'm entitled to under the contract".

Here the Council's not in that position, it's received what it wanted under the contract, so it's not in a position to say that Planet Kids is in breach and Planet Kids hasn't performed. It's in the same strange position that Planet Kids is in. The supervening event has taken away Planet Kids' ability to perform but it has simultaneously taken away the Council's ability to receive performance.

So the cases that Professors Dawson and McLauchlan were talking about were ones where the party wanting to cancel is sitting waiting for performance, it's not that case

here. So I say that neither the Contractual Remedies Act nor frustration apply and of course if we ended up in a situation where frustration didn't apply but this Court thought or a Court thought that perhaps the High Court, if we went back to the High Court, thought that it was a Contractual Remedies case then I would certainly be looking at relief under section 9 but say I don't have to do that because it's not actually a case where my client's in breach.

WILLIAM YOUNG J:
Well, the statement of claim's a bit odd because it actually should be a proceedings for specific performance, shouldn't it? Whereas it's simply a claim for a declaration and a money judgment?

MR BLANCHARD:
Yes.

WILLIAM YOUNG J:
And the question which has sort of gone through my mind since the application of leave was dealt with is whether you could obtain specific performance. Is your client ready, willing and able to settle? And that turns really on the significance or otherwise of the inability to provide a surrender of the lease.

MR BLANCHARD:
Yes.

WILLIAM YOUNG J:
What would've happened if the property had been owned by a third party and the Council acquired, entered into two agreements, one to acquire a surrender of the lease from your client, and secondly an agreement to acquire the property for the residual value of the property from the third party. Would you have been able to get, would you –

MR BLANCHARD:
Well I say that's a very different case, it's a hypothetical that's not this case and we don't need to concern ourselves with it, it's –

WILLIAM YOUNG J:

Well, it might indicate, give at least some insight into whether the inability to surrender the lease is of any significance.

MR BLANCHARD:

My approach to that Your Honour is that you, in a frustration case it comes back to the multi-factorial approach, you need to look at the case as a whole and you don't get into technicalities, if I can put it that way, and my submission will be a mistake to look at another case which has quite different facts. I mean that, the hypothetical you're putting to me is quite a different situation to the one we have here.

GLAZEBROOK J:

It might be helpful to you, mightn't it, because in that case the argument would be can the Council cancel and effectively only pay the residual value of the land from the landlord?

MR BLANCHARD:

It might be helpful, it might be, but in my submissions, my primary submissions it's not this case, and we should focus on this case.

McGRATH J:

What you're saying is that frustration always involves an inquiry into the particular circumstances to decide whether or not in those circumstances it's just that the contract be frustrated.

MR BLANCHARD:

Yes.

McGRATH J:

So don't go and change the circumstances to have another owner of the land, or something of that –

MR BLANCHARD:

That's right, and also one has to be careful with hypotheticals, because the hypothetical is, involves something that makes the hypothetical quite different to the actual case, then the hypothetical may not be that, may not be –

WILLIAM YOUNG J:

What it really highlights is the reality that the strange feature of this case, the standout feature of the case is the double role of the Council.

MR BLANCHARD:
That's right, the strange quirk of this case is that there's, like the way I put it in my submissions is that the supervening event actually achieved the purpose of the contract rather than thwarted it and that's one of the primary reasons why I say this is not a frustration case, because the very word frustration, it's about, it's frustrating the objectives of the contract and we don't have that here. The supervening event actually achieved the contract's object to the extent that it was to provide and surrender the lease and I say that, and I'll come to it, but I say the surrender of the lease was clearly significant but there was more to this agreement than just surrender of the lease.

ELIAS CJ:
On the other hand, the, well the agreement, I'm just wondering about the Council's ability to make the payment in terms of the Public Works Act, whether from the Council's point of view it lacks authority to make a payment like this unless it's under, in settlement of a Public Works Act claim.

MR BLANCHARD:
Well I suppose the first thing is that the Council's, reading the Council's submissions you sometimes get the impression that this land has been taken under the Public Works Act whereas in fact it's been purchased under, the interest has been purchased under an agreement, effectively. So we're in contract law rather than Public Works Act territory. Perhaps it's worth, be useful to look at the Public Works Act, in particular section 17, which is in the respondent's bundle at tab 2.

So section 17 is the first provision in a section of, or a part of the Act dealing with acquisition by agreement that goes through until section 22 and the heading is "Acquisition by agreement" and if you, but if you look at the terminology used in the section it's talking, the rest of the act talks about acquired or taken. Section 17 uses, section 17(1) uses the word "purchase" section 17(2) uses the word "sell" and section 17 subsection (7) uses, again, talks about agreement to sell. What we have here is it's an agreement that's made under section 17 and in my submission it's not a, this is not a taking or acquiring under the Public Works Act. We're in a situation where

the Council's entered into an agreement under section 17 and whether that contract is enforceable is governed by contract law rather than by Public Works Act

ELIAS CJ:
This does make it, though, an agreement to purchase land, puts it all on that. I'm just wondering whether you really, whether it helps your case if you rely on this as the source of the Council's authority. But it may be that that's a matter we should just raise with Mr Farmer.

GLAZEBROOK J:
Well Councils now don't have limited authority, they have all authority, so we're no longer into limited authority of Councils to legislation, so that may or may not be significant.

MR BLANCHARD:
Well I suppose the –

GLAZEBROOK J:
Because as I read the respondent's argument, it seems to be an argument on the construction of a particular settlement agreement.

MR BLANCHARD:
Yes.

GLAZEBROOK J:
The reference is in that to the Public Works Act.

MR BLANCHARD:
Yes. Well, I've got my own interpretation. Perhaps I can – I should take you to the agreement and give you my interpretation of those clauses, but I suppose I – the Council's submission is, seems to be submitting that this is a taking or acquisition under the Act, whereas to my mind this is a contract situation.

McGRATH J:
Exercising a power specifically conferred by the Act.

MR BLANCHARD:

Yes.

McGRATH J:

But nevertheless a contract?

MR BLANCHARD:

Yes, and there don't seem to be any particular restrictions on that power in the Act.

ELIAS CJ:

But it's acquisition of land. It places it all on whether you are able to deliver up an interest in land, whereas the form of the contract might not be so stark.

MR BLANCHARD:

That's right. Perhaps we should go to the contract because the Council says, well, this is all about surrender of the lease. Well, actually, if you look at the contract and you look at the provisions of the Act it's not all about surrender of the lease. It's much more to it than that.

ELIAS CJ:

Well, in fact, the lease is quite a minor part of it, isn't it?

MR BLANCHARD:

Certainly that's my impression and I base that firstly on paragraph 3 of the recitals.

McGRATH J:

I'm following it electronically and I need a little more time.

MR BLANCHARD:

Yes, I apologise. So the Chief Justice was asking me about the connection between the Act and the contract.

ELIAS CJ:

No, I think he's much more prosaic.

McGRATH J:

I want to know where the lease is, in the bundle.

MR BLANCHARD:

Page 61.

So I think the key provisions are paragraph 3 of the recitals and clause 1 of the agreement. There's no mention of surrender of the lease on those sections. These are the parts of the agreement that refer to the Public Works Act. You'll see that what – first of all, dealing with paragraph 3 of the background, the focus there is on the closing of the business and the loss of goodwill arising from closing of the business, not on the taking of the land. And we see the same thing if we go to clause 1, that the conversation is being paid for settlement of the claim under the Public Works Act and for the undertaking of works by the Council and for closure of the lessee's business. If we look at clause 1A, the compensation is being paid under s 68(1)(b) of the Public Works Act, and if we could look at that section of the Act as well –

GLAZEBROOK J:

It is settlement as claim for compensation because I understand that it doesn't seem to refer to the Environment Court challenge because it was – presumably that was withdrawn.

MR BLANCHARD:

Yes.

GLAZEBROOK J:

Because that was a challenge to the taking and the necessity altogether, wasn't it?

MR BLANCHARD:

That's right.

GLAZEBROOK J:

And presumably as a result of this it was withdrawn, even though it was not specifically referred to?

MR BLANCHARD:

That's right. Yes, yes. And if we look at s 68, s 68 can only apply if the party from whom the Council is proposing to take the land has – if the land owner has been notified. That's in s 68(2)(b). But the point I was wanting to make is that s 68 is not the section that is used to give compensation for taking of land. There are other provisions in this part of the Act that deal with compensation for the taking of land. Sections 60 and 62 are two of the key provisions.

This s 68 comes into play when you have someone who has land and they also have a business on the land, and s 68 relates to compensation for the taking of the business, for the closing down of the business and the taking away of the goodwill, so on the face of this agreement the land is not what's being ascribed the value here. The value is to receive under the agreement is for the taking of the goodwill and the closing of the business. That's what the section says. So it does seem to diminish the importance of the taking of the land.

McGRATH J:
Except that the – if it's settlement you have no goodwill in the business because it's been destroyed by the loss of the lease, effectively, or by the fire and the loss of the lease. That, perhaps, is the event we should be focusing on, not so much whether there's an obligation to transfer which you can't beat, but whether in fact you have a goodwill in a business at all to be compensated under the agreement.

MR BLANCHARD:
Well, bear in mind that my client gave a – the Planet Kids and its directors gave a restraint of trade, and that's – if you look at s 68(1)(b)(ii) it's a requirement of the Act that if compensation is to be paid for loss of goodwill, a restraint of trade must be given. My clients gave that and the event didn't take away their ability to give a restraint of trade. They can't set up another business in the same locality because of the restraint of trade, and so the goodwill was still taken from them, notwithstanding this event.

ELIAS CJ:
But if the contract is frustrated, that's off. They can open up again, so I'm not sure that that's your best point. I would have thought that the area where there is room for concern is that in – following this agreement Planet Kids actually destroyed its

goodwill. It told its parents, it told its staff, in the expectation that it was going to receive a payment in compensation for closing down the business. That's the area that leaves me some concern.

MR BLANCHARD:

Absolutely. Well, both parties have relied heavily on this agreement and both parties took steps, important steps in reliance on it. My client sent out a letter or notified parents and staff that they wouldn't be needed and started the business of closing its business down. It's obviously affected its insurance. Equally the Council on that side, it took major steps based on this agreement. It let its $20 million tender and you will have seen from my factorial summary that there was correspondence indicating that this, that Planet Kids was the last obstacle to the Council being able to let its tender and get on with the job here and it was able, in reliance on this agreement, to let the tender and to proceed, so both parties rely heavily on this agreement, and in my submission that's a very important part of the multi-factorial approach.

WILLIAM YOUNG J:

Can I just ask a question on a point I don't fully understand? It's at page 62 of the case. What's the reference in clause 2 to GST referable to, GST will be payable on production of a valid tax invoice delivered to the Council.

ELIAS CJ:

Was that on the rent that they haven't paid which was forgiven?

GLAZEBROOK J:

Isn't that just a timing point, that you had to pay the GST up front if you have an unconditional contract? Is that the issue?

MR BLANCHARD:

I must confess, I've never focused on the GST. I couldn't –

WILLIAM YOUNG J:

So presumably it's GST payable by Planet Kids on the sale of the –

ELIAS CJ:

There's some reference to it in the evidence I've read or decisions.

MR BLANCHARD:
Whoever drafted the agreement must have thought that was GST or there could be GST payable.

ELIAS CJ:
The contract, it seemed to me, was for closure of the business and settlement of the rent dispute and full payment of rent until December.

MR BLANCHARD:
Yes.

ELIAS CJ:
Those are the principal things covered by it, aren't they?

MR BLANCHARD:
Yes, well, of course, the surrender of lease comes in in clause 3A but it's not the, it doesn't seem to be the main focus of the agreement, if we look at the clauses that I've taken you to. But I see also, you'll see also that in clause B the restraint of trade is given, is also features there in clause 3 and we see this restraint of trade which has actually been signed by my client and provided if we go to page 66 in the bundle.

ELIAS CJ:
It's a shame we don't have the settlement statement that's referred to in the documents, because it would be interesting to know how this was fronted up to, not having the validly executed surrender of the lease. Or maybe they did tender one?

MR BLANCHARD:
Yes, I was, I became involved at the Court of Appeal stage and I, my knowledge of the facts is based on what's in the bundle, it's not something, unfortunately it's not something I have thought of.

ELIAS CJ:
No, that's fine.

GAULT J:

What do you say is the main focus of the agreement?

MR BLANCHARD:

Well it's, well, we start off with clause 1 of the agreement, it refers to section 68, section 68's about payment for goodwill for the taking of a, or for the closure of a business caused by the taking of the land, so all of the compensation's been paid for closing the business, so in my submission the main focus, on the face of the agreement is closure of the business. And the surrender of the lease seems to be a less important part of it. It clearly is part of it, I can't say that the surrender of lease is not part of the agreement. There needed to be a surrender of the lease but the focus seems to be on closing the business.

GAULT J:

From the Council's point of view, a very significant focus must have been the surrender of the lease.

MR BLANCHARD:

Yes, well absolutely, it was part of what the agreement was intended to achieve, but I suppose this is a, what I say in my submissions is that in a frustration case you can have, in a frustration of purpose case, which I say this is, you can have quite a lot of the benefit of an agreement taken away by the supervening event and still not have frustration, provided there are other things in the agreement which the Council are still able to achieve then the contract's not frustrated.

GLAZEBROOK J:

The lease, presumably, wasn't worth much anyway if a market rent was being paid?

MR BLANCHARD:

That's right –

GLAZEBROOK J:

So the whole of the value would be the value of the business?

MR BLANCHARD:

That's right.

ELIAS CJ:

So that if you were into Contractual Remedies Act remedies, the Planet Kids might not be so disadvantaged?

MR BLANCHARD:

Yes, yes, that's certainly the, if we ended up back in the High Court arguing about the Contractual Remedies Act that would certainly be an important part of our argument.

WILLIAM YOUNG J:

Something that, I don't know if you can help me on this, in terms, the issue of ability to perform in a specific performance case tends to be captured by the phrase "Ready willing and able to settle". And there's quite a jurisprudence as to the circumstances in which a vendor unable to provide everything that's due under a contract can nonetheless insist on specific performance with abatement of the price –

MR BLANCHARD:

Yes.

WILLIAM YOUNG J:

– compensation. And then sitting beside that, and perhaps entirely overtaking it, well I'm not sure is the Contractual Remedies Act or is there are a carve out for specific performance?

MR BLANCHARD:

Specific performance is governed by equity, I think it's not covered by the Act, the Act deals with cancellation –

WILLIAM YOUNG J:

But the –

MR BLANCHARD:

They sit side by side.

WILLIAM YOUNG J:

Well they certainly seem to sit side by side because ready, willing and able to settle is sort of broadly equivalent to the position of a party who's in some but not major breach of a contract under the Contractual Remedies Act.

MR BLANCHARD:

Yes.

WILLIAM YOUNG J:

But this case has never really been looked at in terms of whether you could have obtained specific performance possibly because that wasn't –

MR BLANCHARD:

No, I must say I've been very focused on frustration.

WILLIAM YOUNG J:

Yes, but I mean the very first thing that you say, sorry the statement of claim says, "We're entitled to a declaration plus a money judgment," and the only response to that is not because of frustrated, there's no response, well you can't perform anyway, so there's been a sort of a, the focus has sort of shifted away into what might be thought to be a secondary issue rather than a primary issue of whether you are actually entitled to a specific performance.

MR BLANCHARD:

I haven't looked at this point Your Honour but I have to say my, I strongly suspect that we won't find anything like this case, because it's such a strange situation where you have the very thing that took away my client's ability to perform also prevents the, means that the Council are whole and aren't looking for anything. I mean, in the ordinary case you focus on whether the vendor's ready, willing and able to perform but in the ordinary case the purchaser is sitting there waiting for a performance. This is a strange case and so, and I doubt that we'll find a case like this.

ELIAS CJ:

Can you just help me with what the position in the litigation that has been reached is? You've failed in getting summary judgment but the defendants have not yet obtained defendant summary judgment –

MR BLANCHARD:

That's right.

ELIAS CJ:

– therefore, any claim that you might bring for the $500,000 or whatever it is, has not been foreclosed on the state of the litigation at the moment, as it would have if the defendants had obtained summary judgment?

MR BLANCHARD:

No. There were two applications of summary judgment, one by the defendant and one by the plaintiff. Ours failed, theirs was adjourned and so when the frustration issues are resolved, then we –

ELIAS CJ:

See where the pieces fall?

MR BLANCHARD:

– we're assuming, well if we're successful, we'd go back to the High Court and I suspect that based on the exchanges before Your Honours today, there might, both parties might want to have a look again at their pleadings and certainly the Council's indicating that they might be relying on the Contractual Remedies Act. I've said that I don't think that they can because my, I say my client's not in breach and they're not in a position to perceive performance.

WILLIAM YOUNG J:

But you will be in breach, because you won't be able to provide a valid surrender of lease, so you can't, I mean –

MR BLANCHARD:

But if they –

WILLIAM YOUNG J:

– but does it matter? That's the question, I mean –

MR BLANCHARD:

Well in my submission it must matter because –

WILLIAM YOUNG J:

Well I think your submission –

MR BLANCHARD:

– how can they accuse us of being –

WILLIAM YOUNG J:

I think your submission's the other way around actually, but it doesn't matter that they can't provide a – section 7 of the Contractual Remedies Act says, it occupies, takes effect in place of the rules of the common law and of equity so presumably it, well it looks as though it displaces the ready, willing and able to settle principles unless they're picked up in a contract. Now the right of the Council to cancel would arise under section 7(3)(c) on the basis it's clear that a term of the contract will be broken by another party to the contract. That is, that you will not be able to provide a release on settlement, there may be other, and probably there is a few other provisions of contract will breach. Now the ability of the Council to cancel then would depend upon whether the breach would substantially reduce the benefit of the contract to them or burden et cetera, in respect of all of which you would have quite a good claim, I would think?

MR BLANCHARD:

Well a lot of my submission s have focused on a benefits and burdens analysis, so I, so yes, that's certainly what I'd be submitting. I'm submitting about –

WILLIAM YOUNG J:

And then the Contractual Remedies Act would provide a mechanism by which the losses the Council suffered could be accommodated?

MR BLANCHARD:

Yes, yes.

WILLIAM YOUNG J:

Okay, thank you.

MR BLANCHARD:

Yes. Perhaps if I go back to my written submission, I'm at paragraph 44. So here I discuss the radical change, fundamental change test and I try and discuss it in terms of categories which some textbook writers, including, in particular, Treitel, has, have found useful. The impossibility case and frustration of purpose cases and the impracticability cases, and I say this is a frustration of purpose case because it's not a case – I haven't seen this as an impossibility case.

I suppose the other point that I'm making here is that, again, the other point I'm making here is that the bar is high, that the Courts tend not to find frustration. In England at least the Courts have generally required impossibility and mere impracticability isn't enough, as we see in the *Davis Contractors* case. Although it was sufficient to persuade four of the five members of the High Court of Australia in *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. When you look at the – so that's the impossibility/impracticability side. If you look at the other side –

ELIAS CJ:
Why do you say you do not see it as an impossibility case? I do not quite understand that.

MR BLANCHARD:
Well that's, that's, that's I guess what we've, I was talking about with His Honour Justice Young, that I, the way I've looked at this case is I've said, well, I don't really see us as being in breach because the contract's been performed and the Council's not looking for performance. That's how I've, how I've seen this case and that's why I make that submission.

ELIAS CJ:
I see.

GLAZEBROOK J:
Can I put a dumb – perhaps what – is what you are saying that the payment was for goodwill not dependent on there being continuing goodwill because it was goodwill that was dependent on the business clearly ceasing?

MR BLANCHARD:

Yes.

GLAZEBROOK J:

So in fact what you have got is the performance of that, if you like, because the goodwill has already been destroyed and handed over?

MR BLANCHARD:

That's right.

GLAZEBROOK J:

There is impossibility in terms of providing the surrender of lease –

MR BLANCHARD:

Yes.

GLAZEBROOK J:

– because it would be a nonsense document because there is not a lease.

MR BLANCHARD:

Mmm.

GLAZEBROOK J:

And there is impossibility to provide the leaseholder interest because there is not any longer a leasehold interest. So what, what do you say about those last two, which are clearly part of the agreement, even if the – you are right that the focus of the agreement is on the compensation for goodwill, which is not actually a transfer of goodwill because in fact if the fire had destroyed the business and it was supposed to be a going concern then there would be impossibility for that as well.

MR BLANCHARD:

Yes. Well I'd –

GLAZEBROOK J:

But you say it's an odd sort of clause because it's actually compensation for goodwill with no indication that the business is continuing?

GLAZEBROOK J:

Yes. And – well I, well I, I suppose I would, what I would say is that the parts of the agreement that might be impossible are, are not major parts. They're not the main thrust of the agreement and in impossibility cases there needs to be a near-complete impossibility or certainly a very major impossibility for frustration to come in to play.

One of the criticisms of my, my approach from the Council is that it would undermine the Frustrated Contracts Act, in particular, section 3(3). I say that, that can't be correct because the Frustrated Contracts Act doesn't come into play until the common law has determined whether or not there has been a frustration.

Another criticism of my approach is that my focus on the benefits and the burden of the contract and whether the objective of the contract was being defeated. The criticism of me is that it obscures that the, the fundamental principle that we find in *Davis Contractors* that I'm somehow moving away from the, the fundamental radical change test by focusing on the consequences of the supervening event.

My submission is that general statements of principle can be hard to apply in practice and surely it's helpful to consider categories of cases and how the Courts have viewed different types of situations, and there is a danger in just looking at a general principle or a test like has there been a fundamental or radical change in a sort of a technical way without thinking about the practical consequences.

There's, the Council also, in their submissions, warn against the problem of distinguishing subjective motives and contractual purpose. Of course I'm not submitting that the Court can take into account subjective motives, but here I say you look at the contract, you look at the surrounding circumstances, and none of what I'm saying is based on subjective motives. It's based on what is evident from the contract and from the surrounding circumstances.

And the sort of benefits/burden analysis that I do to work out whether this is a fundamental change, as I said earlier, has worked well in the context of the Contractual Mistakes Act and the Contractual Remedies Act and there doesn't seem to have been a practical problem of, that the Courts have had in distinguishing subjective motives and contractual motive or contractual purpose. And also, going back to the multi-factorial approach, if one stands back and looks at this case as a whole, surely the consequences on the parties must be an important point.

I'm really at paragraph 59 of my submissions, which is allocation of risk. I've skipped over the section on the multi-factorial approach because I've mentioned it several times and I think it's – the only thing I would say is that it seems – although the *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd* [2007] EWCA Civ 547 (*Sea Angel*) case is a relatively recent decision, this judgment has been very significant. It's been picked up – if you look at the legal textbooks, for example, *Chitty* and *Treitel*, after the discussion of *Davis Contractors* and the usual leading cases there's a section now on the multi-factorial approach which refers to this case. It's been cited in or applied in a number of other English cases since 2007. So it seems to have a good pedigree.

McGRATH J:

That phrase does pre-date the *Sea Angel* though, doesn't it?

MR BLANCHARD:

It does. I'm not sure where it started but it certainly does pre-date it. It's not something that –

ELIAS CJ:

Is this – isn't that – is this multi-factorial?

MR BLANCHARD:

Yes.

ELIAS CJ:

Wasn't that Bingham? Didn't he... I mean, might have been earlier than him. Just does not sound terribly early because it sounds quite a recent word.

WILLIAM YOUNG J:

Newspeak.

ELIAS CJ:

Yes.

MR BLANCHARD:

Mr Farmer thinks Lord Wilberforce –

ELIAS CJ:
Oh right.

MR BLANCHARD:
– in a, in one of the earlier cases. It was Lord Wilberforce who, who also said that, you know, there's the five theories about what frustration's all about. It was Lord Wilberforce who said, look, don't worry about the five theories. They tend to shade into each other. And so it certainly seems consistent with his approach.

And Lord Wilberforce, even in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) even, even said that an implied term analysis could be appropriate which shows the flexibility that, that he, that he thought, His Lordship thought would be appropriate in, in a frustration case.

And the other, I suppose the other thing about the multi-factorial approach is that there does seem to be a convergence going on between different areas of contract law. You've got implied terms, which used to be thought of in terms of *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 (PC) and the five stage test but, but after the *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10, [2009] Bus LR 1316 case the approach to implied terms is possibly a lot closer to the multi-factorial approach to frustration and, and that's a point that's made by Professor McLauchlan. In the, the revised version of his, his article there's a footnote which, which makes, makes, refers to a recent textbook by Professor Carter where he refers to the multi-factorial approach in the context of construction of contracts, so there seems to be a convergence going on between the approaches to implied terms and construction of contracts and frustration, all towards a similar approach which is multi-factorial and it's taking everything into account and standing back and looking at it and saying, "What's fair and reasonable?"

ELIAS CJ:
Well, I'm a contextualist, so you don't need to persuade me of that. I wonder though, in those multi-factors, what emphasis is to be placed on clause 8 of the contract, are you going to deal with that?

MR BLANCHARD:
Yes.

ELIAS CJ:
Yes.

MR BLANCHARD:
Yes, I can deal with that now. It's, in my submission it strongly supports my case. What that clause is, the purpose of that clause is, first of all, what we're concerned with here is, I suppose, is allocation of risk in the context, in a particular context under the settlement agreement, and in my submission that clause 8 is to do with the allocation of risk, there's no doubt about that but it's allocation of risk in a very different, of a different type. When a business is sold and of course there's a range of different types of assets sold, there might be land, chattels, intangibles and ownership and risk will pass at different times depending on the type of asset and what clause 8 is intended to do is to ensure that risk passes in relation to all assets at the same moment on settlement. And so it's to ensure that up until settlement the risk is with the vendor, not with the purchaser, so what that clause is supposed to do is if you have a situation where assets are damaged or lost pre-settlement, the purchaser is able to say well so what, that doesn't affect me, I'm entitled to my performance and it's the vendor's problem.

So really clause 8, I say it supports me because it would actually be opposite, the opposite to what 8's trying to achieve if it somehow brought the contract to an end, because what it's supposed to achieve is to leave the purchaser in a position to call for performance.

ELIAS CJ:
Yes, if one is looking at where the justice of a case lies, and after all there are plenty of references to that in the frustration cases, that's really what the doctrine attempts to achieve as between the parties. I mentioned earlier that it's the fact that your clients acted to effectively destroy goodwill in their business because they were going to be compensated for it that bothers me, but the other view could be that they took that risk and that's what this clause imposes on them, that risk.

MR BLANCHARD:
Well this clause is a, it's a standard form clause, it's the sort of thing that's put into agreements for, I mean, we don't know why it was put in there, but it's a standard form clause. If it was really intended to have the effect that it would, if the assets

were substantially destroyed it would bring the agreement to an end, surely it would've said that? It's –

ELIAS CJ:

Well no, I'm not thinking about whether it brings the agreement to an end in itself, I'm just wondering whether it means that one should be less concerned about the loss of goodwill through the steps taken by your clients to bring the business to an end in reliance on the agreement.

MR BLANCHARD:

Well they're, the agreement and clause 8 are almost fighting against each other, they're almost inconsistent because clause 8 is saying, is the purchaser's saying, look, to the vendor, "You're on risk here, you've got to, whatever happens to the assets, whether they're destroyed or stolen or whatever, you've got to perform under this agreement," and it's, that's what clause 8 is saying. And it's, the agreement's almost intentional with that because the agreement's also saying that the purchaser has no interest in the business and wants to close it down and so that makes me think that clause 8 is really just boilerplate and shouldn't really be in this agreement.

ELIAS CJ:

Yes, it's not a sale of a business really, but does this case say something about the management of the risk to the business in the interim until settlement?

MR BLANCHARD:

Well it's the, I don't, my submission is that clause 8's really a red herring. It doesn't really, it shouldn't really be in this agreement, because it's, because the agreement's saying, in the agreement the Council's saying, "We don't care about the business, we're not interested in it," the agreement's, the only –

WILLIAM YOUNG J:

It's the sort of clause you'd expect to find if it was the sale of a house.

MR BLANCHARD:

Yes, although, well the standard form, yes, yes. The standard form agreement has that clause in it. But also it's important in the context of sale of a business because I think it's particularly important with the sale of business because the, in the case of *Cavell, Leitch, Pringle and Boyle* v *Thornton Estates Limited* [2008] NZCA 191,

[2008] 3 NZLR 637 110613 the, what created a lot of the confusion was that you have, with the sale of a business you have different classes of assets, this case is not in the bundle unfortunately. It's a case that I looked at when I was trying to understand clause 8, but it's, there were different classes of assets and so risk, unless there was a clause dealing with risk in the agreement, the risk in the assets was going to pass at different times because ownership of the different assets would pass at different time, because the basic rule is that risk passes when ownership passes and what created the confusion in that case, which was resolved in the Court of Appeal, was that there was no provision directly dealing with risk but ultimately the Court of Appeal said that because the agreement said that property and the assets all passed on the settlement date, that meant the risk passed on that date. But to avoid confusion about when risk passes, you need to have a clause like clause 8 to ensure that all assets, you either need to say the ownership passes on settlement or that risk passes on settlement or both, otherwise you can get into a complicated situation where risk passes at different time for different asset classes.

McGRATH J:

But you see the contract as one that's for the Council is intended to secure vacating of the site, surrender of the lease, but the payment for you is foreclosure of the business.

MR BLANCHARD:

That's how the agreement's structured. I mean I'm not suggesting for a minute that the, giving up the lease wasn't a significant part of the business, but I'm saying it's, for the contract, for a contract to be frustrated and primarily we're dealing with frustration, you've got to have a complete sweeping away of the purpose of the contract. Here you have a part of it that's been affected by the frustration but there are other important parts of it. There's the, in particular, the giving up of the goodwill and the restraint of trade to ensure that the Council took the benefit of the goodwill away from my clients.

While I'm talking about agreement, clauses in the agreement that are relevant or might be relevant to allocation of risk. But I should mention the other two provisions relied on by the Council. The first is clause 13(1) of the lease and the other is clause 40 of the lease. Perhaps if we looked at the lease. The first clause is at page 29 in the case on appeal.

ELIAS CJ:

29?

MR BLANCHARD:

Yes. The part of the clause that the Council's relying on is the first part. The lease will, lessee will occupy and use the premises and the risk of the lessee. Again in my submission this is a boilerplate clause, or it's a standard indemnity provision and if we read on and look at the rest of the clause you can see what it's aimed at, it's really a different type of risk allocation to the one we're concerned with today. And of course, this lease was signed well before, many years before the settlement agreement, and in my submissions it's a real stretch to say that somehow this clause could be relevant to risk allegation under the settlement agreement.

The other clause is clause 40 itself. Clause 40 is actually part of the risk, it's part of the supervening event. It was the fire and clause 40 itself operating together which created the risk here.

McGRATH J:

What page is this?

MR BLANCHARD:

Sorry, Sir, it's page 41. Again, this clause is a standard form of clause and leases. My understanding is that it's a clause that's partly for the benefit of the land or partly for the benefit of the tenant. Of course, it depends on the particular circumstances who does best out of it, but it's not – it's a clause that allows both parties to make a clean break and to go their separate ways when the premises has been destroyed. The point that I make is that we're talking about risk allocation in a particular context here. We're concerned with risk allocation under the settlement agreement and the specific issue is should the supervening event bring the settlement agreement to an end? In my submission, again, it's drawing quite a long bow to somehow suggest that this clause decides or has relevance to the risk allocation that we're concerned with under settlement agreement, and it's important to look at the circumstances at which the clause 40 came into being and compare those with the circumstances in which the settlement agreement came into being. Of course, when the lease was signed, both parties wanted the lessee to have the interests under the lease. The

Council wanted it and the lessee wanted it. Whereas now or when the settlement agreement was signed it was a very different dynamic. The Council wanted the leasehold interest back and was prepared to pay valuable consideration for it, so to me the two situations are so far apart that it's hard to see how clause 40 could have any real significance in terms of the risk allocation that we're concerned with, and I come back to the point that Professor McLauchlan made in his article that if what the parties had wanted was for the destruction of the premises plus clause 40 to bring the agreement to an end, surely they would have said that.

GLAZEBROOK J:

Well, they may just have overlooked it, not thinking that it was a likely event.

MR BLANCHARD:

Yes. Well, it was a very unlikely event. That's why, of course, the implied term approach has been – some Judges have thought the implied term approach is inappropriate in a frustration context because how can you say that something's implied when the party has never thought of it?

So if I go back to my submissions at paragraph 49, I've talked – allegation of risk, it's something you see in the frustration cases. It's not always clear exactly how it's supposed to fit in with the fundamental radical change test but it's certainly under Rix's LJ approach it's part of the mix. There are some cases which have been decided based on allegation of risk. For example, the two cases I refer to in paragraphs 60 and 61. In those cases, the Court said it was effectively obvious that the risk lay with one party or the other, so the Court of Appeal said in the amalgamated investments and property case that it's clear that the risk of rezoning is with the purchaser. I don't know if Your Honours were interested in the hypotheticals that are referred to in some of the cases, the famous wedding dress and cab ride to Epsom cases. It seems to me the best way of thinking of those cases is allocation of risk. It's just clear in that situation that the risk was with the hirer in the cab case and with the purchaser of the wedding dress and it's so obvious it goes without saying.

So then at paragraph 64 of my submissions I deal with those point about hardship being prerequisite, and this again comes back to my feeling this case is back-to-front.

McGRATH J:

Just before you go on, Rix LJ – it was more than just in the mix. He thought that the allocation of risk was a very important factor.

MR BLANCHARD:
Yes, yes. It is a very important factor and it's one of the factors and it's a very important factor.

McGRATH J:
Whether it's expressed or implied?

MR BLANCHARD:
Yes. You see it referred to from time to time in the cases. It's clearly regarded as an important factor in the cases. What I come to when I apply later in my submissions I make the point that this wasn't really a risk for the Council at all. A risk is something that causes you harm. Here the risk was going to achieve what the Council wanted so to say it's a risk – a risk for the Council is, well, it's a factor but my big point is that I'm saying, well, it's reasonable that this risk sits with the Council because it's not a risk that should have been any particular concern to the Council given that it was a risk that was going to result in the Council getting what it wanted.

So dealing with substantial hardship as a necessary prerequisite, I just note in paragraph 64 the fact that it's implicit in the statement of Lord Radcliffe and I quote, "It's implicit that hardship is a sort of a first hurdle." What Lord Radcliffe was really saying that mere hardship is not enough, but also he's implicitly saying that mere hardship is a prerequisite, so you have a first hurdle, which is hardship, and if you get over that first hurdle then you mount your argument that it's frustration. Here I say the Council doesn't get over the first hurdle of showing the hardship. This is why it's a strange case because in the Council's submissions they openly say they're no worse off as a result of the supervening event and in my submission there's never been a frustration case where a party has fronted up and said, "Well, we're no worse off but we still think the contract is frustrated." It's very unusual. The normal situation is someone's suffering serious hardship. They come to Court and they try and persuade the Court that it's frustration and they fail. Every now and again someone actually manages to get over the second hurdle and establish frustration, but here we don't get over the first hurdle.

And then I, in the final section of, or the second-to-last section of my submissions, I talk about the dictates of justice. It's something that's always been there in the cases. It's one of the five theories that's been advanced for justifying frustration. Although since *Davis Contractors* the theory that is now the accepted one is that frustration is based on construction of the contract. Although that's – the construction of the contract theory is the one of the five that's won out, we still see the dictates of justice as an important factor in frustration cases, and I've collected together all of the statements leading up to the very strong endorsement of the dictates of justice by Rix LJ in *Sea Angel*. I hesitate to say it but in some ways frustration seems to be as close as a commoner gets to equity. It seems to have that sort of dimension to it. But certainly I submit you shouldn't be taking a mechanical or overly technical approach to frustration. You have to stand back and look at the whole situation, take into account the various factors that Rix LJ refers to and make a decision. I certainly acknowledge that the starting point is there's a contract and the factual matrix but you stand back and look at it as a whole.

At paragraph 76 I talk about settlements and compromises, and Professor McLauchlan in his article has collected together all of the statements or some statements that have been made by Judges over the years about how the Court should be slow to set aside a settlement agreement. The Council's retort to that is in their submissions at paragraph 17 and also the judgment of Hoffman and they say that these statements that I'm relying on about settlement agreements can't be rules of law. You don't construct one contract differently to another depending on its type, so you can't say, well, this is a settlement agreement so I'm going to construe it in a totally different way to an ordinary contract.

My retort to that is, I rely on the statement at paragraph 17 of the judgment. It's the BCCI case tab 3. Of course, the context was a little bit different here. It was dealing with the settlement agreement but one party was trying to get out of the settlement agreement and the other party was trying to hold them to the agreement and the party trying to get out of the agreement was relying on the statements going back, I think, hundreds of years or certainly a long period, statements by Judges to the effect that a full and final settlement clause doesn't cover things that the parties couldn't have known about and so one party was relying on a whole lot of law to that effect, and the other side was saying, well, that's not a rule of law. You can't construct one contract differently to another, and certainly Lord Hoffman said that very clearly in his

descending judgment because of course it's consistent with his approach to construction of contracts, but at paragraph 17 of that judgment Lord Bingham said it's not a rule of law but it's a useful cautionary principle. It's a cautionary principle which informed the approach of the Court to construction of settlement agreements, and my submission is that you can say the same about the case law that Professor McLauchlan has collected together in his article saying that the Court should be slow to set aside a settlement agreement. So I'm not saying it's a rule of law. I'm saying it's a cautionary principle.

ELIAS CJ:

Where are we getting to? You've just about finished, haven't you, Mr Blanchard?

MR BLANCHARD:

I've got to the end of my summary of the law. I haven't actually discussed – I've been discussing application of the facts along the way but I probably should – I'm not sure timing-wise.

ELIAS CJ:

Develop your submissions. We have, of course, read your written submission so perhaps just stress the things that you particularly want to rely on.

MR BLANCHARD:

Yes. Now, in my submissions in the section beginning in paragraph 77 I discuss my benefits and burden analysis and I say the Council is relying on frustration so if it wants to rely on impossibility it should be saying that the burden of the contract has been effective from its point of view. Well, clearly it hasn't so I've then looked at it from a frustration of purpose point of view and I've focused on the benefits that they've arrived at under the agreement and in my submission they are considerable and the supervening event didn't take away those benefits to a significant extent. I've already talked in the course of interchange, I've already emphasised some of the benefits, but if we look at paragraph 85 one of the things I'm saying is that this was a settlement agreement and the purpose of the settlement agreement is to resolve a dispute and obtain certainty and the Council did obtain certainty, which is of real benefit to it and it was able to rely on it. It got the certainty that it would be able to obtain Planet Kids' interest. It's very highly likely it would have got the interest anyway under the Public Works Act but it got certainty on that. It certainly achieved certainty as to the date by which it would obtain Planet Kids' interest. If the Council

had had to go through the Public Works Act process it could have been delayed a very long time in obtaining Planet Kids' interest. Here it got the interest on a fixed date that it could work with and it was able to let its $20 million tender and get on with the business of doing the works.

The response from the Council is that, well, certainty can't be a benefit under a contract or it can't be the purpose of a contract because all contracts on one level are about certainty but my submission is this is a settlement agreement and settlement agreements are particularly about certainty and resolving dispute, allowing the parties to rely on – but they go from a very uncertain situation where they're not quite sure how things are going to work out to a much more defined situation where they know what's going to happen, when it's going to happen, that's certainly what the Council got here. So I'd say it's not – because this is a settlement agreement it's not wrong for me to submit that achieving certainty was part of the purpose of the agreement.

In paragraphs 87 and 88, I've just provided more detail around the Council's reliance on the agreement in the $20 million tender. At paragraph 89 I refer again to Professor McLauchlan's article and he emphasises that the actual providing of the surrender of the lease seems to be a technicality. I earlier referred to the passing of the equitable title happening at the time of settlement, and so I would add to what Professor McLauchlan's saying in my paragraph 89, that the – beneficially and equitably the Council already owned the leasehold interest by the time that the supervening event occurred.

Then I go on in paragraphs 90 to 92 to talk about some of the other benefits the Council achieved. It got access to the site to do works prior to the settlement date. In my submission, that's not an insignificant benefit that the Council derived from the agreement that wasn't taken away by the supervening event. Of course my submission is that when you're talking about a frustration of purpose case and benefits that are achieved under a contract on the analysis in Treitel, and in particular in Treitel's book, *Frustration and Force Majeure*, it's only when all of the benefit is swept away that frustration comes into play, so even a less important benefit like having access to the site could be something which would be enough for the Court to say, well, this contract's not frustrated.

McGRATH J:

They’re able to enter the site. They didn't take possession of the site.

MR BLANCHARD:

No. They were able to enter the site to do works and testing and so forth.

McGRATH J:

And the site had been vacated, effectively, prior to the finding? The kindergarten continued?

MR BLANCHARD:

That's right. The agreement was signed and there was a period of several months before settlement, and what the agreement did was allowed them to come onto the site and do works. That’s a right that they didn't have before they signed the agreement and the Public Works Act wouldn't have given them that right, I don’t think. So that was a benefit to the Council and, as I said, the cases indicate that even if you have a major part of the benefit of a contract taken away by frustrating events provided there are other benefits that are less than trivial, generally speaking the Court has said, well, it’s not frustration and there’s the classic contrast between the *Krell v Henry* [1903] 2 KB 740 and the *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683 case where –

WILLIAM YOUNG J:

Posed with exactly the same members of the Court. Neither refers, I think, to the other.

ELIAS CJ:

The same members?

WILLIAM YOUNG J:

Yes.

MR BLANCHARD:

But they both refer to the Epsom Race Day.

WILLIAM YOUNG J:

They were heard effectively around the same time, July and August 1903.

ELIAS CJ:
They'd had enough of the Coronation by then.

MR BLANCHARD:
There were a whole lot of cases. Those were just two of them. There's a very interesting discussion of those cases in the Treitel book *Frustration and Force Majeure* which is in my bundle at tab 13. The reason why I refer to these two cases is they're very, very hard to separate. The instant reaction to the *Krell v Henry* case was it couldn't be right and most Judges and writers seemed to prefer the result in the *Herne Bay Steamboat Co v Hutton* case which said that the contract wasn't frustrated. But nowadays most people seem to agree that *Krell v Henry* was rightly decided and the two cases can be distinguished because the only purpose why the room was taken to watch the procession whereas in the *Herne Bay Steamboat Co v Hutton* case –

ELIAS CJ:
You could go and have a look at the fleet anyway.

MR BLANCHARD:
That's right. That's absolutely it. So coming back to this case, all I'm saying is if there's still some benefit that remains, even if it's not the main purpose, the contract is not frustrated. So I don't accept that the surrender of lease was the main thing here but even if it was that wouldn't be enough to frustrate the contract.

ELIAS CJ:
Does that complete your submissions? We'll take the adjournment now and if there's any matter you want to conclude on we'll hear you after that. Otherwise Mr Farmer can take over.

MR BLANCHARD:
Yes, thank you.

COURT ADJOURNS:11.33 AM
COURT RESUMES: 11.54 AM

MR BLANCHARD:
One of my major conclusions that is at paragraph 95 of my submissions and that's where I say that in a frustration of purpose case when and when you're looking at the benefits that a party derives under a contract, the contract will only be frustrated if no part of the contractual purpose other than a part which is trivial can be achieved. And the Council submissions are critical of that paragraph and say it doesn't accurately state the law. I just make the point that that, that, in that paragraph I'm paraphrasing what Sir Guenter Treitel concluded about frustration of purpose after carrying out a very detailed review of all of the cases. That's the review that we see in the textbook at, chapter of the textbook in, in tab 13 of my bundle of authorities. The textbook on *Frustration and Force Majeure*. In all of – it includes a review of English, US and Australian authorities. I think there's even some German cases referred to. So it's a very extensive review and that's what that conclusion's based on.

The criticism of, of the view expressed by Treitel seems to be based on case law about total failure of consideration and there's a reference to Lord Simon, this is in the Council submission, there's a reference to Lord Simon saying in *National Carriers v Panalpina* that frustration cannot be explained as being based on total failure of consideration because there are many cases where the contract has been part executed.

I say well there's no doubt that's correct but that doesn't mean that section [*sic*] 95 of my submissions is wrong. The cases in which frustration have been found in which contracts are partly executed, well many of them will be impossibility cases of course, which – and impossibility cases are concerned with performance and, and in frustration cases there is – impossibility cases you have the impossibility that the possibility arises partway through performance. Paragraph 95 of my submissions is concerned with frustration of purpose where you're looking at whether the frustration took away the benefits of the contract and – so I, I simply, simply say that I don't think that statements about total failure of consideration in some of the cases really have any bearing on, on the Treitel analysis.

The Council mentions insurance as a factor in its submissions. It's referred to in its opening and in its conclusion so it's obviously given some importance, although it's not developed in the main body of the submission. The, the problem from, from Planet Kids' point of view is that under the settlement agreement it agreed to close

down its business, it provided a restraint of trade from the company itself and from its directors, and what the insurance company is, has said is that at the time that the fire occurred Planet Kids had agreed not to operate its business beyond 20 December 2010 and the insurer is saying, "Well, we don't have to pay for business interruption after that date because your business wasn't going to carry on after that date." So the insurer's relying on the settlement agreement to say it doesn't –

ELIAS CJ:
But what use, though, can you make of that in the argument you are putting to us? Because that is outside all of this.

MR BLANCHARD:
Absolutely, and that was going to be my very point. What I was going to say is that if you imagine a hypothetical world where the insurer has not taken the position that it's taking and it's said, "Fine, we'll pay you out in full," and Planet Kids were sitting on insurance monies, then the insurance company would subrogate into Planet Kids' position and it would be looking to enforce the agreements, so, to me, reliance on insurance is sort of circular or, and doesn't really take you anywhere. If the insurer had paid out in full there'd probably be another lawyer who acts for the insurance company standing here arguing the case but it would still be the same case.

Finally, in both the opening and closing for the, or conclusion of the Council's written submissions they make the point that the fire and the termination of the lease occurred well before the settlement date and – but I just make the point that on the logic of the Council's approach it shouldn't make a difference when the fire occurred. On the logic of their approach the result would be the same, even if the fire had occurred in the early hours of the morning on the day of settlement so that the fire – the, the lease disappeared just before settlement, just a few hours before settlement. And I say that this calls in, this should call into question whether the Council's approach is right. It seems wrong to me that this case could be frustrated when the parties got all the way through to a few hours before settlement and the, the alleged frustrating event occurs. Surely that, that couldn't frustrate this contract? And if that can't, couldn't frustrate it, then on the same logic it shouldn't be frustrated in this actual case.

ELIAS CJ:

Just really wondering whether that is a sound submission – I always get them confused – for an executory contract. Does it matter if the impossibility or the breach or future breach becomes clear at the very end? It just can't matter.

MR BLANCHARD:

Well maybe it – I'm at the end of my submissions and I'm being multi-factorial. I'm just standing back and saying surely it's absurd that if the fire occurred just a few hours before settlement the contract would be frustrated. That's what I'm saying. It just seems bizarre to me when everything that's happened, everything's happened that needed to happen. As I've said earlier, the Council's got its specifically enforceable right. It's got beneficial interest in the lease. It's got the restraint of trade. It's got everything else it needs. Planet Kids is giving it credit for the chattels and plants that, plant that's been challenged which the Crown doesn't really want.

Just finally, I haven't been able to find anything on the position with the settlement statement. We found the reference to it. The reference to it in the bundle is, or the case on appeal is page 72.

ELIAS CJ:

This is the one that refers to the settlement statement interests?

MR BLANCHARD:

Yes. That was a reference, I think, that Your Honour was referring to earlier. That's all we have. There's nothing else in the bundle that we've been able to find that relates to this but there clearly was a settlement statement provided, so –

ELIAS CJ:

What was the date of settlement? I can't remember.

MR BLANCHARD:

20th of December. So this was quite a time after the fire but, but Planet Kids is saying that it wants to proceed. But by that point, of course, as you can see from paragraph 3, the Council had had advice that the contract had been frustrated so here we are.

GLAZEBROOK J:

Is that – have you finished? It's just the Chief Justice had just handed to me actually a passage from your father's book as well as a passage from the *Sale of Land*, I'm

not sure, but just looking at those passages, they're talking about, "Where a vendor lacks all or a substantial part of the interest in the land which he or she has agreed to sell the purchaser may be able to cancel the contract immediately," but the assumption is that that would now be under the Contractual Remedies Act, and I suppose that comes down to an issue as to whether it's actually frustration or just a mere inability to perform which would be dealt with under the Contractual Remedies Act, and I don't know if you had any comment on that.

MR BLANCHARD:
Well I, I guess the one comment I'd make is that I'm aware that one of the strong themes throughout the McMorland book, *Sale of Land*, is that, that all of this is governed by the Contractual Remedies Act and there's a very detailed Contractual Remedies Act analysis in relation to, to, to cancellation. So we are in the Contractual Remedies Act and I suppose I've been focusing on this as a frustration case and I'm saying it's not a frustration case for all the reasons I've advanced. If I succeed on that then the Council will be, it seems, relying on the Contractual Remedies Act to which my arguments will be, one, we're not in breach, although this Court doesn't seem to, based on the comments, be with me on that, but secondly that if there has been a breach it's not a breach that entitles cancellation, and thirdly if it's cancelled under the Contractual Remedies Act then the relief that we get under section 9 should be similar to or the same as our entitlement under the contract. When you take everything into account here, given the reliance by both parties on this contract and the fact that both parties really got what they wanted under the contract, it seems right into section 9 which allows the, a broader approach for the relief to be in favour of my client and equivalent to what they would be entitled to under the contract.

Those are my submissions.

MR FARMER QC:
If the Court pleases, I think probably the first point to start with is this question that's obviously been vexing the Court as to whether this really is a Contractual Remedies Act case or whether it's a frustration case, and the answer, we would submit, is that if the contract was frustrated then it comes to an end by operation of law and therefore one never gets to a point where remedies, whether they were remedies of rights of cancellation or rights to apply for relief or whatever, even, even arise.

I'll just give you the reference to – I'm going to take you to the case later. It's *Davis Contractors*, which of course you're very familiar with anyway, but page 723 in the judgment in the judgment of Lord Reid, His Lordship says, "The appellant's case must rest on frustration, the termination of the contract by operation of law on the emergence of a fundamentally different situation." So if it, if it's frustrated by virtue of the fire and the lease, that fire causing the leasehold interest to come to an end, it is at an end at that point. So, as I say, the contract never get to the Contractual Remedies Act.

ELIAS CJ:

No I understand that. But one of the issues for us is whether this is frustration.

MR FARMER QC:

Oh, of course. That is the issue.

ELIAS CJ:

And perhaps of assistance in that determination is whether there are remedies now provided by New Zealand law which would be less extreme, leaving frustration to operate in cases not of impossibility but those rather strange cases like the Coronation cases.

MR FARMER QC:

Well that – I think what Your Honour's suggesting is that we no longer have law of frustration in New Zealand except perhaps in that very odd kind of frustration of purpose case.

ELIAS CJ:

Well the –

MR FARMER QC:

That the impossibility law –

ELIAS CJ:

Yes. Yes.

MR FARMER QC:

– frustration based on impossibility is no longer part of the common law of New Zealand.

ELIAS CJ:

Yes. It may not be as extreme as that but I am interested in the, and I think other members of the Court are interested in the relationship between the doctrine of frustration at common law and the Contractual Remedies Act. Which does purport to be a code, of course.

MR FARMER QC:

Well, well yes. But, but my – Contractual Remedies Act is really concerned with contracts and remedies that arise in contracts where there's been a breach. Whereas what we're looking at here is a doctrine of, that the common law itself has developed outside those sorts of issues and has imposed, as it were, imposed being quite the wrong word, but has brought to bear in order to deal with the situation where a contract has become impossibility performance and so my submission, and it's the only submission here now is that the question Your Honour has raised is an interesting one but, with respect, it, our submission would simply be that the doctrine of frustration based on impossibility performance remains part of the law of New Zealand and one doesn't have a choice as it were, one can't say, "Well, we'll either go under the doctrine of frustration or we'll go under the Contractual Remedies Act or perhaps we can only go under the Contractual Remedies Act because the doctrine of frustration based in impossibility performance is no longer available.

ELIAS CJ:

Well don't you have to start, though, with the submission that section 7(3)(c) or whatever it is of the Contractual Remedies Act has no application to cases of impossibility?

MR FARMER QC:

That is my submission.

ELIAS CJ:

Right, thank you. And you may want to develop that a little or you may say that you don't, that you're just going to assert it, but I'd be quite interested if you are able to develop it.

MR FARMER QC:

Well my, I can only develop it very briefly and just say that when something happens by operation of law, then it happens by operation of law and so if the contract is brought to an end by operation of law one, as I said earlier, just does not get into the Contractual Remedies Act domain because that is concerned with situations of breach and the remedies that flow from that.

WILLIAM YOUNG J:

But in terms of whether the doctrine of frustration operates by way of application, just as an automatic effect of the common law. Isn't it material to consider whether the situation that's arisen is one that can be resolved sensibly within the framework of the contract and in relation to the statutory provisions that relate to contracts?

MR FARMER QC:

Well, that is, I think Your Honour, with respect, saying that the Contractual Remedies Act has excluded –

WILLIAM YOUNG J:

No, not sure that it is actually –

MR FARMER QC:

– the doctrine –

WILLIAM YOUNG J:

– all I'm, it just seems to me that this case could be dealt with in a sort of a fair way, if I could put it in quotation marks, within the framework provided for under the Contractual Remedies Act because the problem for Planet Kids is that it can't produce a discharge release. Whether that matters or not is something that can be dealt with and accommodated within the Contractual Remedies Act framework.

MR FARMER QC:

Yes, what would happen under the Contractual Remedies Act, if for example, the Court were to find that the contract was not frustrated, that the events that had occurred fell short of there being a termination of contract through frustration, then we would be in a position of settlement proceeding, Planet Kids being unable to perform, being unable to provide a title, the Council cancelling and then as my

learned friend said, Planet Kids applying for relief and you would get into Planet Kids applying for relief and you would get into some broad –

WILLIAM YOUNG J:

Well Planet Kids would probably say you can't cancel.

MR FARMER QC:

Sorry?

WILLIAM YOUNG J:

Planet Kids would say, well, you can't cancel –

MR FARMER QC:

They'd say that, they'd say that certainly.

ELIAS CJ:

Unless they decided to cancel on the basis that you've made it clear you're not going to pay the money owing under the contract, that's possible too.

MR FARMER QC:

Well that's possible as well, I agree. And then you would get into a situation where perhaps both parties are purporting to cancel and either one or the other or both again were applying for relief and the Court would, in Your Honour's terms, be able to do –

ELIAS CJ:

The fair thing.

MR FARMER QC:

– the fair thing, by the exercise of some kind of broad discretionary power that section 9 –

ELIAS CJ:

But why is that –

WILLIAM YOUNG J:

It's not as bad as you suggest.

MR FARMER QC:

– unprincipled power that's given by section 9. I mean, Your Honours, this is a wonderful discussion, but with respect, I haven't come here to argue that point, because it's never been raised before and –

ELIAS CJ:

No but the case is not –

MR FARMER QC:

– the only issue before Your Honours is whether this contracted has been frustrated.

ELIAS CJ:

Yes, but the case is not over on any, well the case is not over unless the appellants win, is that right? Yes, if they get summary judgment –

MR FARMER QC:

Well then there are some other consequences –

ELIAS CJ:

Then there'll be some other consequences in any event, but if they don't succeed, matters are still open.

MR FARMER QC:

Well not really because the Court of Appeal has all but ruled, held that they lose, you win.

GLAZEBROOK J:

What I'm not certain about is your submission that frustration operates by operation of law because certainly if it's looking at an implied term in the contract, the contract is seen to be subsisting and you're actually looking at the contract itself as, so to say that the contract has come to an end and the Contractual Remedies Act doesn't apply, I'm not sure on your analysis that that's quite right. Because what you're looking at is probably an executory breach because it becomes clear there is going to be a breach because of the impossibility –

MR FARMER QC:

No, no –

GLAZEBROOK J:

– and isn't that the very thing that Contractual Remedies Act is looking at?

MR FARMER QC:

No, with respect, we're not into the area of breach at all –

GLAZEBROOK J:

So you say it's not a breach, if the contract comes to an end and so there's, it's not that there's nothing, so there's no contract for the Contractual Remedies Act to operate on?

MR FARMER QC:

That's right, thank you, that's exactly right.

GLAZEBROOK J:

Is that the –

MR FARMER QC:

That's how I'm trying to put it.

GLAZEBROOK J:

That's the submission?

MR FARMER QC:

Yes.

ELIAS CJ:

Which means that section 7(3) has no application –

MR FARMER QC:

Yes.

ELIAS CJ:

– in cases of impossibility?

MR FARMER QC:
Yes.

WILLIAM YOUNG J:
What about if someone takes the risk of the impossibility?

MR FARMER QC:
Well there are such cases of course where the parties have actually specifically contemplated the particular event and you get this sometimes in these oil tanker charter cases and they make specific provision about the possibility of the tanker sinking or whatever it might be or being delayed and then there are –

WILLIAM YOUNG J:
Well some of the coronation cases involved contracts which specifically covered one way or another the contingency of delay or cancellation?

MR FARMER QC:
Yes, yes –

WILLIAM YOUNG J:
So the possibility can –

MR FARMER QC:
Yes, indeed –

WILLIAM YOUNG J:
– come into breach?

MR FARMER QC:
It can be specifically contemplated or it can even be, as it were, half contemplated and there being some provision put into the contract that deals with the situation in the event that this happens, then this will be the position. But this is not –

WILLIAM YOUNG J:

But often enough just by promising to do something, you take the risk of not being able to do it?

MR FARMER QC:

Indeed and that gets you in the whole area of allocation of risk and so on.

ELIAS CJ:

And –

GLAZEBROOK J:

Well – sorry.

MR FARMER QC:

And that's, of course, one of the clause 8.1 actually we would say is quite significant in this case.

ELIAS CJ:

Isn't your position inconsistent with the cases that Justice Glazebrook raised on defect in title where they have been dealt with under section 7(3)? Or why is that not –

MR FARMER QC:

Well they're not frustration –

ELIAS CJ:

Well why not –

MR FARMER QC:

– cases.

ELIAS CJ:

– if they're impossibility?

MR FARMER QC:

Well they're not frustrated, they haven't been dealt with as frustration cases.

WILLIAM YOUNG J:

Shouldn't they have been dealt with as frustration cases if you're right?

MR FARMER QC:

I can't answer for the –

GLAZEBROOK J:

Well it may depend on –

MR FARMER QC:

– failings of my previous, of my predecessors. If they, the point, if the point wasn't taken, if the case wasn't seen as a frustration case –

ELIAS CJ:

No, no, we're talking about the cases –

GLAZEBROOK J:

Well it may be there's a question as to why the vendor can't provide title, whether it's just because they haven't got round to putting a plan in and getting title or whether there's some other reason for that. But I suppose, can I restate, I know when people get annoyed with Judges do this, but can I try and restate, I think what you're suggesting, if I understand it, is that the doctrine of frustration, whatever that comprises of brings the contract to an end and therefore there is nothing for the Contractual Remedies Act –

MR FARMER QC:

Yes.

GLAZEBROOK J:

– to operate on because there's nothing to breach?

MR FARMER QC:

Yes.

GLAZEBROOK J:

So the Contractual Remedies Act will work on an executory breach but only where that hasn't frustrated the contract?

MR FARMER QC:

That's right, that's right.

GLAZEBROOK J:

Is that –

MR FARMER QC:

That's how I put it.

GLAZEBROOK J:

And so now we've got to work out, so you say, and I suppose you'd say that the Frustrated Contracts Act was meant to apply to something and therefore we couldn't come to the view, in terms of the statutory scheme, I mean the broad statutory scheme –

MR FARMER QC:

Yes.

GLAZEBROOK J:

– that in fact the doctrine of frustration has disappeared or even that it's been diminished.

MR FARMER QC:

I hadn't thought of it that way, thank you Your Honour, but it would mean, of course, that the Contractual Remedies Act has implied we repealed the Frustrated Contracts Act.

ELIAS CJ:

Well that would only be if there's no area where frustration would not operate –

MR FARMER QC:

Yes.

ELIAS CJ:

Although I have to acknowledge that the Frustrated Contracts Act which is preserved by the Contractual Remedies Act does refer to impossibility or some other reason.

MR FARMER QC:

Thank you –

ELIAS CJ:

Frustrated, yes.

MR FARMER QC:

– I wasn't aware of that. Yes.

WILLIAM YOUNG J:

Say Planet Kids had actually wanted to sell its business to a person who wanted to carry it on, and so there's an agreement for sale and purchase, settlement in December, they have to assign the lease, and then blow me down the premises are destroyed. Might they not have been in breach because the risk – you know, because they'd accepted, they'd promised to provide a business and they can't. So wouldn't that be a case that would have to probably be dealt with under the Contractual Remedies Act?

MR FARMER QC:

I would have thought in that case that Planet Kids would be very enthusiastic about the proposition of relying on the doctrine of frustration.

WILLIAM YOUNG J:

Well they would be, absolutely, but they might be out of luck, mightn't they?

MR FARMER QC:

Well not on our case. Although when I say that we, that's without reference to what is really our primary argument, that the Public Works Act is a highly significant factor in this case and in Your Honour's example the Public Works Act wouldn't be –

WILLIAM YOUNG J:

No, no, I agree.

GLAZEBROOK J:

I can understand that argument as an argument of construction of a contract so the – as you construct the contract the only thing that was going to be paid for was an

extant at the time of settlement thing, because it's a slightly odd thing because it's the – well, extant goodwill and extant underlying land, but I'm not so sure I can understand it in the context of discussing what the, whether the contract has been frustrated or not.

MR FARMER QC:
Well I really took from His Honour's example that what was being sold was the business but an essential part of that business was the premises which, an essential part of which was the leasehold interest in the land, and the leasehold interest in the land would be transferred and a title to the leasehold interest was lost by virtue of the fire and the operation of the clause 40.1 ending the lease well then Planet Kids would be in a position where it couldn't complete the contract and then, though, it may well be it might want to argue the very argument that we're running here, albeit not within the context of the Public Works Act, but that's always –

WILLIAM YOUNG J:
Say the lease was cancelled because they didn't pay rent. They couldn't claim that as impossibility could they? I mean –

MR FARMER QC:
No, no, that would be what one of the Courts have called self-induced frustration.

ELIAS CJ:
But how –

MR FARMER QC:
It was there –

ELIAS CJ:
– would you treat it?

MR FARMER QC:
Sorry?

ELIAS CJ:
How would you treat it if you were the purchaser and the – if you were the purchaser and the vendor of the lease had allowed the lease to default, is that frustration or –

MR FARMER QC:
I would say –

ELIAS CJ:
– is that breach?

MR FARMER QC:
No, no, that's certainly not. No, I would say it was breach because it's a fundamental principle of the law of frustration that if it's a self-induced frustration it's the event, in this case, the cancellation of the lease has come about not by a fire, but by a failure to pay rent, then the party who caused that –

WILLIAM YOUNG J:
Well there would probably be an express or implied covenant to pay the rent.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
To keep the lease on.

MR FARMER QC:
Yes, but that is a classic case of self-induced frustration. What I would, perhaps I've got about five points. The first of them is that this is, we would say, a classic case of impossibility of performance and the frustration of purpose category based on *Krell v Henry* in the Coronation cases that my learned friend has put up is while I wouldn't necessarily say that there isn't such a category, it's, as he fairly acknowledges, it's not the typical, traditional case of frustration. The traditional, typical case of frustration is indeed impossibility of performance and here we have a supervening event, which is a fire, which has brought about the end of the title to the land and therefore we do have a classic impossibility of performance and the significance of that distinction is that my learned friend is seeking by saying, well this isn't really a impossibility of performance case, it's a frustration of purpose case. He then seeks to rely on the writings of Treitel, who through his analysis says, well when you have frustration of purpose cases, you have to also show some kind of – you have to show that there is absolutely no benefits that had been passed under the

contract, or that can pass under the contract, and unless you can show that then the contract will not be frustrated. Now my learned friend simply relies on what Treitel says. He does say that Treitel has done an exhaustive analysis of the law around the world but there isn't really, with respect, any stand out case that one can point to that would, first of all, establish the principle that there is no frustration unless it can be shown that no benefits pass, or can pass, under the contract, and secondly, we would in any event say this isn't one of those kind of cases. It is a traditional, classic impossibility of performance case.

And relevant to that, and following on from that, we would submit that the Public Works Act is highly relevant in this case. Now you've been taken to both the Public Works Act and to the Contract. I do want to just go back to them, I'm sorry there'll be a little bit of repetition involved in this, but just to be sure that you have the complete picture, if I could go to the Public Works Act first, which is in our volume of cases, tab 2, and I think the point that's already emerged in the discussion with my learned friend that what we're looking at here is the acquisition of land, or an interest in land, and that's a compulsory acquisition and the power, the statutory power, to take land is –

GLAZEBROOK J:

Well you're not looking at a compulsory acquisition at all, you're looking at a threatened compulsory acquisition which was challenged and then – and in settlement of that challenge, or for whatever reason, just to get it over with, or certainly settlement of the amount, then an agreement that was encompassed in the settlement agreement aren't you?

MR FARMER QC:

Well yes and no. If I can explain it this way Your Honour. If I could take you to the Act itself and go to section 16 first of all. Section 16(2) gives the power to the local authority to acquire the land for which – which it requires for a local work. So it has a statutory power to do that. Then effectively what section 17 does is it provides a mechanism for doing that by agreement.

GLAZEBROOK J:

Well, but the Council could go out if it had a – it doesn't need to have this as an empowering statute to go out and acquire land to do whatever it wants to do with the land.

MR FARMER QC:

You mean it can't buy the land voluntarily?

GLAZEBROOK J:

Certainly.

MR FARMER QC:

Yes, indeed, it could, but that's not what it's doing under section 17. What it's doing under section 17 is it's a mechanism – it's having issued a notice requiring acquisition. It has then entered into an agreement, as it's empowered to do, again by statute under section 17, to purchase the land for a public work for which the local authority is responsible. But what then follows from that is a right, a basic entitlement to compensation, if we go to section 60, which provides that where under the Act any land is acquired or taken for any public work, and then jumping down a bit, "The owner of that land shall be entitled to full compensation from the ... local authority ... for such acquisition". So that's a basic entitlement. And then built on that are some other entitlements.

GLAZEBROOK J:

But they are not getting compensation under section 60, are they? They're getting payment for the land under an agreement under section 17.

MR FARMER QC:

Yes.

GLAZEBROOK J:

Because compensation is quite different from payment for the land under an agreement for sale and purchase.

MR FARMER QC:

Yes. They are. But the – if I can take you to the contract – I haven't finished with the Act, so if you wouldn't mind just keeping it there...

ELIAS CJ:
But is the point that you're making that these are public law powers and the Council can't simply give away money, and if it's going to be paying compensation it has to be tied into some – to an acquisition for a public purpose?

MR FARMER QC:
It is, and it is indeed, that's – when you look at the contract that's exactly what the contract is acknowledging. So if I can take you to the contract –

GLAZEBROOK J:
I suppose the point I was putting to you is that I can understand that as a matter of construction of the contract. What I can't understand it is why it fits into frustration. Because as – what you can say is as a matter of construction of the contract the only thing we were ever going to buy was something that was available at the time of settlement and if it's not available we are no longer going to buy it.

MR FARMER QC:
How it follows, how it fits into frustration, our argument there is that our obligation to pay under the contract was an obligation to pay for land that we were acquiring under the Public Works Act. And if we're not acquiring land under the Public Works Act because we already own it as a result of the events that have occurred and the reversion under the lease, then that obligation is – then the contract – in terms of our – so it goes two ways. So not only is Planet Kids unable to perform under the contract by virtue of the fire because it can't provide title, but we would say also that our, that the event of that fire and the reversion of the lease to us means that we can't properly, in terms of the fundamental basis of this agreement, which was that we are obliged under the agreement to pay compensation pursuant, albeit by contract, pursuant to our obligations under the Public Works Act. That's not an obligation that we can perform properly either. And so if you look at the contract you'll see it's –

GLAZEBROOK J:
Well why cannot you perform it? You are not indicating any limitation on powers of the Council to enter into agreement.

MR FARMER QC:

No.

GLAZEBROOK J:

You are just – so is the argument just because it is referable to the – I suppose my problem is I can see that as an argument of construction of the contract but that is not how the case has been run.

MR FARMER QC:

Well can I just take, could I take you through the contract and we'll come back to this? I don't want to avoid Your Honour's point. So looking first of all at the background, the first point to note is in recital 1 –

ELIAS CJ:

Sorry, we are looking at the contract now?

MR FARMER QC:

At the contract, which is tab, which is page 61 of the case on appeal. So the first point to note about recital 1 is that the business that's being carried on is being carried on from named premises, and it's the same premises that are then described by reference to their legal, their legal title, legal description, and the lease is specifically identified. And then, if you go to recital 3, "The parties have negotiated a basis for payment of compensation under the Public Works Act." So that's what is the basis of the contract, payment of compensation under the Public Works Act is what the Council will be doing as its fundamental obligation under this contract. And that's for the closure of the lessee's business, which I'll come back to, and then you'll see, going down a couple of lines, that, "The payment of compensation and the basis of business relocation and disturbance is not considered either a fair or appropriate basis for payment of compensation. Accordingly it has been agreed to compensate the lessee for the loss of goodwill arising from the closure of the business calculated on the same basis as if the lessee had sold the lessee's business to the Council as a going concern." The point there being that there were no suitable premises in the location or the vicinity so there was no option but to close the business and that triggers, as we'll see, section 68 of the Act providing a particular basis for compensation, which is compensation to be in effect for the loss of the goodwill in the business.

So there it is again. That's clause 3, recital 3. Then if we go over to clause 1 of the terms of agreement, "The Council pay to the lessee in full and final settlement of any claim for compensation the lessee may have under the Public Works Act and the closure of the lessee's business." And then you get the specification of how that's assessed: (a), for the goodwill of the business pursuant to 68(1)(b) of the Public Works Act, together with chattels and eth like. Now, if you've still got 68 of the Public Works Act available there, 68(1)(b) specifically says, "The owner of any land taken or acquired", taken or acquired, "under this Act for a public work who has a business located on that land shall be entitled to compensation for", and it's not (a), it's (b) because (a) is a business loss where you can actually relocate down the road. That's not the case here. So (b), "loss of the goodwill of any such business, if – (i) the land is valued on the basis of its existing use; and (ii) the owner gives such assurances and undertakings not to dispose of the goodwill and not to engage in any similar trade or business as may be required by the ... local authority."

So once again, we're going to pay you goodwill because you can't relocate down the road because you've lost, the business is gone. You've lost your goodwill. Then we do want a restraint of trade clause because we don't want you starting up again somewhere and in effect being paid for something you haven't lost. So that's, that's the sort of – there's the interrelationship, the interaction between the Act and the contract.

And you get, if I can still stay with the contract for a moment or two, in clause 3, "On the settlement date", on the settlement date, not before, "On the settlement date the lessee will yield up vacant possession", we don't get it beforehand. The fact that Council had some access, sent a surveyor onto the site to survey things up, measure things up for when they did get possession is, is not part of this, "will yield up vacant possession and deliver to the Council two things". The first, "a validly executed surrender of the lease", and secondly, "a validly executed restraint of trade covenant with the Council on the same terms as the deed attached to this agreement as appendix A."

Now my learned friend took you to that and he said, "Well look, they actually signed it," and indeed they did, but the, the contractual obligation was not to deliver it up until settlement and of course it couldn't really have any impact or effect until, until settlement.

And then we have the only other provision of the contract we've already looked at, which is clause 8, "The lessee's business to remain at the sole risk of the lessee until the settlement date." So our, our point, and it's in our written submissions, I won't go back to it and read it again to you, but is that this context, statutory context, the fact that the leasehold interest was being delivered up as a part of an acquisition under the Public Works Act, albeit by contract, which the Act specifically provides as a mechanism for doing and achieving that, all of that is highly relevant not only to the question of, of the impossibility of the – or the – of Planet Kids to provide title, deliver up the lease, but is also highly relevant to whether the nature of the obligation that the Council undertook under this contract, which was to pay compensation for a taking of land under the Public Works Act, is the question, is that the same thing or is it, as we would say, radically different from an obligation to pay money when the land is not being taken under the Public Works Act? Because we already own the land. So it's not just a question of whether you're paying something for nothing. It's also a question of the nature of the obligation as radically and fundamentally changed in terms of Lord Radcliffe and Lord Reid's test in the *Davis Contractors* case.

ELIAS CJ:
Well you could almost go further though and say that you don't have the power to make the payment, so that it's impossible of performance on your side as well as on the Planet Kids side.

MR FARMER QC:
Yes.

WILLIAM YOUNG J:
Can I just, is it the case that a council acquiring land which it intends to use for a public work can only operate within the confines of the Public Works Act?

MR FARMER QC:
No, no, that's –

GLAZEBROOK J:
Yes.

MR FARMER QC:

– Your Honour Justice Glazebrook's point to me, no they could go out and freely negotiate a contract whatever they're going to use it for. They might be going to use it for something that's not a public work?

ELIAS CJ:

But they couldn't pay without receiving value. I mean there must be some requirement to obtain value.

MR FARMER QC:

Oh indeed –

GLAZEBROOK J:

Well, but you enter into the contract on the basis you're going to obtain value. The fact that something becomes worthless after the contract's entered into is, that isn't a power issue, it's just whether that frustrated. I'm actually thinking more fundamentally now, I'm just wondering whether in fact this has been mischaracterised as an acquisition contract because all we have is a surrender of lease which isn't an acquisition as such, it's a surrender of lease, plus, so whether it is an agreement to purchase any land, it's actually an agreement to get the surrender of lease and it's full and final settlement of a section 68 compensation for business loss. So that what they're saying is, "Well, we're not going to make you acquire this under the public works act because we're going to give it to you, i.e. surrender it. But you're still going to, as the Council, pay us compensation for business loss. In that sense as a settlement agreement, it's actually happened as soon as it's been entered into hasn't it? Because you don't say, for instance, say you settle a piece of litigation on the basis of the law as you understand it and then another case comes along and shows you totally didn't understand the law. You wouldn't say that that has frustrated the settlement agreement.

MR FARMER QC:

Oh, no, no, of course not, no, I wouldn't –

GLAZEBROOK J:

Well isn't this just a settlement agreement? I know the analogy isn't an exact analogy but just looking at it, I'm just wondering whether it's been mischaracterised and what the effect of that is.

MR FARMER QC:

Well, the parties wrote the contract and they've incorporated all of those key Public Works Act provisions and said, pursuant to those provisions, this is what we're doing, albeit by contract.

GLAZEBROOK J:

No, but we're settling in advance anything that might or might not arise under the Public Works Act and voluntarily Planet Kids is giving up its lease even though it had an Environment Court, very unlikely to succeed, I think has been conceded, objection.

MR FARMER QC:

Recital C, "The parties have negotiated a basis for payment of compensation under the Public Works Act," that's what they said they were doing.

GLAZEBROOK J:

But it's not actually a section 17 agreement then, it's a compromise of a future claim –

MR FARMER QC:

No, well with respect, I, we would say –

GLAZEBROOK J:

And actually there isn't any acquisition either.

MR FARMER QC:

Well, there are two points there, perhaps. The first is, we would say yes, it is a section 17 agreement. It's not, there may be an element of settlement of an objection that's been taken in the land and the Environment Court –

GLAZEBROOK J:

Well what's been acquired?

MR FARMER QC:

Pardon?

GLAZEBROOK J:

What's been acquired –

MR FARMER QC:

Well that's the second –

GLAZEBROOK J:

– in terms of land?

MR FARMER QC:

– question Your Honour's raised, is there an acquisition or is a surrender of a lease not an acquisition of the lease, and with respect, we would say it's, the word "acquire" must surely be wide enough to include both a transfer of a lease and a surrender of a lease because otherwise, because the basis objective of the Council here is to obtain possession of the land to carry out a public work and with respect that distinction, while it may have relevance in other contexts, private law contexts, it can't we would submit. It would be a very narrow view of acquisition. I had a look, I don't think there's any specific definition of acquisition.

WILLIAM YOUNG J:

It's not so much acquisition, is it, it's acquiring of state in land and it's in a sense it's only indirectly acquiring of a state in land because it's achieving the extinction of an encumbrance on its title.

MR FARMER QC:

It's extinguishing an interest in the land –

WILLIAM YOUNG J:

Yes, yes.

MR FARMER QC:

– that somebody else had, albeit that it was, it owned the freehold already. I'm not sure Your Honour Justice Glazebrook I can take that point any further, I understand the point that you're making but our submission would be that it is an acquisition –

GLAZEBROOK J:

I'm not sure it makes any difference to your argument actually, I just was interested in the characterisation of the agreement, that was all.

MR FARMER QC:

Yes, okay. As a matter of interest I should probably give you a reference to, in our bundle, cases tab 11 is *Laws of New Zealand* section "Compulsory acquisition and compensation" and towards the end of that on page 57, 58, this is a reference to section 62 of the Act, sorry if you still have that there as well, section 62 of the Act says, "The amount of compensation payable under this Act shall be assessed in accordance with the following provisions," and then if you go down to B, "The value of land shall, except as otherwise provided, be taken to be that amount which the land have sold in the open market by a willing seller to a willing buyer on the specified date, might be expected to realise," and then the specified date is defined in section 62 subsection (2), "In this section the terms specified date means," and then there are a number of scenarios which are set out and the one that's relevant –

McGRATH J:

Is it 62(1)(e), that's the provision is it, do you say?

ELIAS CJ:

(b)

MR FARMER QC:

62(1)(e).

ELIAS CJ:

No, 62(1)(b) the specified date –

MR FARMER QC:

62(1)(b), I'm sorry Your Honour, 62(1)(b), that the date for assessing compensation is on the specified date and what I'm going to say is the specified date is the date of settlement and you'll get that if you go to subsection (2) the term specified date means, and then there are all these terrible different scenarios that possibly exist. But if you go through to (c) we would say this is relevant one. "In the case of any

other claim in respect of land of the claimant which has been or is proposed to be taken for any work, the date on which the land in its proclamation," which we're not dealing with here, "or the date on which the land was first entered upon for the purpose of the construction or the carrying out of the work, whichever is the earliest," so the date when possession was given.

And if you go over now to tab 11, *Laws of New Zealand,* page 58 where this term "specified date" is considered by the learned author, Mr Salmon QC as he now is, where on page 58 subsection (3) you see there the subsection (3) which I've just referred to, the date, ending with, "The date on which the land was first entered upon for the purpose of constructing or carrying out the work, whichever is the earlier," and then footnote 6 it said, "An example would be a case where land is taken for a public work by agreement under section 17 of the Public Works Act". So that's saying, "Well if you've got an agreement under section 17, it'll be the date you take possession, enter upon the land for the purpose of carrying out the work". And all of that ties back to section 17.

And I won't take you to it, but *Te Marua Limited v Wellington Regional Water Board* [1983] NZLR 694 (CA), which is in the, in our bundle, is a case, it's tab 10, is a case where that, the question of the date of assessment was critical and where the Court of Appeal said that what you get compensation for is compensation of what is taken at, what is taken at the time it's actually taken and not compensation for losses that may have occurred between the time when notice was given, notice of acquisition was given and when the, the land was finally taken, and the same would be true of a contract. We would say it's only the compensation is for the losses that are incurred as at the date of taking. What had happened in the *Te Marua* case was that the – there'd been a very, very significant drop in land values between the time of notice if acquisition and the time when the land was actually taken. And that's – what's happened here is much the same thing. There is a loss that has occurred to Planet Kids as a result of the supervening event.

Now, there is this question of risk. That's figured in my learned friend's submissions. It figures also in our submissions. We say clause 8.1 is highly significant. It does place the risk fairly and squarely on the, on Planet Kids. They would have been, of course, well aware of clause 40.1 and the drastic consequences that would arise from a fire. The whole question of the lease, and of course this, this whole question, as Your Honours would well know, is, is of fires occurring, the risk of fire occurring

between the date a contract is entered into and date of settlement, I was involved a long time ago in a case called *Carly v Farrelly* [1975] 1 NZLR 356 (SC) which is in the, in the New Zealand Law Reports where in fact that's exactly what happened. A fire occurred and the risk was found to be on the purchaser who unfortunately hadn't taken out insurance to cover that risk, although he was then able, happily, to sue his solicitors for negligence. And of course as a result of that, possibly that very case, the forms, the standard forms for sale and purchase published by the Law Society were all changed. Now, here you have a –

GLAZEBROOK J:

But that contract wasn't frustrated, was it –

MR FARMER QC:

No.

GLAZEBROOK J:

– because it burnt down?

MR FARMER QC:

No it wasn't.

GLAZEBROOK J:

So why is this frustrated because it's burnt down? As a matter of construction you mightn't have to pay for something that's no longer available but why is that frustration?

MR FARMER QC:

Because in that case it was still possible to get title and title was given. What the purchaser lost was the value of what he thought he was buying. He was buying a house but in the end he got bare land only. And so the point I'm making out of all of that is that the, is that questions of risk and risk from fire is not only something that's generally well known and generally covered or protected by insurance but in this case you have an express provision in the lease that had a particular consequence, namely that the lease would come to an end by operation of law in the event of fire, which was a provision that possibly was there that for the benefit of benefit or detriment, as the case may be, of both parties, depending on the circumstances.

So the whole insurance position is, is, we say, is relevant, relevant at least in the sense that if the, if for whatever reason Planet Kids has not had adequate insurance or if, which may well be the case, its insurance company is simply saying, "We're not going to pay you because we think this contract is not frustrated and you should be able to paid out fully under the contract," whatever the situation is, and we don't know it entirely at all, either way, that's a matter for Planet Kids rather than for the Council.

Now, turning – next, actually the final area I want to deal with, Your Honours, is, but it will take a little time, not too long I hope, is just to look really at the aspects of the law of frustration that my learned friend relied on for saying, in effect, that this is not a frustration case. And they are principally the issues of hardship and injustice because what he said, of course, under hardship is, well, you've got what you contracted to get. You got your, you've got the land, albeit by a totally different route, so what are you complaining about? And that's tied in with the notion of injustice and whether or not, as my learned friend put it this morning, whether it's necessary to show hardship and injustice in order to get to the impossibility of performance, radical change in the nature of a contract, et cetera, test laid down in, in *Davis Contractors*.

And the, of course, following from that is, well what is meant by hardship and what is meant by injustice? And to deal with that I really wanted to take Your Honours through *Davis Contractors* but really as it was dealt with by the High Court of Australia in *Codelfa*, not because the High Court of Australia in *Codelfa* is a better authority or anything of that kind, but because, particularly in the judgment of Justice Aickin, is a very, very helpful and clear account of how the doctrine of frustration has developed over time and in particular how *Davis Contractors* became a landmark case and how other cases that followed were really simply regarding *Davis* as, the test laid down in the *Davis* case, as settled law. And then we have only to deal with, perhaps, after that what my learned friend's reliance on Lord Justice Rix in the *Sea Angel* case, which, we say, doesn't impact on any of that and, indeed, what Lord Justice Rix says, he says things that are really quite helpful, we would say, to us in this case.

COURT ADJOURNS: 12.57 PM
COURT RESUMES: 2.15 PM

ELIAS CJ:
Yes, thank you.

MR FARMER QC:

If I could take Your Honours to the *Codelfa* case which we handed up this morning as a separate authority. I'm not going to go right through it you'll be pleased to know. This case, I recall it when it came out, it created a lot of interest in Australia at the time, more actually in the area of implied terms which was one of the ways in which the case was run then on the question of frustration but there was an inter-relationship between the two at that time. So very briefly the facts were as stated in the head note that a construction company had contracted to perform excavations for an underground railway and they had to – there was a fixed period under the contract but they were restrained ultimately by injunction from working the hours that they had expected to be able to work which led to substantial extra costs and they argued first, unsuccessfully, for an implied term that in the event that they were prevented from working the hours that had been contemplated there would be a quantum merit type claim that could be made. Alternatively they argued successfully, by a majority of four to one, that the contract had been frustrated as a result of the injunction that had been granted and that therefore, via that route, they were able to claim for the extra costs that had been incurred.

Now I only want to refer to two judgments, the judgment first of Justice Mason, which I'll be very short with, and then more at greater length the judgment of Justice Aickin. So Justice Mason first of all considered at some length the question of implied term and, as I say, ultimately that was rejected really on the grounds that it wasn't possible to imply a term of a kind that was being argued for there and that raised the sort of usual issues that you get in all implied term cases, particularly in commercial contracts. But on the question of frustration, if you go through to page 356, at the foot of the page there's a heading "Frustration" and His Honour referred first of all to *Brisbane City Council v Group Projects Pty Ltd* (1979) 26 ALR 525 (HCA), also an earlier judgment of the Australian High Court, which is in the casebook but I won't take you take it, in which there had been a discussion about *National Carriers v Panalpina* and *Davis Contractors* and the like and you'll see, I'll come back to it in Justice Aickin's judgment, but you'll see at page 357, about a quarter of the way down the page, was that famous dictum of Lord Radcliffe's which is really the test, we would say, for impossibility of performance frustration. "That frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that

which was undertaken by the contract... It was not this that I promised to do." And His Honour left out the Latin tag which that statement which will – which is normally cited there.

There is also, and I'm not going to go through this, but further down the page there's a – really enters into the question of whether the basis of the doctrine of frustration is one of, you'll see about three quarters of the way down the page, to whether the basis of it is – that there has to be shown a, "Common assumption that some particular thing or state of affairs essential to its performance will continue to exist or be available with neither party undertaking responsibility in that regard and that the common assumption proves to be mistaken..." and that led, as you see at the very foot of the page to, and over onto the next page, to a discussion about *Krell v Henry* [1903] 2 KB 740 (CA) where the common assumption was the holding of the Coronation and what His Honour describes about six or seven lines down on page 358 as the, "unexpressed common assumption". It's actually interesting, I won't take you to it, but it's interesting to go back and actually reread *Krell v Henry* because when you do you see that actually the, there were some quite interesting clear facts surrounding the making of the contract that made it plain that the parties really did understand that the whole purpose at the time for the hiring of the room and hiring it only during the day, not at night, as indeed to view the, the Coronation.

So the criticism that are made of *Krell v Henry* in, in, in modern, these days, well I, I would think, with respect, where a broader contextual approach is taken to the interpretation of contracts would not actually be seen as so, so untoward after all. And indeed, that seems to have been the view that Justice Mason himself took as he discussed this particular case.

ELIAS CJ:
There's an interesting discussion – oh, you might be coming to it – by Justice Mason about the linkages between mutual mistake and, and frustration which may be of some –

MR FARMER QC:
Yes, that's, that's on, I think, on page 360 because in this case the, the – well perhaps looking at 359 first, about a quarter of the way down the page His Honour says, "the second objection is the proposition does not" – that the proposition, being the common assumption proposition, does not sufficiently acknowledge the fact that

the event which generally, if not universally, works at frustration is an event which supervenes after the making of the contract, namely a change in the law which makes it impossible for the parties to execute the contract. And he there then goes on to talk, at the foot of, the end of that paragraph, to talk about the injunction as a supervening event, though it does not stem from any alteration in the law.

And, and then he refers in the very next paragraph, he says, “An unusual element in the present case is the parties appear to have received, accepted and acted on erroneous legal advice the contract work could not be impeded by the grant of an injunction to restrain noise or other nuisance, advice which was based on an erroneous interpretation of a particular statute.”

And I think that leads him on the next page to go on to say at the top of the page, “The doctrine of frustration is closely related to the concept of mutual mistake. However, in general, relief on the ground of mutual mistake is confined to mistakes of fact, not of law. If the common contractual assumption is of present fact it is a case of mutual mistake; if the assumption is of future fact it is a case of frustration. The distinction being that in one case the contract is void ab initio and the other it is binding until the assumption is falsified. Here the mistake is not one of present fact; it is either a mistake as to future fact or a mistake at law. Even a bare mistake of law, this is not, I think, fatal to the application of the doctrine of frustration. The unsatisfactory distinction between a mistake of fact and one of law has not so far been carried over into frustration. I see no reason to further complicate the doctrine by invoking this distinction.”

And he then goes on to say, “The critical issue is whether the situation resulted from the grant of the injunction as fundamentally different from the situation contemplated by the contract on its true construction in the light of the surrounding circumstances.” So that, that’s taking it back into Lord Radcliffe’s test of, of frustration.

And the other interesting passage in, in the judgment if – seeing we’re allowed to indulge ourselves for a moment in some academic discussion, is on page 363 at the top of the page where His Honour looks back at the implied term position. He says, “There is, of course, no inconsistency between the conclusion that a term cannot be implied and the conclusion that events have occurred which have brought about a frustration of a contract. I find it impossible to imply a term because I am satisfied that in the circumstances of this case the term sought to be implied was one which

parties in that situation would necessarily have agreed upon as an appropriate provision to cover the eventuality which has arisen. On the other hand I find it much easier to come to the conclusion that the performance of the contract and the events which have occurred is radically different from performance of a contract in the circumstances which it construed in the light of surrounding circumstances contemplated.

Perhaps from there we can go over to Justice Aickin. His judgment begins at 731 but we can go right through to 375 where he begins his discussion on frustration and then 376 is the beginning of three or four pages of, as I say, in my respectful submission, extremely helpful review of the history and really beginning with the implied term theory of frustration as it was originally seen to be and then following through the, in effect, a rejection of that theory in favour of what became the test laid down in *Davis Contractors* by Lord Radcliffe and by Lord Reid. So – but just looking at 376 then about, a paragraph beginning a third of the way down the page.

WILLIAM YOUNG J:
Sorry what page?

MR FARMER QC:
376 Your Honour. So Justice Aickin, His Honour said, "The manner in which the doctrine of frustration is generally expressed has undergone some change, though it has not been suggested that its content has changed. When it was first developed it was usual to express it as arising from an implied term," and then he refers to famous cases up until that time of *F A Tamplin Steamship Co* and in Australia, *Scanlan's New Neon Ltd v Toohey's Limited* (1943) 67 CLR 269, which was the neon lights case, the effects of the war on being able to use electric power for this purpose, *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 (HL) –

ELIAS CJ:
Oh, the neon light cases.

MR FARMER QC:
Sorry?

ELIAS CJ:

They were neon lights or something weren't they?

MR FARMER QC:
Yes.

ELIAS CJ:
And you couldn't use them in the black out.

MR FARMER QC:
They were prohibited by wartime regulations from actually having the lights, full beam lights. You could show them during the day. They were still in signs, advertisements, but you couldn't light them up at night time and what, in that case the Court refused to hold that the contract was frustrated because it was not radically different, there was still considerable benefit in the contract for the – arising from the hiring of the signs.

Now if you just, this is halfway down the page, just after the reference to *British Movietonews*, His Honour said, "The doctrine is now generally expressed as depending on changes in the significance of the obligations undertaken and the surrounding circumstances in which the contract was made. This development was explained by the House of Lords in *Davis Contractors v Fareham UDC*, see especially Lords Reid and Radcliffe." And then he quotes a long passage from Lord Radcliffe, and this is where this is useful, it's all in the one place, and I won't read you all of this. It comes, perhaps halfway down the next page after reviewing, after Lord Radcliffe had reviewed a number of earlier authorities he said, "By this time it might seem the parties themselves," he's reading his rejection of the implied term theory and the officious bystander and the man that Professor McLauchlan, with respect, is wanting to revive in his article in terms of allocation of risk, and halfway down the page His Lordship says, "By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the Court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically

different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do," and it's that last few lines that gets quoted over and over and over again subsequently as the statement of the modern basis for the doctrine of frustration.

I won't read the rest of that passage on the next page. His Honour then turns to subsequent developments in Australia, *Brisbane City Council v Group Projects Pty* which you have in the bundle where Justice Stephen with whom Justice Murphy agreed considered the question of frustration, reviewed many of the cases in a manner with which I respectfully agree, apart from the above more extensive quotation from Lord Radcliffe's speech, I cannot do better than refer to and adopt all that Justice Stephen said at those pages.

Then he goes on back to the House of Lords, he says, since the judgment of Justice Stephen was delivered, there's been two further decisions of the House of Lords which I should mention, the first is *National Carriers v Panalpina* which Your Honours know is often referred to as well and which was a case which, among other things, it was held, put to rest the question of whether the doctrine might not be able to be applied to a lease. It was held that it could, albeit hardly ever it was said.

Lord Hailsham, the Lord Chancellor, discussed the case generally and then the reference to the five theories of frustration and a preference being expressed for the formulation of Lord Radcliffe and *Davis Contractors* and then Lord Wilberforce, a quotation, a passage from Lord Wilberforce's judgment in that case, which is the various theories that have been expressed. And I perhaps might read a little bit of that, "Various theories have been expressed," said Lord Wilberforce, "as to its justification in law, as a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands as an implied term as a matter of construction of the contract as related to removal of the foundation of the contract as a total failure of consideration," and I think the Court of Appeal in the present case picked up those possible ways of looking at frustration and including there the principal one of course, the removal of the foundation of the contract and also a reference to total failure of consideration as a not wholly accepted basis for looking at frustration, at least in some cases.

And His Lordship said, "It's not necessary to attempt selection of any of these as the true basis. My own view would be they shade into one another, a choice between

them is a choice of what is most appropriate to a particular contract under consideration," and it is sort of really shades of that or an echo of that in Lord Justice Rix's much more recent judgment in *The Sea Angel* case that my learned friend referred to and the use of the multi–factorial, where, and I'll give you the references later, but where Lord Justice Rix is really saying that you shouldn't just take one factor, whatever it might be, and say, "Well that's conclusive," you do have to look at the case –

ELIAS CJ:

Now where are you taking us, because we have gone over these authorities and you're quite correct, it's a very useful rehearsal of them here, but is there any particular point you want to make?

MR FARMER QC:

No, I'm happy to do that, I was, just leave it with you and just commend this judgment to you as being a very useful survey. And but to emphasise the point on the way through that what keeps coming through loud and clear is Lord Radcliffe's formulation, and you get it again on page 380, on the following page, and I, perhaps the only other, also on 380, this is the very end of what I was going to refer to, about two thirds of the way down the page. For my own part, I would, with respect, adopt the reasons of the House of Lords in those three cases, which are *Davis Contractors, National Carriers,* and the more recent one of *Pioneer Shipping Ltd v Electricity Corporation of New Zealand* (1999) 9 TCLR 227 as being preferable to the other bases which have been suggested from time to time, their test has the advantage of being flexible and capable of application to a wide range of circumstances and lacks the degree of unreality involved in the implied term, theory and so that's really all I wanted to do with that.

And then *The Sea Angel* and Lord Justice Rix, I think you'll have the references but if I can just give them to you, that's tab 5 of my learned friend's bundle. This is a sea ship charter case and going to 664 and 665 and the particular point I want to take, that's paragraphs 110 and through to 112, particular point I want to take out of 110, which is the multi-factorial point, that begins, "In the course of the party's submissions we heard much to the effect that such and such a factor excluded or precluded the doctrine of frustration or made it inapplicable," and so in this case we had my learned friend talking about the need to show hardship as a precondition to invoking the doctrine.

And His Lordship continues, "I am not much attracted by that approach, for I do not believe that it is supported by a fair reading of the authorities as a whole. Of course the doctrine needs an overall test such as that provided by Lord Radcliffe if it is not to descend into a morass of quasi discretionary decisions. Moreover, in any particular case, it may be possible to detect one or more particular factors which have driven the result there. However, the cases demonstrate to my mind that their circumstances can be so various as to defy rule making," and then he goes on immediately to say, "In my judgment the application of the doctrine requires a multi-factorial approach." And later in the paragraph he talks about the allocation of risk and so on.

So that, if Your Honours please, was all I wanted to say about the case law and I just wanted perhaps then to return to the, what seems to be the main platform of my learned friend's case, which is that there is nothing unjust, there is no injustice to the Council, which is the party seeking to rely on frustration and there is no hardship to the Council because it got what it wanted.

And what we would say, I'd just put two ways really of saying the same thing to you if I can put it this way. First, we say it is unjust or would be unjust to require the Council, rather than performing the contract as it was formed, that is to say, to pay compensation pursuant to the Public Works Act, in return for the surrender of the leasehold interest in land. Instead, to require it to pay money that is not of that nature but which is in effect requiring the Council to pay for something it already owns and which it therefore cannot acquire pursuant to the Public Works Act. That's one way of putting it.

The other way of putting it would be to say that in the, to say that the frustrating event in this case, the fire and the reversion of the lease as a result of the fire, it's that frustrating event has radically and fundamentally changed the nature of the Council's obligation and it's that change that creates the injustice because, in Lord Radcliffe's terms, this is not what I contracted to do, non haec in foedera veni, and the case, we say, falls squarely within that. In other words, it's the frustrating event which actually creates the hardship and the injustice if the party, either party for that matter, is held to the contract as it was originally formed. Those –

McGRATH J:

Do you accept Mr Blanchard's submission that hardship is an additional element?

MR FARMER QC:

He picks up –

McGRATH J:

Because he linked that back to Lord Radcliffe, didn't he?

MR FARMER QC:

Yes, he did –

McGRATH J:

It's an additional, as well as the change in the significance of the obligation.

MR FARMER QC:

Yes, he picks it up out of that. We would submit that that's a fair reading of His Lordship's judgment, both that passage but more particularly reading the judgment as a whole, would not be that you have to show hardship as a condition precedent to invoking the doctrine of frustration which is really how my learned friend is putting it, but rather that hardship and injustice must, in some way, be shown as a result of the particular supervening event that has created a fundamental and radical change in the nature of the obligations, is the way I put it a moment ago, that's where the injustice comes.

McGRATH J:

Yes, I certainly understand the application that you've developed. That's helpful. You accept the principle in that way?

MR FARMER QC:

In the way I put it but not in the way my learned friend has put it.

ELIAS CJ:

Do you accept that it's a necessary but not sufficient condition? You seem not to accept that?

MR FARMER QC:

It's necessary – because I couldn't argue otherwise because the whole basis on which the Courts have developed the doctrine of frustration is to do justice.

ELIAS CJ:
Yes.

MR FARMER QC:
But my point is that if there is, to use Lord Radcliffe's approach, a radical and fundamental change in the nature of the obligations, then that, is itself, unjust. What you don't have to do is to do as my learned friends want to do which is to do some kind of pragmatic and factual analysis of all the –

ELIAS CJ:
Benefits and detriments.

MR FARMER QC:
Benefits and detriments, yes.

ELIAS CJ:
Well what's the hardship to the Council? Can you just say very, just in a sentence, what would you say the hardship to the Council is?

MR FARMER QC:
The hardship to the Council is being required to pay money not pursuant to a statutory regime that it has signed up to but requiring it to pay money outside that scheme for something it already owns. And that is particularly invidious for a public body such as the Council.

GLAZEBROOK J:
Is another way of putting it that the unjustice that you say – sorry, I probably should not say unjustice because – injustice in these circumstances, because what is actually happening is that but for the contract the Council would have got this for nothing so if it had waited it would have got it for nothing but it had contracted earlier to pay for it so actually isn't it just getting a bad bargain.

MR FARMER QC:
Is the Council getting a bad bargain?

GLAZEBROOK J:

I mean you'd say yes because it's having to pay for something it already owns –

MR FARMER QC:

Yes, yes.

GLAZEBROOK J:

– and that's changed the fundamental nature but another way of looking at it is, well it could have waited and it would have got it for nothing, and the injustice is that it's now having to pay for it because it entered into a contract. That's subject to the argument about the construction of the contract.

MR FARMER QC:

Yes, yes, I understand. I think perhaps a slight variant on that might be that there is an injustice in, in effect, having to compensate not under the Public Works Act but having to compensate gratuitously, as it were, the other party for the consequences of the operation of the lease which is the surrender of the lease by virtue of the fire. There'd be no question of, if we weren't in this area of taking the land, if there'd just been a fire, the lessee would have lost its interest in the land and, leaving aside questions of insurance, it would not have been able to turn to the landlord for compensation because those are the terms of the lease whereas what there is an injustice in saying, well because there was this Public Works Act contract that had been entered into, there is somehow no injustice if, contrary to that first situation I have described, there is no injustice if the lessee is relieved of the consequences of that lease, at it turned out, by virtue of the fact that you have, you are going to hold the Council to pay them, notwithstanding the events that have happened.

GLAZEBROOK J:

See on the other side though, in the circumstance where it was just destroyed by fire, then there would have been business interruption insurance presumably and that would have gone on until they were able to set up another lease or another building or move somewhere and then continue their business. Whereas in this circumstance, one can see why there's no business interruption insurance because they had already given up their business and agreed to give up their business on a particular date. So in fact the injustice there is that they, they then find that they've

given up their business for absolutely no compensation because their business is being given up anyway. There wasn't a sale of business aspect that they –

MR FARMER QC:
No, no.

GLAZEBROOK J:
– can then go back and continue with their business.

MR FARMER QC:
I think clause 8.1 is what the answer to that is. That that's a matter that they were at risk, they agreed they were still at risk –

GLAZEBROOK J:
Well agreed they were at risk for that period up until the end of December but after that they were no longer at risk because they were no longer going to have the business.

MR FARMER QC:
No, but it would depend on what kind of insurance they had and at least –

GLAZEBROOK J:
They'd be fine with building insurance –

MR FARMER QC:
But being prudent they – it's knowing they're at risk –

GLAZEBROOK J:
But what insurance could you get for if this burns down then can we actually insure for what we might have had if we were carrying on with the business having already stopped it. I just don't know that there's any insurance of that nature.

MR FARMER QC:
I don't know.

GLAZEBROOK J:

I would suspect not but.

MR FARMER QC:
Well, I think, yes, perhaps, but I don't – neither of us knows.

GLAZEBROOK J:
Well you'd say it doesn't matter anyway –

MR FARMER QC:
No.

GLAZEBROOK J:
– because that was the risk they undertook I suppose?

MR FARMER QC:
No, that's right. I mean it's a situation where in one sense it might be said there are no winners in this but someone is going to have to suffer loss. The question is whether the law, what the law says about the situation and, you know, there are no entirely satisfactory outcomes when you have a fire.

ELIAS CJ:
Any other questions? No.

MR FARMER QC:
Thank you Your Honours.

ELIAS CJ:
Thank you Mr Farmer. Yes Mr Blanchard?

MR BLANCHARD:
Thank you. I thought I would start by just saying a little bit more about the relationship between the Contractual Remedies Act and frustration because it is – that relationship is obviously important in the way the case has been developing. This is an unusual case. The typical case, take a typical case of sale and purchase of land. If you have a situation where the fire destroys the premises pre-settlement, and the property is at the vendor's risk pre-settlement, as it is here, it's going to be a

situation where the vendor can't settle or their ability to settle is impaired because the building on the land has been destroyed and the purchaser is not able to deliver to the purchaser – the vendor is not able to deliver to the purchaser what the purchaser contracted for and normally what you find in these situations is that the purchaser relies on the Contractual Remedies Act if they want to bring the contract to an end. They say the vendor can't perform, it's a serious defect in performance, I'm entitled to cancel and the contract would be brought to an end by the Contractual Remedies Act, at least that's the purchaser's position. Then on the other side you have the vendor saying, well hang on a minute, this contract has been frustrated, so you have the vendor relying on frustration and the purchaser relying on the Contractual Remedies Act.

What's very odd about this case is that it's the purchaser relying on frustration, which is the opposite to the usual situation, and now using the Contractual Remedies Act as a back up if frustration fails and the reason why we see this unusual situation that we wouldn't normally have is that the purchaser, through other means, has got what it wants. The purchaser has got everything it needs. It doesn't need to cancel and rely on a claim for damages or relief under the Contractual Remedies Act and the purchaser knows that it doesn't need relief. It's the vendor that needs relief and the purchaser in this case, the Council, knows that the relief the vendor can get under the Frustrated Contracts Act is very limited compared to the relief under the Contractual Remedies Act. So that's why it's much better for the Council to take the unusual position of being a purchaser relying on the Frustrated Contracts Act than to take the more usual course for a purchaser in this sort of situation of looking to cancel under the Contractual Remedies Act.

But my submission is that this fundamentally is just not a frustration case. It's a case where the purchaser, the Council, should be relying, if anything, on the Contractual Remedies Act the way that purchasers normally do in this situation. It's just not a frustration case.

GLAZEBROOK J:

What do you say to Mr Farmer's answer to me when I put that proposition to him that frustration operates effectively before you get to contractual remedy or breach or even executory breach because it's a doctrine that just gets rid of the contract so it's not a matter of one relying on one and the other relying on the other. It's effectively a pre-step.

MR BLANCHARD:
I think that – I must say I think that has to be right. That's why in the classic situation the purchaser relies on the Contractual Remedies Act and the vendor tries to avoid the consequences of the Contractual Remedies Act by relying on frustration and I think – so I think frustration comes first but I don't think this is a frustration case.

GLAZEBROOK J:
All right I understand the submission, thank you.

MR BLANCHARD:
So then the Public Works Act. Now the Council's submission sort of shifts a bit but it seemed to be, initially at least, the leasehold was actually being acquired under the Act and then it then developed into a submission that the Public Works Act provisions are very relevant to interpretation of the agreement. Planet Kids' submission is, of course, that the Public Works Act is just part of the background against which the agreement was entered and the Public Works Act has no direct application here. The task of the Court is to determine whether the contract has been frustrated under ordinary principles and it's important to notice that the agreement and the Public Works Act are actually inconsistent and my learned friend referred to section 62 of the Act and the specified date in section 62(2)(c). Now that provision, well we're actually in a section 68 situation, but assuming this was a section 62 situation, that section would have you determine the compensation as at the date that – effectively as at the date that the Council took possession of the property, which is obviously going to be on 20 December or thereafter.

What actually happened here, under the agreement, was the parties reached an agreement in principle regarding the compensation back in April 2010 and they signed an agreement in May 2010. So we see that the parties agreed to compensation on a different basis to section 62. It would have made no sense here for the parties to agree the compensation based on the position as at 20 December because the business was being shut down on that date and it would have had no value. So the agreement in the Public Works Act aren't – they're really inconsistent in that way.

So I don't really know – ultimately I don't think that the Council's submission that the Public Works Act is significant really takes you anywhere. The parties reached an

agreement that compensation would be paid. They decided what that compensation should be back in April 2010 and that's inconsistent with the Public Works Act but that's just the way it had to be. So I think that the Public Works Act is really a bit of a red herring.

Now there was also reference to accountability of the Council to ratepayers and that could be a factor but in my submission Council shouldn't be treated as any different party – any differently to any other party to a contract. Sure, the Council had ratepayers but companies have shareholders, there were people obviously behind Planet Kids. So the fact that the Council is a public body and has ratepayers really should be immaterial in my submission.

McGRATH J:
Can I just stop you, just going back and looking at section 62, are you really saying that's the provision that applies when compensation has to be assessed –

MR BLANCHARD:
That's right.

McGRATH J:
– under the Act.

MR BLANCHARD:
Yes.

McGRATH J:
With valuations in whatever Tribunal is charged with that responsibility?

MR BLANCHARD:
Yes. My submission is that this – we're dealing here with an agreement and we have to work out whether the agreement is frustrated. The Public Works Act is in the background but I don't see it as having any particular bearing in this case and in particular I note that the Council are placing particular emphasis on section 62 and in particular the definition of "specified date" but actually the agreement is inconsistent with compensation being assessed on a specified date.

McGRATH J:

If the statute requires that, and the agreement is inconsistent with it, the statute, I suppose, would prevail but I understood you were saying the statute doesn't apply to preclude the agreement setting what the compensation is. Is that, am I misunderstanding you?

MR BLANCHARD:
Well I certainly wouldn't say that the Act prevails. I would say that we have a contract and contract law prevails and what the parties agreed prevails.

GLAZEBROOK J:
Well you, I think, said it was section 17 –

MR BLANCHARD:
Yes.

GLAZEBROOK J:
– whether it is section 17 or it's not section 17 you'd say it's just a contract?

MR BLANCHARD:
Absolutely.

GLAZEBROOK J:
So even if it's not a section 17 contract it's just a contract with the Act in the background.

MR BLANCHARD:
Yes.

GLAZEBROOK J:
Because – and actually section 17 must override section 62 because in fact you wouldn't have a contract that says, well, we'll pay whatever the valuation rate is when we settle.

MR BLANCHARD:
Yes.

GLAZEBROOK J:

You would set a figure for the –

MR BLANCHARD:

Absolutely.

GLAZEBROOK J:

– so it would always – it's likely to be inconsistent with section 62 because it would never be the date.

MR BLANCHARD:

Yes. Well I mean if –

ELIAS CJ:

I don't know that section 62 applies at all, does it?

MR BLANCHARD:

Well, no –

ELIAS CJ:

First of all it's, "Except as otherwise provided," and secondly it's a formula by which assessments of value are to be made but it doesn't preclude you establishing it at some other time.

MR BLANCHARD:

Yes I mean I don't think section 62 applies at all to this case because –

McGRATH J:

I think, that's what I understood you to be saying.

MR BLANCHARD:

Yes but what I'm trying to respond to is my learned friend's suggestion, they're trying to bring the Public Works Act sort of in through the back door and I'm saying this is just a contract. It's a contract that's actually inconsistent with the Public Works Act. I mean if it was totally consistent with the Public Works Act then you just wouldn't both having an agreement you'd just – you wouldn't have an agreement, you'd just have a compulsory acquisition under the Act and – I guess what I'm saying is the Council

doesn't have to, there's no reason why the Council has to act in a way that's consistent with the Act in every respect.

ELIAS CJ:
Well except that the contract envisages that its section 68 that provides the authority for the Council in providing compensation for the loss of goodwill.

MR BLANCHARD:
Well, I guess what the contract says is that the compensation has been calculated in accordance with section 68. It's not actually going to be paid in accordance with section 68. I mean, I imagine from a best practice point of view, what the Council likes to do, so it can't be criticised, is to look at the Act and try and work out what compensation it's going to pay based on the Act because that seems a sensible way for it too so it tries to follow the Act where it can but it can't follow the Act in every respect because –

ELIAS CJ:
But isn't the point of the Act, and you might be entirely right in saying that it's simply background, is that it is one of the factors which indicates what the parties expectations were which are, it is argued, frustrated.

MR BLANCHARD:
Yes.

ELIAS CJ:
That's the significance.

MR BLANCHARD:
Yes, it's part of the factual matrix that –

ELIAS CJ:
Yes.

MR BLANCHARD:
– might give some indication as to what the parties intended but the submission, off the back of it, that my learned friends are trying to make, is well you have to – they're saying, and they rely on the *Te Marua* case, they say, you know, you've got to work

out the compensation – under the Act you work out the compensation as at the date that the Council takes possession of the property under compulsory acquisition so – and that has, and the fact that you do that under compulsory acquisition has some sort of importance to this case because there's obviously been a change between the time the contract was signed and the time of settlement in this case, which means that the value that my clients had has disappeared. But what I'm saying is, well –

WILLIAM YOUNG J:
But there'll always be changes.

MR BLANCHARD:
There'll always be changes and here the agreement that the parties reached doesn't calculate compensation as at settlement date. It was calculated seven months earlier in April by agreement.

McGRATH J:
It just sets a figure.

MR BLANCHARD:
Yes. So I'm just, I guess I'm saying there's no magic, to me *Te Marua* and the specified date in section 62 are sort of red herrings, I just don't see how they can have any impact.

I just thought I should say a little bit more about clause 8 because again I see clause 8 as being a red herring. At common law, risk passes to the purchaser under an agreement for sale and purchase on the signing of the agreement. And what that means is that if, at common law, the – and the reason why risk passes on the signing is because at that point the purchaser becomes the equitable owner of the property and risk goes with ownership. And what that means is that if there's a fire burning down the building pre-settlement, the loss sits with the purchaser and in practice what that means is that the vendor can proceed with the agreement as if nothing's happened. So even though the vendor's only got land and no building because the building's been burnt down, the vendor can proceed and the vendor's entitled to be paid in full even though the house has been burnt down, is not there anymore.

And so what the purpose of clause 8 is, is to reverse that, the position at common law and what that does is in that situation I've been talking about, where the house is

burnt down pre-settlement, it allows the purchaser to insist on getting what they contracted for, so the loss ends up residing with the vendor. So the burnt down house becomes the vendor's problem and the vendor, and it creates a situation where the purchaser may be able to cancel the agreement under the Contractual Remedies Act and will have entitlement to damages because the house is not there and the purchaser's not getting what they contracted for.

So that's what clause 8 is about, and it's a boilerplate clause that's included in agreements. It's particularly useful in, well you see it in agreements for sale of land because of the reason I've just explained. You also see it in agreements of sale of businesses because businesses also have assets, well a lot of the assets in the sale of a business will be ones where risk passes at the time of settlement but there may be some assets where risk passes prior to settlement.

ELIAS CJ:

This isn't really apt for assets, is it? It's about the business being at the sole risk and that's really because what's provided for in this agreement is compensation for goodwill, one would've thought?

MR BLANCHARD:

Yes, but the business is a shorthand name for the assets of the business, including the goodwill and so what it's saying is that the, that everything that comprises the business, or the business is made up of, is at the risk of the vendor prior to settlement. Anyway, this is a long winded, where I'm getting to with all of this is that the task that we're looking at, essentially what we're –

WILLIAM YOUNG J:

What it means is that if you can't supply what you've contracted to supply at settlement, it's to your account.

MR BLANCHARD:

That's right. And –

WILLIAM YOUNG J:

Which in a sense possibly supports the view that this is a Contractual Remedies Act case not a frustration case?

MR BLANCHARD:
Absolutely.

GLAZEBROOK J:
Yes.

MR BLANCHARD:
Absolutely. The clause 8, because if this was a, frustration's all about bringing the contract to an end and if the risk is allocated to my client and their contract comes to an end, but this clause is nothing to do with that, this clause is not about bringing the contract to an end, it's actually about the opposite, it's about the purchaser, the Council, being able to insist on its contractual rights, which is why this is a Contractual Remedies Act case, not a frustration case. So in my submission, clause 8 is either a red herring or it actually supports the view that it's a Contractual Remedies Act case rather than a frustration case.

GLAZEBROOK J:
Well, you might even go so far as to say if the risk has been allocated, then it's not a frustration case, it's just that the vendor then has its remedies under the contract.

MR BLANCHARD:
Yes, and I say that the –

GLAZEBROOK J:
Which may well be cancellation in this case –

MR BLANCHARD:
Yes, yes.

GLAZEBROOK J:
– but then with the section 9, or it may not be cancellation, whatever the –

MR BLANCHARD:
Yes, well we end up back where we, which we've talked about, which is I say the chattels and the plant weren't essential and that wouldn't give a right to cancel –

GLAZEBROOK J:

Well they didn't care about the building either –

MR BLANCHARD:
They didn't really care –

GLAZEBROOK J:
– as it turns out.

MR BLANCHARD:
They didn't care about the building, we gave them the restraint of trade so in a sense they took the goodwill in the business, so they got that, we would say. So I would say it's a case where Council's suffered no loss other than the loss arising from the chattels which we're compensating them for by reducing our claim by the value of the chattels in the plant, and it's not entitled to cancel, or if it is entitled to cancel, we get the section 9 relief, but it's just not a frustration case.

And as I said earlier, the reason why the Council wants it to be a frustration case is because it knows that the power to grant relief is very limited under the Frustrated Contracts Act, whereas it's quite powerful under the Contractual Remedies Act.

I just thought I should say a little bit about *Codelfa* and my learned friend's suggestion that *Codelfa* emphasises that this, that Lord Radcliffe's test has become the test for frustration and it's all about whether there's been a fundamental or radical change.

We accept that there was an assumption made by the parties that there would be a surrender of lease, that was an assumption that the parties made, but you need to have much more than just an assumption. Under the *Davis Contractors* test there has to be an assumed, much more than just an assumed state of affairs. That ceases to exist as the result of a supervening event. The disappearance of the assumption has to result in radical or fundamental change to the positions of one or both of the parties and the question is whether there's been a radical or fundamental effect on the parties here and we say that when you take everything into account, there hasn't been a fundamental change. And that's where my benefit and burden analysis comes in. There's been a change, there was an assumption but it's not fundamental.

And I also go on to say that the fundamental, there have been, the law has developed since *Davis Contractors* and that is reflected in the decision of Lord Justice Rix in *The Sea Angel* case. I don't think it's right to say now that the fundamental radical change test is the be all and end all. It is important, it's certainly part of, a very important part of the factorial approach. Lord Justice Rix said that the fundamental change is important. He said this at paragraph 111 of the decision. It's important because it tells us that the doctrine is not likely to be invoked, that mere incidents of expense or delay or onerousness is not sufficient and that there has to be a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

But then he went on to say at paragraph 112, "Ultimately application of the test cannot safely be performed without the consequences of the decision one way or the other being measured against the demands of justice," and so I say, you can't look at whether there's been a fundamental or radical change in a technical or, technical way or in a vacuum, you've got to look at the consequences, you've got to look at the effect on the parties.

The other thing that my learned friend was suggesting about *Codelfa* was that it put the implied term theory of frustration to bed. But I don't think that's right now, I think the implied term theory of frustration is possibly on its way back up again because the multi-factorial approach perhaps goes back to Lord Wilberforce and *Panalpina* saying that the five tests which include not just the construction of the contract approach but also question, matters of justice that if they tend to shade into each other, and we also have the approach to construction in the *Belize Telecom* case and the more modern more flexible approach to implied terms and so as I said earlier, there does seem to be a convergence here and it's probably not safe to say that the implied term theory is gone. It could be part of the mix under the multi-factorial approach or as part of Lord Wilberforce's five theories shading in together. But I'm possibly, anyway, so that was what I wanted to say about *Codelfa.*

And unless Your Honours have any further questions, those are my submissions.

ELIAS CJ:
Thank you Mr Blanchard.

MR BLANCHARD:

Thank you.

ELIAS CJ:

Thank you counsel for your submissions which have been of great help. We will reserve our decision in this matter.

COURT ADJOURNS:3.11 PM