IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2013
[2014] NZSC 146

BETWEEN	VIKRAM KUMAR AND NIRUPAMA KUMAR First Appellants
	ROBERT JAMES SELWYN Second Appellant
	MICHAEL DONALDSON AND PATRICIA BRONWYN DONALDSON Third Appellants
AND	STATION PROPERTIES LIMITED (IN LIQUIDATION AND IN RECEIVERSHIP) Respondent

Hearing:	12 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	R M Kelly, K J Jarvis and S A Eckhoff for Appellants D J Goddard QC, M J Tingey and S V A East for Respondent
Judgment:	15 October 2014

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The orders of Toogood J are reinstated.**

C **The respondent must pay costs of $25,000 to the appellants collectively, together with reasonable disbursements.**

D **The order for costs in the Court of Appeal is quashed. Costs in that Court are to be fixed in light of this judgment.**

REASONS

	Para No
Elias CJ, McGrath, Glazebrook and Arnold JJ	[1]
William Young J	[103]

ELIAS CJ, McGRATH, GLAZEBROOK and ARNOLD JJ

(Given by Arnold J)

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Introduction

[1] Between late 2005 and early 2006, the appellants entered into agreements with the respondent, Station Properties Ltd (in liquidation and in receivership) (Station), for the purchase of units in an apartment development in Queenstown (the agreements). They claimed to have done so on the understanding that they would not be required to purchase the units, their role being simply that of underwriters facilitating the raising of funding to enable the construction of the development so that it could be on-sold to an organisation which would operate it under a brand name as serviced apartments. They were, in effect, investors who expected to receive a return on what was intended to be a relatively short-term investment.

[2] Between the time the agreements were made and the time the development was substantially completed in mid-2008, the value of the units dropped significantly as a result of a general downturn in the property market. Station was unable to find a purchaser for the development and looked to the appellants and other purchasers to

settle their transactions. The appellants refused to settle. One, Mr Selwyn, purported to cancel his agreement. Ultimately, in April 2010, Station took the view that the appellants had repudiated the agreements and cancelled them. Station then sued the appellants for damages for breach of contract, based on the resale prices achieved for the units or, in the case of the Donaldsons, on its then market value.

[3] Station was unsuccessful in the High Court,[1] but succeeded in the Court of Appeal.[2] The question on which this Court granted leave is whether Station was entitled to cancel the agreements.[3] Important to the resolution of this question are the circumstances and effect of the appellants' refusals to complete. As s 7 of the Contractual Remedies Act 1979 provides the framework for analysis, it may be helpful if we briefly state its effect at the outset.

Section 7 of the Contractual Remedies Act 1979

[4] Subject to particular statutory exceptions, and to the ability of the parties to make their own contractual arrangements,[4] s 7 of the Contractual Remedies Act operates as a code in relation to the circumstances in which a contract may be cancelled for breach, misrepresentation or repudiation. As this Court said in *Mana Property Trustee Ltd v James Developments Ltd*,[5] this is clear from s 7(1), which provides:

> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

[5] Section 7(2) deals with a party's right to cancel a contract where the other party repudiates it. It provides:

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1 *Station Properties Ltd (in rec) v Kumar* [2012] NZHC 1527 (Toogood J) [*Station Properties* (HC)].

2 *Station Properties Ltd (in rec and in liq) v Kumar* [2013] NZCA 70, (2013) 14 NZCPR 32 (O'Regan P, Randerson and Asher JJ) [*Station Properties* (CA)].

3 *Kumar v Station Properties Ltd (in rec and liq)* [2013] NZSC 81. The Court declined leave in respect of various other matters raised by the appellants, such as whether the absence of evidence from Mr McEwan and his son constrained the ability of the Court of Appeal to draw certain inferences.

4 Contractual Remedies Act 1979, s 5.

5 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [21].

> (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

This is a key provision in the present case, given the party's arguments. The appellants say that Station manifested an intention not to fulfil certain essential obligations under the agreements, thereby repudiating them. As a consequence, the appellants were not required to complete the transactions. By contrast, Station says that the appellants repudiated the agreements by indicating through a continuing course of conduct between mid-2008 and early 2010 that they had no intention of completing the transactions under any circumstances. Accordingly, Station was entitled to cancel the agreements and seek damages for breach of contract. Any breach of contract by Station was irrelevant.

[6] Sections 7(3) and (4) deal with a party's right to cancel a contract for misrepresentation or breach (including anticipated breach), as follows:

> (3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if—
>
> (a) he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
>
> (b) a term in the contract is broken by another party to that contract; or
>
> (c) it is clear that a term in the contract will be broken by another party to that contract.
>
> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) applies, a party may exercise the right to cancel if, and only if,—
>
> (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
>
> (b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—
>
> (i) substantially to reduce the benefit of the contract to the cancelling party; or
>
> (ii) substantially to increase the burden of the cancelling party under the contract; or

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[7] The appellants argue that Station's non-performance related to contractual obligations that were essential, entitling them to cancel the agreements.[6] Accordingly, Station's failure to perform these obligations amounted to repudiation, justifying the appellants' refusals to perform. Station accepts that it was in breach of the relevant contractual obligations, but says that the appellants did not refuse to complete as a consequence of those breaches but for other reasons. Consequently they repudiated the agreements, which ultimately led Station to cancel them. Apart from that, Station says that the terms breached were not essential and the breaches were not substantial.

[8] Finally, we mention s 7(5) and ss 8(1) and (2). Section 7(5) provides that the right to cancel may be lost where the innocent party affirms the contract:

> (5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

The appellants submitted that, if they had wrongfully repudiated their agreements, Station had affirmed them, a contention that Station contested.

[9] Sections 8(1) and (2) provide:

> **8 Rules applying to cancellation**
>
> (1) The cancellation of a contract by a party shall not take effect—
>
> (a) before the time at which the cancellation is made known to the other party; or
>
> (b) before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, if—
>
> (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or

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[6] Although s 7(4) contains two alternatives – essentiality and substantiality – the focus of the appellants' argument was on essentiality.

(ii) the other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract.

(2) The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. It shall not be necessary to use any particular form of words, so long as the intention to cancel is made known.

Factual background

[10] Station was one of a group of companies controlled by Mr Daniel McEwan. He ran property investment seminars for members of the public through a company known as Investors Forum NZ Ltd, offering advice, information and promotional material about property investment.[7] At the seminars, Mr McEwan offered attendees the opportunity to invest in property developments that companies associated with him proposed to undertake.

[11] Between 2001 and 2004, the appellants had attended Investors Forum meetings and, as a consequence, received offers to invest in various property development schemes. They all decided to invest in the Queenstown apartment complex, which was to be developed by Station. Initially, this investment was undertaken through the purchase of redeemable preference shares in a company called Forum Select Bowen View Ltd (Forum Select), which was the vehicle to be used to invest in Station. The purpose of the investment was to enable Station to develop the Queenstown apartment complex, initially by purchasing the land from another company associated with Mr McEwan. The appellants paid $72,000 each for nine redeemable preference shares in Forum Select, the intention being that they would share in the profits of the project.

[12] The project's principal funder was Bank of Scotland International (Australia) Ltd (BOSI). In September 2005, the appellants received an email in the names of Dan McEwan and his son, Kelly, advising as to the project's progress. The email said that construction was ready to begin. It advised that the design had been altered to allow for a management arrangement to be run from unit three. The email said:

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[7] Members of the public paid a fee of $5,000 for the right to attend.

> This means the management rights will be sold to the highest bidder (around $25,000 per unit is the market rate) providing further income [for] the company. The sale and purchase contracts do not include a management agreement at this stage, however this will be made available during construction, along with the furniture package. (This will be [passed] onto the company at cost plus 10% – we will fly to Italy and import the majority of these items.)

[13] The email then raised the possibility of the appellants purchasing apartments. It said that, to ease difficulties over funding,[8] the appellants were being offered the opportunity to change the form of their investment by purchasing units in the complex either outright or "as an underwrite". The underwrite option was explained as follows:

> Buy as an underwrite with the intention of the company selling. A "Gazump clause, Clause 37.1" has been inserted into the contract. This clause allows the development company to cancel your contract at any time. The purpose of this is if we can sell the unit for the same or more value this will benefit the project (this is at the [company's] discretion). The project will split the difference 50/50 with the original purchaser. This secures the project funding and as future sales occur increases the values. Contracts with a gazump clause are not unconditional we pay no sales commission – this commission is only paid to the final purchase sales person. When an offer is made you may either go unconditional on your purchase or agree for us to cancel the agreement and sell sharing the profit.

Following this extract, there was an illustration of how this option would work using an apartment with a purchase price of $700,000. The example was prepared on the basis that purchasers would acquire a furniture and air-conditioning package for the apartment for an additional $30,000. The email also said that, as an incentive to purchase, "the project" would pay a one per cent "purchaser's fee" to purchasers pre-settlement.

[14] The appellants were sent an unexecuted agreement for sale and purchase, a price list and a document headed "Bowen View Agreement Instructions" under cover of letter dated 20 September 2005. The letter was on McEwan Group letterhead but signed by Station. It read:

> This letter should be held on your personal file and is for reference purposes for the intention/direction of the development.

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[8] Station's funding was about to expire and Station wanted to achieve some sales in order to access a lower rate of interest on its new funding.

> On the basis that you are either a shareholder in the vendor company or a shareholder in Forum Select Bowen View Limited, we confirm that any reference in the sale and purchase agreement to your deposit is hereby varied to provide that the total deposit to be paid by you is one dollar only.
>
> The vendor company also confirms that it will not be in a position to commence construction until it has made arrangements with lenders in respect of the balance of the deposit that would otherwise be payable. This arrangement may well require you to assign your rights to your RPS and associated monies received thereafter for a sum equal to the normal 10% deposit, that would otherwise be payable for their security purposes. We have had discussions with a lender and this may not be a requirement but need to warn you that it may.
>
> If we are unable to enter into such arrangements with your co-operation the economic viability clause will be revoked and you would not have any obligation to settle under the sale agreement.
>
> The sale agreement needs to include the furniture package/air-conditioning/heating package. Full lists of the contents of this item will be made available and as you are a shareholder will be at cost plus 10%. We have set a budget and will work to this. The public will pay a marked up price determined by a third party valuation (this is clearly more profit to the project).
>
> The vendor intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement. Decisions to be considered would be a number of weeks for personal usage, operator and brand, and [whether] the income would be pooled or tied to each unit. If pooled this would require a prospectus.
>
> Please complete and sign in duplicate your sale and purchase agreements in order to secure your investments. An instruction sheet is attached to help you complete this document.
>
> …

[15] We pause to note two features of this letter that become important later in the narrative. First, there is a reference to a "furniture package/air-conditioning/heating package", for which an additional sum must be paid, namely, cost plus 10 per cent. Second, there is reference to an intention to arrange a serviced apartment management agreement "as an option". These aspects were referred to in the agreement instructions document, as follows:

> Prior to completion, an up to date furniture package arrangement, along with air-conditioning and heating, will be mandatory.
>
> A property management agreement will be offered pre-settlement, we expect settlement to be approximately April 2007.

[16] A price list was attached, which gave a price for each apartment, plus an additional sum for an air-conditioning and heating upgrade and a further sum for the furniture package (the latter was to be confirmed).

[17] On 10 November 2005, Station emailed the Forum Select investors to advise as to progress. The report indicated that some sales had been achieved but more were required to enable access to the funding necessary to commence construction of the development. The report indicated that the tender drawings were ready to be lodged and also said:

> **Management**
>
> We are in talks with Accor Hotel and their subsidiaries and also Breakfree. We hope to pin something down in the coming weeks.

[18] The appellants decided to buy apartments on the basis of the "underwrite" option. They executed the sale and purchase agreements on various dates in late2005/early 2006[9] at the following prices (exclusive of GST):

(a) First appellants (Mr and Mrs Kumar) – unit 24 at $1,135,125.

(b) Second appellant (Mr Selwyn) – unit 17 at $1,039,625.

(c) Third appellants (Mr and Mrs Donaldson) – unit 13 at $880,125.

These prices included the estimated cost of the air-conditioning/heating upgrade and the furniture package. The deposit payable on each purchase was one dollar,[10] although Station subsequently sought and received a top-up of the deposits. The agreements were not executed on behalf of Station until 26 May 2006.

[19] The agreements comprised a summary and execution section, clauses from the Real Estate Institute of New Zealand and Auckland District Law Society Agreement for Sale and Purchase of Real Estate[11] (the REINZ/ADLS agreement)

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9 Mr Selwyn signed his agreement in October 2005, the Kumars in February 2006 and the Donaldsons in April 2006: see *Station Properties* (HC), above n 1, at [19].

10 Clause 36.1.

11 Real Estate Institute of New Zealand and Auckland District Law Society *Agreement for Sale and Purchase of Real Estate* (7th ed (2), July 1999)

and a number of special conditions, together with some attachments. The summary and execution section contained the following clause:

> **Operative Clause**
>
> It is agreed that the Vendor sells and the Purchaser purchases the Units, fixtures and fittings and chattels, upon the particulars set out above and the terms of this within [the] sale and purchase agreement, including the general conditions, the special conditions and the specifications enclosed.

[20] Relevantly the REINZ/ADLS agreement provided:

(a) The purchaser was required to pay the balance of the purchase price to Station on the settlement date.[12]

(b) If the transaction was not settled on the settlement date, either party could issue a settlement notice requiring the other party to settle, provided that the party issuing the notice was in all material respects ready, willing and able to settle.[13]

(c) If the purchaser did not comply with a settlement notice issued by the vendor, the vendor could sue the purchaser for specific performance or cancel the agreement, forfeit the deposit and sue for damages.[14]

[21] The special conditions set out Station's obligation to complete the development in a proper and workmanlike manner, substantially in accordance with the plans and specifications, and in conformity with the relevant regulatory requirements.[15] Station gave a number of warranties as to the design and standard of the development. In addition, there were three other special conditions of particular relevance.

[22] First, under cl 14.1(5), settlement was to occur five working days after the last of the following events:

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12 Clause 3.7(1).
13 Clause 9.1(1) and (2).
14 Clause 9.4.
15 Clause 17.1.

(a) The date of issue of unit titles;

(b) The date of practical completion as defined; or

(c) The date of issue of code compliance certificates.

The date of practical completion was defined to mean:[16]

> … the date on which the Works reach the stage of Practical Completion as certified by the vendor's Architect.

"Practical Completion" was defined to mean:[17]

> … that stage of construction when the Works are substantially complete so that the property is capable of being used for the purposes for which it is intended without material inconvenience notwithstanding that there may be items of a comparatively minor nature that require finishing, alteration or remedial action.

"Vendor's Architect" was defined to mean:[18]

> … Leuschke Group Architects Limited or such other company, firm or person as the vendor may appoint to supervise the construction of the Works.

[23] Second, there was a sunset clause:

> **26.0 Sunset clause**
>
> 26.1 If the vendor is not ready, willing and able to settle this agreement on or before 20 December 2007, then either party may, by notice in writing at any time thereafter, cancel this agreement and the purchaser shall be entitled to the return of the deposit together with Net Interest accrued and neither party shall have any right of claim against the other.

This clause was later varied by agreement to extend the date to 13 March 2009 (which was 12 months after the "estimated completion date" of 13 March 2008).

[24] Finally, there was the "gazump" clause:

> **37.0 Vendor's right to cancel ["Gazump" clause]**

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16 Clause 14.1(2).
17 Clause 14.1(4).
18 Clause 14.1(7).

> 37.1 Notwithstanding anything to the contrary herein, the vendor shall have the right to cancel this contract without notice at any time. In the event of such cancellation, the purchaser shall not have any right to compensation of any sort whatsoever.

[25] As noted above, after the appellants had signed their agreements, Station required that they "top up" their deposits.[19] In corresponding with Station about this, Mr Kumar enquired whether those who had underwritten a unit would be required to pay further funds. He also asked whether, in light of the slow sales to date, there was a risk that they would "have to actually purchase the unit". Station responded that more aggressive marketing would soon be undertaken and that because the Kumars had chosen a very desirable unit, it was likely to sell early, so that, "hopefully", they would not be required to settle.

[26] By mid-2008, the complex was nearing completion and Station began communicating with the appellants about settlement. Station acknowledged that the property market had become depressed by this stage and that its efforts to sell the completed development had been unsuccessful. Station advised that it had been talking to various organisations who might operate the complex as serviced rental apartments and had selected a preferred candidate. It also advised that it had been investigating furniture packages.

[27] By this time, however, Station was experiencing financial difficulties. In particular, BOSI was unwilling to provide further funding, so that Station could not proceed with the purchase of any furniture. The appellants obtained their own valuations of their apartments, which revealed that the then current values were substantially lower than the prices agreed in the relevant agreements in 2006.

[28] Station wrote to the appellants on 15 July 2008 advising that titles were expected to be available by the end of July and once they were available, Station would call for settlement. On 17 July 2008, Mr Selwyn emailed Station to enquire about progress with the sale of the complex and any management arrangement for it. On 7 August 2008, Station's solicitors wrote to the appellants, calling on them to settle their purchases and advising that the settlement date was 14 August 2008. It is

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[19] See above at [18].

not disputed that titles and code compliance certificates had been issued. No practical completion certificate had been issued by the architect designated in the agreements, Leuschke Group Architects Ltd (Leuschke). Instead, Station relied on a practical completion certificate issued by Mr Tony Dawson of Maltbys Ltd, who had been appointed jointly by Station and by BOSI as quantity surveyor for the project and had made an independent assessment of the date of practical completion for the purpose of the construction contract between Station and the builder, Fletcher Construction Ltd. Mr Dawson's certificate was dated 2 July 2008 and read:

> This is to certify that in accordance with clause 10.4 of the conditions of the Contract, Practical Completion of 24 units[20] and 3 houses was achieved on 3 June 2008.
>
> Outstanding defects are noted on the attached schedules and will need to be resolved within the 12 week period.
>
> This certificate does not warrant that the works have been completed as designed, marketed or in accordance with relevant laws or standards, but merely that the building is on the whole fit for occupation. Refer to attached Queenstown Lakes District Council Code Compliance Certificate for compliance with the Building Act 2004.

[29] The appellants failed to settle at this time and also failed to settle in response to Station's further efforts to achieve settlement in September and October 2008, including the issue of a settlement notice on 10 October requiring settlement within 12 working days.

[30] There were two other relevant events in August 2008. First, on 13 August 2008, a Station representative emailed a BOSI representative identifying several outstanding matters that needed to be resolved before settlement notices could be issued. Relevantly, these were:

> 1. Furniture packages – to be provided or credited?
>
> …
>
> 3. Management agreement – purchasers need to know if there will be an operator in place or not. …
>
> …
>
> 5. 1% purchasers fees – will these be able to be credited on settlement?

[20] This was an error: there were 25 units in the development.

[31] BOSI indicated the provision of furniture packages depended on valuations, which were being obtained. In relation to the fees, BOSI obtained further details from Station, before responding on 21 August 2008 as follows:

> BOS was not aware of any underwrite/purchaser fees nor was Tony Dawson who has confirmed that they were not included within the marketing & sales commissions budget.
>
> Furthermore, the S&P agreements do not detail such fee arrangements, [indecipherable].
>
> Hence, no set off will be made at settlement. You should provide me with any "side agreements" (which agreements, you should note, will be in breach of BOS' facility agreement given they were made without our prior consent) sooner rather than later – I need to know what we are potentially dealing with here and report the situation to HBOSA Credit. Needless to say, Credit will not be forgiving in this regard and we will be pushing back on any set offs claimed, to the legal extent that we can.

[32] Second, on 8 and 13 August 2008, Mr Selwyn emailed Station seeking information on the payment of the purchaser's fee and asking if the furniture package had been installed. Then, on 29 August 2008, he sent an email to Station advising that he was cancelling his agreement because he considered that Station had not fulfilled its contractual obligations. In the email, Mr Selwyn noted that he had obtained a valuation which put his unit at little more than half the contracted price and that the valuer had expressed the view that the original sales in 2006 "were above the market at the time". The email then read:

> The original intent of the contract was to onsell the apartments to an operator and this has not been done. Indeed, I understand that half of the apartments remain unsold.
>
> Accordingly, because I believe that the developer has not complied with its obligations under the Contract, I now wish to rescind the contract. This is without prejudice to any remedies I may have against the developer.

Station replied that it did not accept the cancellation. Mr Selwyn's solicitors confirmed his position several times in September and October 2008.

[33] Finally, we note that, on 29 September 2008, Mr Kumar sent an email to Station on behalf of himself and his wife offering to buy unit 24 for $535,000 (inclusive of GST and the furniture package), which was less than half the contracted price. The offer was made on the basis of a valuation they had obtained. Mr Kumar

said in evidence that, when they discovered how low the value of unit 24 was, he and his wife realised that settling the purchase was not a viable option for them.

[34] In February 2009, in light of their failure to settle, Station issued proceedings against the appellants (and other purchasers) seeking orders for specific performance of the agreements and applying for summary judgment. The appellants opposed the summary judgment applications, principally on the basis that Station had misled them as to the terms of the underwrite agreements. It was claimed that Station had represented that the appellants would not be required to purchase their units in the event that Station could not sell the development to a third party. On 20 April 2009, before Station's proceedings had been heard, Station was placed into receivership by BOSI. In a decision dated 17 December 2009, Associate Judge Robinson dismissed Station's applications for summary judgment against the appellants, on the basis that they had an arguable defence under the Fair Trading Act 1986 based on pre-contractual misrepresentations.[21]

[35] On 23 February 2010, Station's solicitors wrote to the appellants' solicitors advising them that unless the appellants confirmed that they would proceed with their purchases by 5 pm on 26 February 2010, they would be treated as having repudiated the agreements. On 6 April 2010, when the appellants had neither settled nor confirmed that they would settle, Station cancelled the agreements, indicating that it would seek damages for breach of contract. It subsequently issued the present proceedings. On 2 June 2010, the solicitors for Mr and Mrs Kumar wrote to Station's solicitors stating that they did not accept that Station was entitled to cancel the agreement because it was in breach of its obligation to pay the one per cent fee ($11,351.25). As a consequence, Mr and Mrs Kumar cancelled the agreement under which the date in the sunset clause was extended from 20 December 2007 to 13 March 2009. They then cancelled the sale and purchase agreement in terms of the sunset clause as originally formulated.

[36] To summarise, then, the appellants' initial investment was by purchasing shares in a company that was to invest in Station so that it could develop the Queenstown complex. Later, at Station's request, they became "underwrite

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[21] *Station Properties Ltd v Lever Action Ltd* HC Auckland CIV-2009-404-354, 17 December 2009.

purchasers" of particular units in the proposed complex. It was anticipated that the complex would either be on-sold or managed as furnished short-term rental accommodation. But, in the event, the appellants were asked to settle on the basis that the units were unfurnished and without any management agreement.

High Court and Court of Appeal decisions

[37] Station's claim for damages was determined by Toogood J in the High Court.[22] Station had sued on the agreements, alleging that when it called upon the appellants to settle in 2008, it was itself ready, willing and able to proceed. It claimed that the appellants' continued refusal to confirm that they would proceed with the transactions amounted to repudiation, entitling it to cancel the agreements. In the alternative, it claimed that the appellants were in breach of their agreements as a result of their failure to settle. It sought damages comprising the difference between the contractual prices and the prices achieved on re-sale, together with interest at the contractual rate from the original settlement date.

[38] In their statements of defence, the appellants denied that the effect of the agreements was to commit them to purchasing the particular units. They claimed that it was a term of the agreements that they would be:

> … conditional only, until such time as [Station] obtained an offer by a third party to purchase all of the units in the development en masse, upon which event [the appellants] would have the option of either confirming [the agreements] (ie confirming that they wished to proceed to purchase, or "go unconditional") or of agreeing to terminate [the agreements] to enable [Station] to sell to the third party. Upon the latter event, [Station] would pay to [the appellants] a half share of the said profit on the re-sale.

The appellants alleged that further terms of the agreement required Station to:

(a) Pay a fee of one per cent of the purchase price to the purchasers in consideration of their entering the agreements.

(b) Provide a furniture package for each apartment.

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[22] *Station Properties* (HC), above n 1.

(c) Arrange a management agreement "with a manager who would operate a business of service apartment rental of all units in the premises … with the result that no Goods and Services tax would apply on any sale to [the appellants] should they exercise the option to 'go unconditional'".

[39] The appellants alleged that the date for settlement under the agreements was never reached as Station did not obtain a valid certificate of practical completion (the certificate being given by Maltbys rather than by Leuschke, the party identified in the agreements). They also alleged that Station was never ready, willing and able to settle because it had not paid the one per cent fee, provided the furniture package or arranged a management contract. The appellants said that Station's purported cancellation of the agreements in April 2010 amounted to repudiation, as a result of which they were entitled to cancel their agreements.

[40] The appellants also maintained several affirmative defences, most significantly that they were induced to enter into the agreements by various misrepresentations (framed as misleading or deceptive conduct within the meaning of s 9 of the Fair Trading Act and as misrepresentations under the Contractual Remedies Act). In particular, the appellants claimed that they had been induced to enter into the sale and purchase agreements by misrepresentations about their role as "underwrite" purchasers. They alleged that their agreements were conditional and that they were not bound to, or Station would not require them to, settle their purchases.

[41] In relation to the three terms referred to in [38](a)–(c) above, Toogood J rejected Station's argument that they were not its obligations but obligations of an associated company and held that they were part of the contractual arrangements between the parties (the side agreements).[23] This finding was not challenged in the Court of Appeal or before this Court. The Judge also held that the time for settlement had never arrived as the certificate of practical compliance was not issued in accordance with the agreements because it was provided by Maltbys rather than by Leuschke. As a consequence, Station was not ready, willing and able to settle.

[23] At [56] and [75].

Station's breach of the side agreements was material and substantial and the appellants' refusal to settle was justifiable given Station's breaches and its repudiation of the principal agreements.[24]

[42] Toogood J rejected the appellants' contention that the effect of the "gazump" clause was to give them an option either to settle their purchases or to relinquish their rights to do so, irrespective of whether a third party agreed to purchase the complex. The Judge held that, absent an acceptable offer from a third party, the appellants were contractually bound to settle the transactions.[25] The Judge did not address the affirmative defences in any detail given his decision on the other issues, but did indicate that, had it been necessary to do so, he would have relieved Mr Kumar of his obligations under the sale and purchase agreement by means of the Contractual Remedies Act as a result of misrepresentations made to him that he would not, as an underwrite purchaser, be required to proceed with his purchase under any circumstances.[26]

[43] In the Court of Appeal, Station accepted that the side agreements had contractual force, that the certificate of practical completion provided by Maltbys did not comply with the agreements and that the time for settlement had not arrived at the point it cancelled the agreements.[27] Its arguments focussed on what it said was the appellants' repudiatory conduct. The essence of its submission was that the appellants had indicated by their conduct in mid to late 2008 that they did not intend to complete the agreements, come what may, and they continued that stance through to April 2010, when Station cancelled the agreements and stated its intention to sue for damages for breach of contract. The appellants' continuing conduct demonstrated that they had repudiated the agreements, which gave Station the right to cancel. Station said it was not in material breach of either the agreements or the side agreements and could have settled the transactions had the appellants identified the issues of the certificate of practical completion and the performance of the side agreements as roadblocks at the time.[28]

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24 At [114]–[129].
25 At [76]–[85].
26 At [139].
27 *Station Properties* (CA), above n 2, at [15].
28 At [16].

[44] For their part, the appellants did not seek to challenge Toogood J's finding that the effect of the agreements was that they were obliged to settle if no third party sale eventuated. Rather, they focussed on supporting the Judge's analysis in relation to the certificate of practical completion and the side agreements.

[45] The Court of Appeal held that the apartments were substantially complete by no later than mid-July 2008.[29] It noted that although Station had called for settlement on three occasions in August – October 2008, none of the appellants had settled. In essence, all had taken the position that they were not required to settle because they were simply underwriters rather than genuine purchasers and had conveyed this to Station at various times during that period. Given that the agreements did impose an obligation on them to complete their purchases, and subject to any issue of justification, the Court of Appeal considered that the appellants had repudiated the agreements.[30]

[46] The Court considered the justifications put forward by the appellants for their refusal to complete the purchases. This was against the background that the Court accepted that Station's actions from July 2008 onwards indicated that it was not intending to honour the side agreements.[31] The Court held as follows:[32]

(a) *Certificate of practical completion*: The Court noted that the fact that certificate of practical completion had been issued by Maltbys rather than by Leuschke did not emerge as an issue until shortly before trial. The apartments were, the Court said, substantially completed no later than mid-July 2008. The Court agreed that the date for settlement could only be triggered by the issue of the certificate, but the appellants had repudiated their contracts before the date for settlement had arrived. Had the issue of the certificate been raised at the time, Station could have obtained the appropriate certificate and tendered it on settlement.

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29 At [35].
30 At [50], [57] and [66].
31 At [82].
32 At [68]–[78].

(b) *One per cent fee*: The Court accepted that Station was unable to pay the one per cent fee. However, the amounts involved were small (between $8,801 and $11,351) and some appropriate accommodation could have been reached with Station had the appellants been willing to settle, such as by way of an appropriate reduction in the purchase price.

(c) *Furniture package*: The Court accepted that Station had not, despite considerable efforts, supplied the furniture package and was not in a position to do so given that BOSI was unwilling to provide additional funding. Again, however, the Court considered that Station would have made some accommodation to reflect this, by way of a reduction in the purchase price.

(d) *Management agreement*: The Court accepted that Station had nominated a manager but that the arrangement was not in place at the time it called for settlement in August 2008. The Court was satisfied that, had the appellants been willing to proceed, it would have been a simple matter for a management contract to have been finalised or for an appropriate allowance to have been made against the purchase price.

[47] The Court held that the consequence was that Station was entitled to cancel the agreements and sue for damages.[33] The Court also said that it was satisfied that there was no basis for the Judge's obiter finding in relation to Mr Kumar's affirmative defences.[34]

Overview of arguments

[48] For the appellants, Ms Kelly argued that the obligation to provide a certificate of practical completion and the performance of the side agreements were essential terms of the agreements, breach of which would have entitled the appellants to cancel the agreements. Station was in breach of these obligations and its breaches

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[33] At [86].
[34] At [90].

constituted, by 7 August 2008 at the latest, a repudiation of the agreements. None of this was the result of any conduct by the appellants. Ms Kelly placed considerable weight on BOSI's email of 21 August 2008 as indicating that Station was never likely to be in a position to honour the side agreements as to the one per cent fee or the furniture packages as BOSI would not provide the necessary funding. As a consequence of Station's breaches, Station's settlement notices were invalid, as was its purported cancellation of the agreements in April 2010. Moreover, one of the appellants, Mr Selwyn, had validly cancelled his contract in September 2008. If the appellants had committed an act of repudiation in 2008, Station lost the right to cancel as it affirmed the agreements.

[49] Mr Goddard QC, for Station, argued that the appellants repudiated the agreements initially at various times in 2008 because they advised Station that they were not required to settle whatever Station did, and never intended to settle in accordance with the agreements. They maintained this stance up until April 2010, when Station cancelled the agreements. Station accepts that the time for settlement had not been reached in 2008 or subsequently given its failure to tender a compliant certificate of practical completion but submits that that is irrelevant as repudiation can occur before performance is due. Station also argues that the question whether it was ready, willing and able to perform its obligations at the time it cancelled the agreements in April 2010 is irrelevant, as that is not a requirement for an effective cancellation following a repudiation under s 7(2) of the Contractual Remedies Act. In any event, it submits that the Court of Appeal found that it was ready, willing and able to perform its obligations at that time. To the extent that it was in breach of any of its obligations, none of the breaches would have justified the appellants in refusing to perform the agreements.

Our assessment

Preliminary observations

[50] Before we address the parties' arguments, we make three preliminary comments.

[51] First, as already noted, Toogood J rejected the appellants' contention that the agreements, and the "gazump" clause in particular, meant that the appellants were not obliged to complete the transactions except at their option.[35] The Judge held that under the agreements the appellants had an obligation to purchase in the event that the parties' expectations about selling the development to a third party were not realised,[36] a finding not subsequently challenged by the appellants. Toogood J did, however, find that Station had a contractual obligation to perform the side agreements,[37] also a finding that was not appealed.[38] So the contractual position is that the appellants did have an obligation to complete the purchases if there was no on-sale and Station was obliged to perform the side agreements, which meant in particular that it was obliged to provide a furniture package and have a management agreement in place to enable the apartments to be operated as serviced rentals.

[52] Second, by way of preliminary comment, we note that the effect of the sunset clause, as amended, was that if Station was not ready, willing and able to settle by 13 March 2009, either party to an agreement was entitled to cancel it by giving notice in writing. Although it asserted to the contrary at the time, Station now accepts that it was not ready, willing and able to complete at that date. However, none of the appellants attempted to exercise their rights under the clause prior to the Kumars' reliance on it in June 2010.[39]

[53] Finally, we mention affirmation. Ms Kelly submitted that, if the appellants had wrongfully repudiated their agreements in 2008 and 2009, Station had refused to accept their repudiations and had affirmed the agreements. Mr Goddard objected to this line of argument, on the basis that it had not been foreshadowed in the appellants' pleadings, nor had it been raised in the Courts below. He submitted that had the point been raised from the outset, there might have been additional relevant factual material that could have been adduced at trial.

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35 See above at [42].
36 *Station Properties* (HC), above n 1, at [81]–[85].
37 At [75].
38 *Station Properties* (CA), above n 2, at [15].
39 See above at [35].

[54] We are sceptical of this claimed prejudice. It seems unarguable that, if there was repudiatory conduct by the appellants in 2008 and 2009, Station did not accept that the agreements were at an end but rather sought to enforce them in various ways. Ultimately, however, this may be a sideshow because even if Station did affirm the agreements in 2008 and 2009, that could not prevent it from cancelling in 2010 when faced with a continuing repudiation at that time. Mr Goddard argued that there was a continuing repudiation: the appellants' conduct during 2008, 2009 and 2010 was consistent and demonstrated that they had no intention of performing the agreements whatever Station did; their refusal to complete in 2010 was simply the culmination of a long-standing course of conduct.

Framework for analysis

[55] Given the parties' arguments, there are under the Contractual Remedies Act two ways in which the events such as those at issue might be analysed – in terms of s 7(2) (repudiation) or in terms of ss 7(3) and (4) (cancellation for breach or misrepresentation), although in some situations (in particular, where "partial" repudiation is alleged), they converge.

[56] Dealing first with s 7(2), an actual or anticipated breach of contract by one party may manifest a clear intention that it will not perform its side of the bargain, justifying the conclusion that it has repudiated the contract under s 7(2). Where a party manifests a clear intention not to perform, the innocent party has a choice – either to accept the repudiation, cancel the contract and sue for damages; or to insist on completion of the contract by, for example, seeking specific performance. Where the innocent party accepts the repudiation and brings the contract to an end, it is, of course, relieved from any further contractual obligations.

[57] Repudiatory conduct may relate to the whole of the contract or to part of it.[40] The possibility of partial repudiation seems to follow from the language of s 7(2):[41]

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[40] See John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 704.

[41] (Emphasis added).

> … another party repudiates the contract by making it clear that he does not intend to perform his obligations under it *or, as the case may be, to complete such performance*.

The italicised words suggest that the repudiating party may have done something by way of performance, but then refused to complete.[42] In the case of partial repudiation, however, the conduct must constitute a contractual breach that is sufficient to entitle the innocent party to cancel in terms of ss 7(3) and (4).[43] If the breach does not justify cancellation in terms of ss 7(3) and (4), the innocent party will be left to its remedy in damages. Because an allegation of "partial repudiation" requires analysis in terms of ss 7(3) and (4), the term is arguably somewhat unhelpful.

[58] A conclusion that a party has repudiated a contract will not be reached lightly – repudiation is a "drastic conclusion".[44] The evidence must show an unequivocal intention not to perform the contract.

[59] Turning to ss 7(3) and (4), they contain two alternatives; essentiality and substantial breach. Relevantly, a party may cancel a contract if:

(a) a term has been broken by another party to the contract, or it is clear that a term will be broken, and the parties have expressly or impliedly agreed that the performance of the term is essential to the non-defaulting party; or

(b) there is a breach or anticipated breach of contract that will, for the non-defaulting party, substantially reduce the contract's benefit,

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42 As might occur, for example, under a long term supply contract.

43 See Francis Dawson and David W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell (NZ), Auckland, 1981) at 63–64; and Burrows, Finn and Todd, above n 40, at 704–707. This is consistent with the position at common law. For example, in *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60 (HL), Lord Wright said that a party who intended to fulfil a contract but only in a manner substantially inconsistent with his obligations and not in any other way would have repudiated the contract: at 72. The Privy Council made a similar observation (in relation to New South Wales law) in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [2004] 1 NZLR 289 at [58]. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, (2007) 233 CLR 155 it was said that repudiation could result from "renunciation either of the contract as a whole or of a fundamental obligation under it": at [44] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

44 *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL) at 283 per Lord Wilberforce.

> substantially increase its burden, or make the benefit or burden substantially different from that contracted for.

By contrast with repudiation, breach does not require intention – the fact of breach is sufficient.

[60] In relation to essentiality, this Court emphasised in *Mana Property* that it is essentiality to the cancelling party that is important – it is not necessary that the term be essential to both parties.[45] The Court went on to identify the preferable approach to determining the issue of essentiality, namely:[46]

> … to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[61] Whereas essentiality analysis focuses on the importance of the term to the cancelling party, assessed objectively, substantiality analysis focuses on the effect of the breach.[47] If the effect is substantial in one of the ways identified in s 7(4)(b), the innocent party will be entitled to cancel.

[62] Two further points should be mentioned. Station says that the only reason for the appellants' refusal to perform their agreements was their mistaken view that the agreements had the effect of giving them an option to purchase rather than requiring them to complete. This raises the question of the approach to be taken to conduct that is alleged to be repudiatory where the relevant party acts on a mistaken understanding of its contractual obligations.

[63] On this point, it is necessary to return to the fundamental question under s 7(2), namely, whether an inference can reasonably be drawn in the circumstances that the relevant party no longer intends to perform its obligations under the contract. This fact-based assessment must be made against the background that the threshold is a high one and that disputes about the meaning of contracts or the nature of the

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45 *Mana Property Trustee Ltd v James Developments Ltd*, above n 5, at [23].
46 At [25].
47 At [22].

obligations they impose are commonplace. The mere fact that a party vigorously espouses a view of a contract's meaning that is ultimately shown or accepted to have been wrong does not mean that the party is thereby manifesting an intention not to perform its obligations under the contract. If it is clear that the party accepts that it is bound by the contract, whatever meaning it is ultimately determined to have, the party should not be held to have repudiated the contract. By contrast, if a party persistently refuses to perform unless the other party accepts additional onerous terms inconsistent with the contract or on the mistaken view that there was never an enforceable contract, the party may well be found to have repudiated the contract. In such circumstances, the stance adopted amounts to a refusal to accept any obligation to complete the contract in accordance with its terms.[48]

[64] The second point that arises concerns the position where a party cancels (or refuses to perform) a contract for an insufficient reason but there is at the time, unknown to the cancelling party, a reason that would justify cancellation. This point arises in relation to all the appellants, but particularly Mr Selwyn. He purported to cancel his agreement on 29 August 2008 on the ground that Station had not met its contractual obligation to on-sell the complex. In fact, it had no such contractual obligation. But what is the position if Station was in breach of an essential term of the contract at the time?

[65] At common law, it was accepted that where a party cancelled a contract for an insufficient reason, the cancellation might nevertheless be justified if there was a sufficient reason at the time of cancellation even though the party cancelling was not aware of it.[49] In *Thompson v Vincent*, the Court of Appeal held that the rule continued to apply under the Contractual Remedies Act.[50] In that case, the vendors of a yet to be established motel business agreed to sell the business on the basis that

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[48] See, for example, *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*, above n 44, at 281–283 per Lord Wilberforce, at 292–293 per Lord Russell, at 295–297 per Lord Keith and at 298–299 per Lord Scarman. See also Burrows, Finn and Todd, above n 40, at 701–704 and HG Beale (ed) *Chitty on Contracts* (31st ed, Thomson Reuters, London, 2012) vol 1 at [24-019]–[24–020].

[49] See, for example, *The Mihalis Angelos* [1971] 1 QB 164 (CA) at 195–196 per Lord Denning MR, at 200 per Edmund Davies LJ, and at 204 per Megaw LJ; and *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436 (CA) at [32] per Rix LJ (with whose judgment Tuckey and Aldous LJJ agreed). Further authorities can be found in *Chitty on Contracts*, above n 48, at [24-014].

[50] *Thompson v Vincent* [2001] 3 NZLR 355 (CA).

it could be run as a 24 unit operation whereas, in fact, it had planning consent only for 12 units. There were difficulties between the parties, which led the purchasers to repudiate the agreement. The vendors then cancelled and sought damages. Shortly afterwards, the purchasers became aware of the vendors' misrepresentation. The Court of Appeal held that the purchasers were entitled to justify their repudiation on the basis of the vendors' misrepresentation even though they were not aware of it when they refused to perform the agreement.[51] The Court justified its view by reference to fairness and probable legislative intentions.[52] The Court said that although the purchasers had not cancelled the agreement, they were entitled to do so as they could have established essentiality within s 7(4)(a) as well as the factors referred to in s 7(4)(b).[53]

[66] We consider that the Court of Appeal's reasoning in *Thompson v Vincent* on this point is correct. Although s 7 "has effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach",[54] it does build upon the common law and incorporates common law concepts (such as repudiation). As others have noted,[55] there is nothing in either ss 7 or 8 to suggest that a party who wishes to cancel a contract must give a valid reason at the time of cancellation.

Was Station in breach of an essential term?

[67] Against this background, we assess the appellants' argument that Station's failure to provide a certificate of practical completion from Leuschke and its non-fulfilment of the three side agreements constituted breaches of essential terms that would have entitled the appellants to cancel the agreements: by acting in this way, Station, in effect, repudiated the agreements. We will address the breaches in turn.

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51 At [86]–[89].
52 At [87].
53 At [90].
54 Contractual Remedies Act, s 7(1).
55 See DF Dugdale "Justifying Cancellation by Unadvanced Reasons" (1996) 2 NZBLQ 147 at 149; and *Donnelly v Westpac Banking Corporation Ltd* (1999) 6 NZBLC 102,781 (HC) at 102,793.

(i) Certificate of practical completion

[68] The agreements provided that the obligation to settle would be triggered by the latest of three events, one of which the provision a certificate of practical completion from the "vendor's Architect", which was defined to mean:

> … Leuschke Group Architects Limited or such other company, firm or person as the vendor may appoint to supervise construction of the Works.

[69] Ms Kelly argued that the provision of a certificate of practical completion in accordance with the agreements was essential because the certificate was a critical milestone, defining the transition from the construction phase of the project to the sale phase. Proper certification provided a fundamental assurance to purchasers such as the appellants that the construction warranties had been met because an independent and appropriately qualified person intimately involved with the project was required to give a certificate to that effect.

[70] Station accepted that the certificate of practical completion that it proffered when it called for settlement in August 2008 and subsequently was invalid because it had been given by Maltbys and not by Leuschke and that, as a consequence, the appellants' obligation to settle under the agreements never arose. Station said that this is irrelevant because, as s 7(2) recognises, a party can repudiate a contract before its obligation to perform arises and this is what the appellants did. Station also submitted that no one appreciated that the Maltbys certificate did not meet the contractual requirements until shortly before the High Court trial in September 2011. So it was not a matter that the appellants relied upon when they refused to settle the transactions. Moreover, if the issue been raised at the time, Station could have remedied its omission by obtaining and providing a certificate from Leuschke, given the Court of Appeal's finding that the development was substantially completed by mid-July 2008.

[71] The Court of Appeal set out the evidence in relation to the certificate of practical completion in some detail.[56] We will not repeat it here. We simply note that two architects from Leuschke (an Auckland-based firm with no office in

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[56] *Station Properties* (CA), above n 2, at [25]–[33].

Queenstown) conducted a detailed inspection of the development on 29 and 30 May 2008 when Fletcher Construction indicated that it was substantially complete. The architects produced a lengthy list of matters which they considered needed to be attended to before the development was practically complete, although most were minor and capable of being remedied relatively quickly and easily. Mr Dawson of Maltbys inspected the development in early June 2008 and was satisfied that it was practically complete for the purposes of the construction contract, even though some minor matters remained to be remedied. Mr Dawson, who was Queenstown-based, said that he visited the development weekly over this period and was satisfied that the outstanding matters, including those identified by Leuschke, were being attended to. His certificate, dated 2 July 2008, said that practical completion was achieved on 3 June 2008.

[72] Mr Goddard submitted in oral argument that the agreements did not impose an affirmative obligation on Station to provide a certificate of practical completion from anyone. It will be recalled that the agreements contained a sunset clause, under which either party had a right to terminate the agreement if Station was not ready, willing and able to settle by a specified date.[57] The agreements contemplated, then, that Station may not have been able to complete the transactions. Station may well have had an obligation to use reasonable endeavours to put itself in a position that it could complete, but its obligations in this respect were not absolute. While provision of a certificate of practical completion was a pre-condition for settlement, it was not required as a term of the contract.

[73] The obligation to provide a certificate of practical completion from Leuschke arose if Station did complete the development before the expiry of the sunset date and wished to trigger the obligation to settle. Station did substantially complete the development and did attempt to trigger the obligation to settle. We accept that certification is an important process in construction contracts, and that the presence of a certification mechanism is likely to be viewed as essential by purchasers in the appellants' position. But this does not mean that the provision of a certificate from Maltbys rather than from Leuschke was a breach of an essential term entitling the appellants to cancel their agreements or, putting it another way, that by providing a

[57] See above at [23].

certificate from Maltbys rather than Leuschke, Station was repudiating the agreements. Station did not dispute its obligation to provide a certificate; rather, it provided a certificate from the wrong entity, something which, on the evidence, could have been readily corrected. We note that there has been no suggestion that Station was in breach of its various design and construction warranties.

[74] The Court of Appeal's finding that the development was substantially completed by mid-July 2008 means that the development had reached the stage of "practical completion" as defined in the agreements[58] and that a certificate could have been obtained from Leuschke. Station's failure in relation to the certificate did not concern its underlying obligation, which it accepted, but an aspect of it, namely that the certificate was required to come from Station's nominated architect for the project (ie, Leuschke or anyone else Station might nominate to perform the role). The fact that the certifier was the architect for the project might well be important to purchasers, but in this case the error could have been rectified.

[75] Accordingly, we agree with the Court of Appeal that, while Station's failure to provide a valid certificate meant that it could not trigger the obligation to settle, it was not a breach of an essential term or an act of repudiation of the agreements by Station.

(ii) Side agreements

[76] As we have said, Station accepted that it was contractually bound by the three side agreements concerning the payment of a fee of one per cent of the purchase price for the relevant apartment, the provision of a $30,000 furniture package and the arranging of a management contract enabling the units to be operated as serviced apartments. The question is then whether Station's failure to comply with them was such as to entitle the appellants to cancel the agreements in terms of ss 7(3) and (4). If so, the appellants argue that Station's failure to perform them was capable of amounting to repudiation.

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[58] See above at [22].

[77] The one per cent fee involved sums ranging from a little over $11,000 in the case of the Mr and Mrs Kumar down to $8,801 for Mr and Mrs Donaldson. Given the purchase prices, Station's failure to pay these sums cannot be regarded as sufficient to entitle the appellants to cancel the agreements or to amount to a repudiation by Station of its obligations under the agreements. Mr Goddard suggested that the appellants should have offered to pay the various purchase prices less the one per cent fees. Clause 23.1 of the agreements did, however, provide that on settlement, a purchaser could not retain any money "for extras, set-off, deduction or otherwise", which may have created a difficulty. Moreover, as the material referred to at para [31] above indicates, BOSI stated that it would "push back" on any claims for fees, although only to the extent that it could legally do so. Nevertheless, we see this as exactly the type of obligation that would give rise to a claim in damages rather than to a right to cancel.

[78] This brings us to the side agreements in relation to the furniture package and the management agreement. We will deal with these together, as both are related to the possibility that the complex would be operated as serviced apartments: Station's requirement that purchasers take the furniture package enabled it to ensure uniform furnishing of a sufficient standard to be attractive to a potential purchaser of the development or to an operator under a management agreement.[59]

[79] As we have said, the prices in the agreements included an allowance of $30,000 for the furniture package. Station did not provide the furniture package and did not offer any reduction in the price to reflect this.[60] Accordingly, Station was requiring the appellants to pay for something which they did not receive. Mr Goddard drew attention to the fact that the parties had replaced cl 6.2 of the REINZ/ADSL agreement with a clause that provided in part:

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[59] It is artificial to consider these in isolation, as was the approach of the Court of Appeal and is the approach of William Young J. Moreover, we emphasise that Station's obligation in relation to the management agreement, undisputed either in the Court of Appeal or in this Court, was to arrange a management agreement for all apartments in the complex: see *Station Properties* (CA), above n 2, at [3].

[60] The settlement statements issued to the appellants in September and October 2008 were for sums that included the cost of the furniture packages, except that in the case of the Donaldsons, a replacement statement was issued omitting that cost, but it was then reintroduced in a subsequent statement, all without explanation.

> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (1) The chattels are delivered to the purchaser in their state of repair as at the date of this agreement (fair wear & tear excepted) but failure so to deliver the chattels shall only create a right of compensation.

He argued that this was an explicit recognition that failure to provide the furniture package was not a breach of an essential term entitling the appellants to cancel. Although the agreements did not refer to the furniture package by name, it is clear from the way the purchase prices for the units were calculated that the furniture package fell within the scope of the agreements. Accordingly, we consider that cl 6.2 applies, so that, standing alone, non-provision of the individual furniture packages to the appellants would not be a breach of an essential term and would sound only in damages. However, we consider that this analysis does not apply when the furniture package and the management agreement are considered together.

[80] The evidence indicates that Station's primary objective was to on-sell the whole development on completion or, failing that, to have it operated as serviced accommodation by a brand-name operator. Under the first option, the purchasers would have been relieved of the obligation to settle, and would have received their deposit back, the one per cent fee and possibly a share of any profit. Under the second option, the purchasers would presumably have been entitled to some payment under the management arrangement and, more importantly, would have had the opportunity to on-sell their units to other investors. Providing the furniture package and putting a management agreement in place were obviously necessary components of the second option. They might also have facilitated the first option, even if they were not absolutely necessary to it:[61] Station received advice from an experienced operator in May 2008 that its prospects for on-selling the development would be enhanced if it put a management agreement in place and completed the furnishing and fitout of the units. The evidence shows that Station could not act on this advice as BOSI was not prepared to make the necessary funding available.

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[61] A management agreement and furniture package were not absolutely necessary to effect an on-sale as a purchaser of the development could have managed it itself.

[81] In our summary of the factual background we have referred to some of the evidence concerning the significance of a management agreement and furniture package and Station's efforts to put them in place. There is further relevant evidence, however. For example, on 12 April 2006, Station reported to investors:

> The Operator:
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> We are in negotiations with Stella Resorts group to brand the development under the Mantra Brand. This brand is their 4 star brand, their 3 star brand is Breakfree. Breakfree is very strong in Queenstown and the addition of a higher quality development to Stella's management portfolio in Queenstown would be very good. They are currently completing a feasibility study and projections, and from there we will assemble sales documentation that allows public sales to occur. It [may be] a requirement to offer a guaranteed return – [w]e will work through how this will work.
>
> We will update you when we have the projections and management agreements.

[82] Later, on 17 November 2006, Station reported to investors that construction had begun, a short-term visitor accommodation consent had been granted and the development was "fully compliant for managed apartment requirements". The email said that several parties were interested in managing the units and one was considering buying the management rights.

[83] On 8 December 2007, Mr Kumar sent an email to Station enquiring as to progress with the development. He asked whether there had been any progress in relation to management agreements, noting that "[e]arlier emails had indicated that discussions with Accor Hotel and Breakfree were in progress". He does not seem to have received a reply despite sending a reminder by email on 24 March 2008. However, on 6 June 2008, when the development was a month from being substantially completed, Station sent an update to the appellants and other investors, which summarised the position in the following way:

> The project is now practically complete and we await titles and code compliance, which are around three weeks away. We have a conditional sale still on the table, but we need to prepare for the alternative, being settlement of the contracted units. We have an operator ready and furniture ready to install. No further single sales have been achieved, meaning in the event that the potential inline sale does not complete, we are reliant upon settlements/completion of existing single sales and seeking options on the balance of the site.

The email reported that there was a conditional agreement for the sale of the whole development for $26.5 million, but noted that in the then current market, "nothing carries much certainty", so that alternatives were necessary. In relation to management, the email reported that, having met with numerous parties, Station had decided on Select Hotels. The email gave the Select Hotels website and also a web address which would be open to investors for seven days to allow them to "download their information pack". It said that there were verbal understandings to get the furniture installed and the site operational by early July. The email made it clear that purchasers might be required to settle their purchases.

[84] In a later email of 22 July 2008, Station advised purchasers that the conditional sale had fallen through and that no further sales of individual units had been achieved. In relation to a management agreement, the email said:

> **Management/Operator**
>
> Select Hotels remain our operator of choice, however it is unlikely that any agreement will be reached before settlement is called for. The construction funder is not prepared to purchase furniture for the unsold units, which would leave the operator with insufficient units to run an efficient operation.
>
> In terms of obtaining mortgage finance, this means the units will not be managed at the time of settlement. Purchasers will thus be able to borrow a higher percentage against valuation, but GST is payable on the purchase price. GST is payable because this was always designed and consented to be a managed complex and as such attracts GST. If a management agreement is put in place in the future, GST registered owners can claim GST back.

The email advised that funding would not be available to provide furniture packages in all units but that Station was still negotiating with the funder in relation to those purchasers (including the appellants) whose agreements included furniture packages.

[85] By 22 July 2008, then, Station was in the position that, at settlement, it would not have furniture packages in place for the unsold units, was unlikely to be able to provide furniture packages for the appellants and would not have a management agreement in place. Despite this, Station advised the appellants that it would be calling for settlement. When Station wrote to the appellants on 7 August 2008 indicating that the date for settlement was 14 August 2008, no furniture package or management agreement was in place, and none was put in place before it ultimately

cancelled the agreements in 2010. As previously noted, Station accepts that it was in breach of its contractual obligations in this respect.

[86] The Court of Appeal did not consider that Station's obligations to provide a furniture package or have a management agreement in place were essential terms. In relation to the furniture package, the Court said:[62]

> Again, we are satisfied that, if the [appellants] had been ready, willing and able to settle the transaction, a deduction of $30,000 from the purchase price would have been the obvious and appropriate way to deal with this issue. We respectfully differ from the Judge on this issue. We are satisfied that this issue was not material or substantial.

In relation to the management agreement, it said:[63]

> We are satisfied that on the evidence that, had the [appellants] been willing to proceed with the transactions, it would have been a simple matter for a management contract to have been put in place or for an appropriate allowance to have been made against the purchase price.

The evidence referred to appears to be that of one of the receivers, Mr Graham, who said that the receivers would have made an allowance for the furniture packages, and Mr Groves, who provided project management services to Station and gave evidence that there were management agreements available.

[87] To determine essentiality, the Court must ask whether the appellants would more probably than not have declined to enter into the agreements if there had been no agreement that the terms as to the furniture package and a management agreement were essential. This question must be answered by an objective contextual appraisal which disregards what the appellants may unilaterally have said.

[88] To reiterate, the appellants were investors whose investments were made initially through the purchase of redeemable preference shares. The form of their investment changed at Station's request to facilitate the raising of funds for the development, the appellants being told they were underwriters rather than outright purchasers. The requirement that the appellants purchase a furniture package was something insisted on by Station, presumably because it considered that uniform

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62 *Station Properties* (CA), above n 2, at [74].
63 At [76].

furniture of an appropriate standard would make the complex more attractive to potential purchasers, whether of the whole complex, of individual units or simply of the management rights. The proposal for a management agreement for all units in the complex was also something initiated by Station. Such an agreement was necessary if Station was to find an operator assuming no outright sale (although, as noted earlier, it might also have facilitated an outright sale). The evidence shows that Station made considerable efforts not only to sell the complex but also to put a management agreement in place.

[89] Against this background, we accept that contractual terms concerning a furniture package and management agreement would, viewed objectively, have been regarded as essential by parties in the appellants' position.[64] The appellants were reliant on Station's assessment of what was required to enable it to achieve its objective of either on-selling the development or arranging an operator to manage the development as short-term rental accommodation, and Station's assessment was that a furniture package and management agreement were necessary to facilitate these options.

[90] Toogood J said that "the prospect of having in place a well-regarded management company to run the complex as part of a going concern was a material benefit [to the appellants], in that it would enhance the likelihood of early sales of the units to third parties".[65] We agree with that assessment. Moreover, assuming no on-sale of either the development or individual units, investing in a complex where the apartments are uniformly furnished and operated as serviced rental accommodation by an established operator is a fundamentally different proposition from a group of individuals acquiring apartments and then making their own arrangements about furnishing and renting them. In the former case, the investment is likely to be a passive one whereas in the latter, more active involvement is likely to be required. Further, the risk profiles between the two forms of investment are

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64 Clause 28.2 of the agreements provided that Station "*may* procure the body corporate to enter into a Building Manager's Agreement, in the same or similar form enclosed, with a professional building management company to be nominated by the vendor prior to settlement date" (emphasis added). Mr Goddard sought to emphasise the "may". Unfortunately, the draft management agreement was not annexed to the agreements provided to the Court, but it seems likely from the body corporate rules that it was not the type of management agreement at issue in the proceedings, so that the reference does not provide assistance.

65 *Station Properties* (HC), above n 1, at [126].

likely to differ, although that might depend on the quality of the operator involved. These considerations would be particularly important to out-of-town investors such as the appellants. It follows that we do not agree with William Young J's assessment that Station's contractual obligation to provide a management agreement could have been satisfied simply by Station making some form of minimalist management arrangement (such as an arrangement with a real estate agent to manage the appellants' individual units).[66] We see this as inconsistent with Station's contractual obligation as alleged by the appellants and ultimately not challenged by Station, which was, as the Court of Appeal recorded, to "[a]rrange a management agreement for all apartments in the complex".[67]

[91] Against this background, it is difficult to see how a failure to perform the obligations at issue could have been adequately compensated for in damages. While $30,000 of the purchase price for the appellants' units was for the purchase of the furniture package, an adjustment to take account of that in respect of an individual unit would be inadequate. To advance its proposals for the development, Station had to furnish all the units to a uniform standard – sold and unsold – and put a management agreement in place.

[92] In summary, then, the furniture package and the management agreement were important to Station's proposals for the complex and Station made that known to investors. Investors such as the appellants were being asked to change the form of their investment and to assume significant liabilities. Such persons would want reassurance and protection. Looking at the matter objectively, we consider it likely that the appellants would have declined to enter into the agreements in the absence of any obligation on Station's part to provide the furniture package and the management agreement given their importance to Station's proposals. Accordingly, we consider that they were, in combination, essential terms and that the appellants were entitled to cancel the agreements if they were breached, as they in fact were.

[93] Mr Goddard argued that, as a matter of logic, an assessment of essentiality under s 7(4)(a) must be carried out on a term by term basis rather than by looking at

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66 See the reasons of William Young J at [125].

67 *Station Properties* (CA), above n 2, at [3].

terms in combination. He submitted that consideration of a combination of terms should be carried out on the basis of substantiality under s 7(4)(b). We do not think this is significant in the present case because an analysis in terms of substantiality under s 7(4)(b) produces the same outcome – without the furniture package and a management agreement the burden of the agreements from the purchasers' perspective was substantially increased, for the reasons already given. But we do not accept Mr Goddard's proposition. In principle, if an objective analysis shows that a particular combination of terms was essential to the cancelling party, effect should be given to that even if a particular term, viewed in isolation, might not be regarded as essential. Any other approach would, in our view, be artificial. We see nothing in s 7(4)(a) to preclude such an outcome.

[94] Only one of the appellants, Mr Selwyn, purported to cancel his agreement in this period, by email dated 29 August 2008. But even if the appellants did not formally cancel their agreements at this point, they were not obliged to perform when Station called for settlement. A party who is in breach of an essential term of a contract is not entitled to enforce its rights under the contract[68] (assuming the other party has not affirmed the contract despite the breach). This is particularly so where the obligations of the parties are mutually dependent and concurrent, as in contracts for the sale of land.[69] By, at the latest, 22 July 2008, prior to calling for settlement, Station had made it clear that it would not be able to meet its essential contractual obligations of providing furniture packages and a management agreement. In those circumstances, it was not entitled to call for settlement on the basis that it was ready, willing and able to complete. On the face of it, the appellants were entitled to refuse to perform, subject to what we have to say below.

Basis of appellants' refusal to complete

[95] As we have said, Mr Goddard submitted that whether or not Station was in breach of its contractual obligations was irrelevant as the appellants had made it clear that they were not prepared to settle under any circumstances and so had made

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[68] See *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433 at [41]. See also Burrows, Finn and Todd, above n 40, at 708–709.

[69] See *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [82] per Blanchard J; quoting from *Foran v Wight* (1989) 168 CLR 385 at 417.

it clear that they were repudiating the agreements in advance of the time for performance.

[96] We accept that after Station wrote to the appellants on 15 July 2008 saying that it may soon be in a position to call for settlement,[70] some did express an unwillingness to settle on the basis of their understanding that their contracts did not require them to purchase. So, when discussing the position with a Station representative following the receipt of Station's letter, Mrs Donaldson said that she and her husband, as underwriters, had never agreed to settle the purchase of the apartment and could not afford to settle if they wanted to.

[97] Moreover, as Mr Goddard said, the appellants' 9 June 2009 notice of opposition to Station's summary judgment application raised various grounds, including that the appellants had a right to cancel the agreements because Station had misrepresented the position by informing them the underwrite agreements were short-term investment contracts which would not result in their having to purchase apartments. In his affidavit in opposition to the application, Mr Kumar said that he had never agreed to purchase an apartment and could not afford to do so. Mr Goddard advised us that affidavits from the other appellants were to the same effect. And that was their stance before Toogood J.

[98] However, while the appellants' refusals to settle in August 2008 and subsequently may have reflected their belief that they were not required to settle under the underwrite option, they were not indifferent to Station's contractual obligations in relation to the furniture package and management agreement. The evidence shows that all three appellants raised one or other, or both, of these matters with Station on various occasions in late 2007 and 2008. In particular:

(a) Mr Kumar, who had acknowledged in an email to Station in August 2006 the possibility that he would have to settle the purchase, raised the question of management agreements in his email of 8 December 2007 and pressed for a response in his email of 24 March 2008.

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[70] See above at [28].

(b) Mr Selwyn enquired as to progress with a management agreement in his email of 18 July 2008.

(c) Mrs Donaldson said in her evidence that she had raised the issue of the furniture package with Station in June 2008 and subsequently in September 2008. She said she had been advised that it would not be provided, although Station continued to demand settlement on the basis of the contractual price, which included the cost of the furniture package.

[99] What is important, however, is that in its email of 22 July 2008, Station had advised the appellants that it intended to call for settlement around mid-August 2008 even though the development would be without furniture packages or a management arrangement, substantially as a result of its funder's attitude. At that point in time, none of the appellants had done anything which could properly be interpreted as repudiatory conduct. By contrast, Station had signalled its likely breach of what we have determined to be essential terms.

[100] Mr Selwyn purported to cancel his agreement by email dated 29 August 2008. The reason he gave for cancelling was that Station was in breach of its obligation to on-sell the complex. This was incorrect – Station had no such contractual obligation. But we do not consider that this means Mr Selwyn's cancellation was not valid as Station was, at the time, in breach of essential terms, about which Mr Selwyn had enquired but received no clear answer. As there can be no suggestion that Mr Selwyn was in some way estopped from relying on Station's non-performance of these terms,[71] Station's breach of essential terms when he gave notice of cancellation on 29 August 2008 justified Mr Selwyn's cancellation, even though that was not the reason he gave in his email.[72]

[101] As to the Kumars and the Donaldsons, because it was clear from the 22 July update that Station was likely to be in breach of essential contractual obligations, they had an election whether to affirm or to cancel their agreements – they had, as it

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[71] See *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 109, [2008] 2 CLC 422 at [51] per Lloyd LJ.

[72] See above at [64]–[66].

was put in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, reached a "fork in the road".[73] If they wanted to cancel their agreements, they had to make their intention to cancel known to Station, either expressly or by conduct evincing an intention to cancel. Although they did not formally cancel their agreements in 2008, they did make it clear that they did not intend to perform them. The refusal of the Kumars and Donaldsons to perform in response to Station's calls for settlement in2008 and subsequently were clear indications that they did not regard the agreements as continuing in force. Station can have been in no doubt that the Kumars and the Donaldsons regarded the agreements as being at an end – indeed, that is the basis of Station's principal argument on this appeal. While it may be, as Station argues, that the Kumars and the Donaldsons considered that they were not obliged to settle because they misunderstood the nature of their contractual obligations, they were entitled to cancel for Station's non-performance of essential terms, although they did not formally do so. By breaching those essential terms, Station evinced an intention not to complete its contractual obligations, and thereby itself repudiated the agreements. Again, even if the Kumars and Donaldsons gave the wrong reasons for their refusals to perform, they did in fact have a proper basis in light of Station's conduct. In these circumstances, Station has no claim against them.

Decision

[102] The appeal is allowed. The orders of Toogood J are reinstated. The respondent must pay costs of $25,000 to the appellants collectively, together with reasonable disbursements. The order for costs in the Court of Appeal is quashed. Costs in that Court are to be determined in accordance with this judgment.

WILLIAM YOUNG J

A preliminary comment

[103] I differ from the majority only as to the significance of the obligation to provide a serviced apartment management agreement. On this point I agree with the approach of the Court of Appeal that compliance with the obligation to do so would

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[73] *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, above n 69, at [72] per Blanchard J and at [96] per Tipping J.

have been a "simple matter" for Station Properties Ltd (in liquidation and in receivership) (Station) and that Station's conduct in this regard did not constitute a repudiation warranting cancellation.[74]

[104] As I will explain, this difference primarily relates to the content of the obligation, which on my approach was limited but which on the view of the majority was very substantial.

The documentation

[105] Two management agreements were in contemplation, one a building management agreement to be entered into by a proposed body corporate for the management of the building and the other a serviced apartment management agreement for the management of the apartments. It is only the latter which is significant for present purposes and for ease of reference I will refer to it as "the management agreement."

[106] The cost of air-conditioning and heating upgrade and the furniture packages which were to be supplied to the appellants was built into the prices they agreed to pay for the apartments. The agreements for sale and purchase made reference to chattels, fittings and fixtures and, given this, the price list in respect of air conditioning, the heating upgrade and furniture packages (which was included in the material sent to the appellants on 20 September 2005) formed part of the agreements for sale and purchase.[75]

[107] In the letter of 20 September 2005 which accompanied the "Bowen View Agreement Instructions" there is this statement:[76]

> The sale agreement needs to include the furniture package/air-conditioning/heating package. Full lists of the contents of this item will be made available and as you are a shareholder will be at cost plus 10%. We have set a budget and will work to this. The public will pay a marked up price determined by a third party valuation (this is clearly more profit to the project).

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74 *Station Properties Ltd (in rec and in liq) v Kumar* [2013] NZCA 70, (2013) 14 NZCPR 32 (O'Regan P, Randerson and Asher JJ) at [76] [*Station Properties* (CA)].

75 See *Station Properties Ltd (in rec) v Kumar* [2012] NZHC 1527 (Toogood J) at [75] [*Station Properties* (HC)].

76 (Emphasis added).

> *The vendor intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement. Decisions to be considered would be a number of weeks for personal usage, operator and brand, and [whether] the income would be pooled or tied to each unit. If pooled this would require a prospectus.*

Also relevant is what is said in the agreement instructions document which was accompanied by that letter:[77]

> Prior to completion, an up to date furniture package arrangement, along with air-conditioning and heating, will be mandatory.
>
> *A property management agreement will be offered pre-settlement, we expect settlement to be approximately April 2007.*

It is unclear whether the "property management agreement" is a reference to the management agreement now under discussion or the building management agreement which a proposed body corporate was to enter into.

[108] In an email of 20 September 2005, Station advised:[78]

> The design has been altered to allow for a management arrangement to be run from House 3. This means the management rights will be sold to the highest bidder (around $25,000 per unit is the market rate) providing further income to the company. *The sale and purchase contracts do not include a management agreement at this stage, however, this will be made available during construction, along with the furniture package …*

[109] There were two relevant subsequent mentions of the management agreement.

(a) In an email of 10 November 2005, Station emailed the appellants advising under the heading "Management":

> We are in talks with Accor Hotel and their subsidiaries and also Breakfree. We hope to pin something down in the coming weeks.

(b) In an email of 12 April 2006, Station advised the appellants:

> The Operator:
>
> We are in negotiations with Stella Resorts group to brand the development under the Mantra Brand. This brand is their 4 star brand, their 3 star brand is Breakfree. Breakfree is very strong in

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77 (Emphasis added).
78 (Emphasis added).

> Queenstown and the addition of a higher quality development to Stella's management portfolio in Queenstown would be very good. They are currently completing a feasibility study and projections, and from there we will assemble sales documentation that allows public sales to occur. It [may be] a requirement to offer a guaranteed return – [we] will work through how this will work.
>
> We will update you when we have the projections and management agreements.

[110] Also relevant is cl 33.1 of the special conditions of the agreements for sale and purchase:

> The purchaser acknowledges that this agreement constitutes the entire agreement between the parties.

The agreements for sale and purchase – which contained cl 33.1 but made no mention of a management agreement – were executed by the appellants between October 2005 and April 2006 and were not executed by Station until 26 May 2006.

The approach of the High Court Judge

[111] In the High Court, Toogood J discussed in considerable detail the documents which went to make up the contract:[79]

> [61] It is also clear that the 20 September email and the agreement instructions which accompanied the 20 September letter contained terms and conditions being offered by SPL which were not expressed in the document headed "Sale & Purchase Agreement". For example, the 20 September email acknowledged that the sale and purchase contracts did not include the furniture package which was a necessary adjunct to the entering into of a management agreement for the running of the development as a going concern. If the units were intended to be purchased for the personal use of the owners themselves, there would have been no need for the vendor to include furniture and air-conditioning/heating packages as mandatory. But those items were necessary for the future use of the units as serviced apartments, and for the sale of the units as part of a going concern (and, therefore, free of GST).
>
> [62] This is explained in the price list which accompanied the sale and purchase agreement, but not in the agreement itself. The price list listed the cost of the air-conditioning and heating upgrade ($10,125) and the cost of the furniture package ($30,000), and contained an explanation in the footnote to the list as follows:
>
> > For use as a serviced apartment Air-conditioning/Heating and furniture package is required.

[79] *Station Properties* (HC), above n 75.

> A furniture package is mandatory and price will be made available 6 months prior to completion. Shareholders in the project will purchase these at cost plus 10%.

[63] The agreement instructions which accompanied the sale and purchase agreement identified that the purchase price to be inserted by the purchasers into the agreements was to be the price which included "air-con and furniture". The instructions also included the following explanation:

> Prior to completion, an up-to-date furniture package arrangement, along with air-conditioning and heating, will be mandatory.

[64] Further confirmation of the necessary inclusion of the air-conditioning/heating and furniture packages as terms and conditions of the contract was provided by the 20 September letter, written on behalf of SPL, which stated that the "sale agreement needs to include furniture package/air-conditioning/heating package."

[65] Since it was never disputed by the plaintiff that it was obliged under the contract to provide air-conditioning, heating and furniture at the time of settlement, that concession necessarily involves acceptance that the obligation arose from the 20 September email, the 20 September letter, the agreement instructions and the price list and not from the document headed "Sale & Purchase Agreement".

[66] The inclusion of the air-conditioning/heating and furniture packages as mandatory obligations, and the inclusion of the cost of those packages in the purchase price, leads also to the necessary implication that the serviced apartment management agreement was an integral part of the offer being made by SPL in the package of documents sent out on 20 September 2005.

[67] Although it was suggested in the 20 September letter that such a management agreement was arranged "as an option", any such option could apply only to members of the public who, at a later stage of the development, may have been purchasing units for their own occupation. Since the Forum Select investors were being encouraged to enter into the sale and purchase agreements for different purposes (namely, to secure the funding which would enable construction to begin) the option of not taking up the air-conditioning and furniture packages was not available to them.

[112] I see this reasoning as less than convincing. As I have already indicated, the price list which identifies the costs associated with air conditioning and the heating upgrade and the furniture package is incorporated in the agreement. It follows that the analysis in [65] is inaccurate, or at least incomplete and more significantly, does not support what is described in [66] as the "necessary implication" that a management agreement "was an integral part of the offer".

[113] Toogood J did not identify the content of the obligation to provide a management agreement, although he plainly envisaged that it would result in the

apartments being able to be transferred as going concerns (with the transactions thus being zero-rated for GST purposes). As well, when he came to deal with the significance of the obligation he said this:

> [126] … Although the defendants themselves did not intend to be long-terms owners of the units, the prospect of having in place a well-regarded management company to run the complex as part of a going concern was a material benefit, in that it would enhance the likelihood of early sales of the units to third parties.

Standing alone, these remarks accurately capture the position. There was "the prospect" of such a management agreement being put in place and this was material to the appellants. Where I struggle is getting from the "prospect" of such an agreement to a cast-iron obligation to provide one. For this reason, I doubt if Toogood J, in this passage, was setting out to identify the content of the obligation.

The approach of the Court of Appeal

[114] The Court of Appeal judgment was likewise not explicit as to the content of the obligation. It was, however, plainly of the view that putting in place a management agreement would have been a "simple matter" for Station had it been required to do so.[80] Perhaps surprisingly, there was no challenge by Station to the finding that there was an obligation to provide a management agreement.

The approach of the majority

[115] The majority go further than the courts below and treat the obligation as extending to a management agreement which would result in:[81]

> … the apartments [being] uniformly furnished and operated as serviced rental accommodation by an established operator …

They also say that Station, prior to settlement, was required:[82]

> … to furnish all the units to a uniform standard – sold and unsold – and put a management agreement in place.

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80 *Station Properties* (CA), above n 74 at [76].
81 At [90].
82 At [91].

[116] As indicated, I consider that there is nothing explicit in the judgment of Toogood J to suggest that he had so extensive a view of the content of the management agreement obligation. It is, as well, clear that the Court of Appeal did not have in mind an obligation of the character envisaged by the majority because, self-evidently, such an obligation would not have been "a simple matter" to discharge.[83] Further, I am pretty sure that if the respondent had had any inkling that this Court would construe the obligation so broadly, it would have sought to challenge the finding that it was contractually obliged to provide a management agreement.

Was there an obligation to provide a management agreement?

[117] As is apparent from what I have already said, I am far from convinced that Station was under an obligation to provide a management agreement.

[118] My reasons for this scepticism are as follows:

(a) no such obligation appears in the agreement for sale and purchase which contains a whole agreement clause which was of particular relevance given that the agreements were to be provided to, and relied on, by a funder;

(b) I do not see the issues associated with the air-conditioning, heating upgrades and the furniture packages as enabling the whole agreement clause to be circumvented because, to my way of thinking, there was sufficient reference in the agreement to chattels fittings and fixtures to incorporate the price list and, incidentally, to put the lender on notice that the prices the appellants were to pay included more than just the bare units;

(c) the reference in the letter of 20 September 2005 to a management agreement is couched in terms of intention rather than contractual commitment; and

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[83] *Station Properties* (CA), above n 74, at [76].

(d) the references in the agreement instructions document and the email of 20 September 2005, while, at least in the latter case, explicit that such an agreement would be offered, are entirely silent as to its terms – terms which were to be negotiated with third parties and which might be unacceptable to the appellants.

[119] It follows that had Station put in issue the question whether there was a contractual obligation to provide a management agreement, it would have had a substantial prospect of success.

Assuming there was an obligation to provide a management agreement, what was its extent?

[120] On the approach favoured by the majority, Station was required to have, at the date of settlement, a building completely available for use as serviced apartments with all sold or unsold units fitted out for that purpose and with an established operator in place.[84] If so, it would follow that:

(a) From the point when the agreements for sale and purchase were entered into with the appellants, it would not have been open to Station to sell any of the apartments to anyone else except on exactly the same basis; and

(b) There would be considerable scope for debate and dispute if some of the purchasers were to decline to accept the management agreement eventually offered. For instance, if the Kumars and the Donaldsons declined to accept the management agreement, would it have been open to Mr Selwyn to say that what was being offered on settlement was not what was promised (because all units were not under uniform management).

[121] I regard such consequences as inconsistent with the documents. It is clear from the letter of 20 September 2005 that no final decisions had been made as to the details of the proposed agreement or as to the identity of an operator. Those details

[84] See the reasoning of the majority at [89]–[91].

were to be worked through between Station and prospective operators. It was anticipated that this would result in a form of agreement being settled (between Station and the preferred operator) which would be offered to "shareholders as an option". There is nothing of a contractual nature to suggest that "shareholders" would be required to accept the agreement. Nor is there anything in the documentation which would require purchasers of other units to enter into the agreement. There was no requirement for any particular operator or any particular brand. There was no requirement that the agreement apply to the building as a whole. And there could be no certainty that such a management agreement would be on terms which would be acceptable to the owners.

[122] The result of construing the obligation as the majority do is that the agreements for sale and purchase, entered into to satisfy a funder, were subject to a condition not explicitly expressed anywhere that there were to be further agreements on unidentified terms, between an unidentified third party and all purchasers of apartments in the building. No mechanism was provided for compelling the appellants (or any future purchasers) to enter into such agreements but, unless all purchasers did so, Station was going to be in breach of the agreements with likely consequential effects on the ability of Station and its funder to enforce them. On this basis, the agreements for sale and purchase were little more than agreements to agree and the security they provided to the funder were either entirely or at least largely illusory.

[123] It is interesting that when the appellants purported to cancel their agreements none of them thought to rely on the absence of a management agreement. I accept that they did not have to give the right reason for cancelling, but the failure to mention the management agreement shows that then – at a time when they were casting around for excuses for non-settlement – the associated obligation was not seen by them as sufficiently significant to even mention.

[124] In the appellants' pleading in the High Court and in their argument in the Court of Appeal there was substantial focus on GST consequences. Thus the pleading was that Station was required to:

> … enter into a management agreement with a manager who would operate a business of serviced apartment rental of all units in the premises … with the result that no Goods and Services tax would apply to any sale to [the appellants] should they exercise the option to "go unconditional".

In the Court of Appeal the GST issue was dealt with in this way:[85]

> [77] Ms Kelly submitted that the failure of Station to provide a management contract meant that the respondents became liable to pay GST on the purchase which they would not have had to pay if the apartments had been sold as a going concern. However, we accept Mr Tingey's submission that the purchasers were always obliged to pay GST on the purchase price. The ASPs provided expressly for the payment of GST in addition to the price. The purchase could not be zero-rated for GST in terms of s 11(1)(m) of the Goods and Services Act 1985 (the GST Act) since the respondents were not registered for GST purposes and the ASPs contained no agreement to sell as a going concern.

The GST argument was not persevered with in this Court.

A conclusion

[125] In all of these circumstances, I think that the obligation to provide a serviced management agreement should be construed on a minimalistic basis; one that recognises that the owners did not wish to personally manage the leasing of the apartments and which therefore required Station to accommodate that requirement on market terms (with the economic cost being born by the owners). It follows that the obligation would have been able to be complied with relatively simply and without difficulty and that performance of such obligation should not be treated as being fundamental to performance by the purchasers.

Solicitors:
Polson McMillan, Dunedin for Appellants
Bell Gully, Auckland for Respondent

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85 *Station Properties* (CA), above n 74.