IN THE SUPREME COURTOF NEW ZEALAND

SC 39/2013
[2015] NZSC 33

	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 RECEIVERSHIP AND IN LIQUIDATION) Respondent

Hearing of recall application:	8 December 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	R M Kelly for Appellants D J Goddard QC and M J Tingey for Respondent
Judgment:	1 April 2015

JUDGMENT OF THE COURT

A **The application for recall is dismissed.**

B **Costs of $10,000 plus usual disbursements are awarded to the appellants.**

C **The judgment of this Court of 15 October 2014 (*Kumar v Station Properties* [2014] NZSC 146) is reissued with the corrections and additions noted in the Appendix to this judgment.**

REASONS

ELIAS CJ, MCGRATH, GLAZEBROOK AND ARNOLD JJ
(Given by Glazebrook J)

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Introduction

[1] On 15 October 2014, this Court allowed the appellants' (referred to in this judgment as the purchasers) appeal against a decision of the Court of Appeal.[1] The appeal concerned whether the purchasers were entitled to cancel agreements with Station Properties Ltd (in liquidation and in receivership) for the sale and purchase of apartments in a Queenstown development. The High Court had held that they

[1] *Kumar v Station Properties Ltd (in liq and in rec)* [2014] NZSC 146, (2014) 15 NZCPR 548 [*Station Properties* (SC)]. William Young J dissented. Unless otherwise stated, the paragraph references are to the re-issued version of the judgment.

were so entitled.[2] That finding had been overturned by the Court of Appeal.[3] This Court's judgment restored the orders of the High Court.[4]

[2] On 17 October 2014, Station applied for recall of this Court's judgment. It said that the Court had acted on a mistaken assumption in its judgment as to an alleged concession made by Station in the Court of Appeal that there was an obligation on Station to arrange a management agreement for all the apartments in the complex. The purchasers opposed the application for recall.

[3] We are satisfied that Station did not make such a concession.[5] The judgment will be reissued to reflect this.[6] In all other respects, the judgment stands and the application for recall must be dismissed.

[4] In order to explain why we have come to that conclusion, we first set out the relevant background in more detail and summarise the relevant parts of the judgment in the High Court, the argument before the Court of Appeal and the Court of Appeal judgment. After examining the leave submissions in this Court, the leave judgment and the oral and written submissions made before this Court, we discuss whether, and in what respects, our judgment should be recalled. Finally, we conclude that, even had we decided to recall the judgment to entertain the arguments Station now makes, the majority would have come to the same conclusion.

Background

[5] The facts are discussed in our judgment of 15 October 2014 and we do not repeat them here, except to the extent they are relevant to the recall application.[7]

[6] In brief, after attending property investment seminars, the purchasers agreed to invest in a Queenstown apartment complex, Bowen View, which was to be

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

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

4 *Station Properties* (SC), above n 1.

5 Although, as we say at [23], Station's argument in the Court of Appeal did fluctuate.

6 The changes made to the substantive judgment of this Court are recorded in the Appendix to this judgment.

7 See *Station Properties* (SC), above n 1, at [1]–[3] and [10]–[36].

developed by Station. Initially, this investment was undertaken through the issuing of redeemable preference shares in another company which in turn was to invest in Station.

[7] The project experienced funding difficulties and on 20 September 2005 the purchasers received an email indicating 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 and that "the management rights will be sold to the highest bidder". It said that the sale and purchase agreements do not include a management agreement but that "this will be made available during construction, along with the furniture package".

[8] The email went on to say that shareholders were being encouraged to purchase a unit, either outright or "as an underwrite",[8] and as an incentive would be offered a one per cent "purchasers fee (of the unit price only), pre settlement". The purchasers chose the "underwrite" option. The email finished by saying that the unit sales would allow construction to begin on 6 January 2006.

[9] By letter of 20 September 2005 the purchasers were sent an unexecuted agreement for sale and purchase, a price list and a document headed "Bowen View Agreement Instructions". The letter said that the sale agreement "needs to include the furniture package/air-conditioning/heating package". The furniture package would be made available at cost plus 10 per cent. The public would pay a marked up price determined by a third party valuation. The letter went on to say:

> 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.

[10] The letter asked the purchasers to sign the enclosed sale and purchase agreement and indicated that an instruction sheet was attached to assist in completing it. In the agreement instructions document it said:

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8 The two options are explained in *Station Properties* (SC), above n 1, at [13].

> 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.

[11] On the accompanying price list there were two notes at the bottom. The first read "[f]or use as a serviced apartment Airconditioning/Heating and furniture package is required." The second read "[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%."

[12] The agreement for sale and purchase used the seventh edition of the Real Estate Institute of New Zealand and Auckland District Law Society Agreement for Sale and Purchase of Real Estate (REINZ/ADLS form),[9] with additions and deletions. Clause 6.2 of the REINZ/ADLS form had been replaced with a clause that provided that failure to deliver chattels "shall only create a right of compensation".

[13] Two of the additional clauses are of relevance to this application. In the added cl 33.1 the purchaser acknowledged that the sale and purchase agreement constitutes the entire agreement between the parties. The other relevant additional clause is cl 28.2 which provided:

> The vendor shall procure the Body Corporate to enter into an agreement for the provision of body corporate secretarial services with such party as the vendor may nominate prior to the settlement date. The vendor may procure the body corporate to enter into a Building Manager's Agreement, in the same or similar form enclosed, with a professional building management company to be nominated by the vendor prior to settlement date.

No draft Building Manager's Agreement has been located by the parties.[10]

The High Court judgment

[14] The first issue of relevance examined by Toogood J was to ascertain what documents and terms comprised the contracts for the purchase of the apartments. He held that the agreement was contained in the following documents:[11]

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

10 There were, however, draft Body Corporate Rules provided with the unexecuted sale and purchase agreements.

(a) the 20 September email;

(b) the 20 September letter;

(c) the agreement instructions;

(d) the price list; and

(e) the REINZ/ADLS sale and purchase agreements.

[15] Toogood J thus held that the "entire agreement" clause 33.1 in the sale and purchase agreement must be taken to refer to the contract which was comprised in the above documents.[12] The first four documents included additional terms which Toogood J held were obligations of Station: to pay the one percent fee, provide the furniture package and enter into the management agreement.[13] As to the management agreement, the High Court held that the complex was to be run as a going concern as serviced apartments by a "well-regarded management company".[14] Toogood J held that this was more than mooted as a possibility, as shown by the mandatory language in the 20 September 2005 email and in the instructions.[15] He also held that the reference to an option in the 20 September letter was referring to members of the public who might later purchase units for their own use and not to the purchasers.[16]

[16] The next issue of relevance was whether the purchasers were entitled to refuse to settle. This aspect of the case was decided in the High Court on the basis that the settlement date had not arrived because of Station's failure to provide a proper certificate of practical completion.[17] In case he was wrong in that

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11 See *Station Properties* (HC), above n 2, at [37]–[75].

12 At [75]. This finding and the finding of what documents constituted the agreement was not appealed and Mr Goddard QC confirmed Station's acceptance of it at the hearing of the recall application.

13 At [61], [62], [65], [66] and [127]. Toogood J was satisfied that Station deceived its funder by withholding information about the existence of the undertakings contained in the 20 September email and letter, the agreement instructions and the price list: see at [119].

14 At [126].

15 At [66].

16 At [67].

17 See [87]–[113].

contention,[18] Toogood J went on to consider whether Station was ready, willing and able to settle. In this regard, he accepted the purchasers' submission that Station was not in a position to meet the three additional obligations on settlement.[19]

[17] Toogood J said that, taken individually, it was arguable that the failure to meet the additional obligations would not justify the refusal to settle.[20] But, in the context of this case, he considered that they did so.[21] Toogood J said that the purchasers had been provided with "an incentive to enter the sale and purchase agreements by the proposition that Bowen View would be a well-managed complex of serviced apartments".[22] Although the Judge accepted that the purchasers did not intend to be long-term owners of the apartments, he considered that 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".[23]

[18] In the circumstances, the Judge considered that a mathematical analysis of the amounts of the benefits not provided by Station did not suffice. He considered that the "failure of [Station] to put itself in a position to provide what it had promised in terms of the purchase fee, the furniture package and the management agreement was essential to the bargain it had struck with the [purchasers]".[24]

[19] The Judge therefore concluded that Station's breaches were material and substantial and that they justified the purchasers' refusal to settle the purchases.[25]

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18 And he was held to have been wrong by the Court of Appeal on this point. This finding of the Court of Appeal was upheld by this Court: see *Station Properties* (CA), above n 3, at [68]–[70] and *Station Properties* (SC), above n 1, at [68]–[75].

19 *Station Properties* (HC), above n 2, at [120].

20 At [123].

21 At [124].

22 At [126].

23 At [126].

24 At [128].

25 At [129].

Station's arguments in the Court of Appeal

[20] In its amended notice of appeal in the Court of Appeal, Station indicated that it wished to appeal against the High Court finding that the breaches of the additional terms were material and substantial breaches on the basis that:

> [Station] was not obliged under the agreements to sign a management agreement prior to or at settlement and therefore its failure to do so cannot have been a breach of the agreements[.]

[21] In Station's written submissions in the Court of Appeal, it was argued that, under the wording of cl 28.2,[26] Station had the option of arranging a management agreement (based on the permissive wording "may procure" in that clause) but that, even if Station elected to procure a building management agreement, its only obligation prior to settlement was to nominate a professional building management company.

[22] At the oral hearing in the Court of Appeal, Station's arguments conformed with its written submissions. For example, Mr Tingey, then lead counsel for Station, said "there's a contractual interpretation issue about what was required in relation to the management agreement. It's accepted that the other obligations were requirements". While most of the discussion was around the permissive wording of cl 28.2, Station also relied on the equivocal wording of the 20 September letter that said Station "intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement".

[23] It is, however, fair to say that Station's argument, as advanced orally in the Court of Appeal, did fluctuate. At some points the argument seemed to be that there was no contractual obligation at all with regard to the management agreement. At other points the argument appeared rather to be that there was a contractual obligation but it was very limited and only required Station to nominate an operator prior to settlement. Mr Goddard QC (at the recall hearing) acknowledged that was so but submitted that overall the argument was that there was an option only.

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[26] Set out above at [13].

Court of Appeal judgment

[24] The Court of Appeal set out, as one of the principal findings of Toogood J, that the side agreements[27] were terms of the overall agreement between the parties.[28] The Court said that "[i]t is no longer in dispute" that "[t]he side agreements did constitute contractual terms".[29] It commented that, unlike in the High Court, the focus of the argument before the Court of Appeal was on the allegedly repudiatory conduct of the purchasers.[30]

[25] Later in the judgment, the Court set out the key terms of the side agreements and also referred to cl 28.2 of the agreements for sale and purchase.[31] The Court said:[32]

> We accept that the precise nature of any obligation on the part of Station to provide a management agreement is ambiguous and that it is reasonably arguable that the contractual term set out in the ASPs should override any other representations made prior to the execution of the ASPs. However, for reasons we later discuss, we do not think it matters whether there was a contractual obligation to provide a concluded management agreement at the time of settlement or whether (as [Station's counsel] submitted) Station had the option of procuring a management agreement if it chose to do so. Nor do we think it matters whether Station's only obligation (at best) was to nominate a building management company prior to settlement.

[26] With regard to the obligations under the side agreements, the Court held that the one per cent fee and the furniture package were relatively minor matters and that in commercial terms it was inconceivable that Station and its funder would not have agreed to them being credited against the purchase price at settlement.[33] As to the management agreement, the Court accepted that, while Station had nominated a manager, the arrangement was not in place at the time settlement was called for or before Station cancelled the agreements.[34] The Court said:[35]

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27 The one percent fee, the furniture package and the obligation to arrange a management agreement for all apartments in the complex.
28 *Station Properties* (CA), above n 3, at [14].
29 At [15].
30 At [16].
31 At [23]. This Court also set out cl 28.2 in its judgment: see *Station Properties* (SC), above n 1, at n 64 and, in the re-issued judgment, n 59.
32 *Station Properties* (CA), above n 3, at [24].
33 See [71]–[74].
34 At [75].
35 At [76].

> Even assuming, contrary to [Station's counsel's] submission, that the obligation was to actually have a management agreement in place, we find ourselves in disagreement with the view of the Judge that this was a material factor. We are satisfied on the evidence that, had the respondents 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.

[27] The Court concluded that none of the matters relied on, whether taken singly or together, constituted a material or substantial breach, which could have justified the refusal to settle.[36] The Court therefore held that Station was at all relevant times ready, willing and able to settle.[37] The obligations under the side agreement "were entirely ancillary to Station's principal obligation and could have been fulfilled or otherwise satisfied if the [purchasers] had been willing to proceed".[38]

[28] The Court concluded that Station was entitled to cancel for repudiation of the contracts and to recover damages for its losses.[39] The Court recorded that counsel for Station acknowledged that "Station would be required to make appropriate allowance for its failure to pay the one percent fee or to provide the furniture and the management contract".[40]

The application for leave

[29] The purchasers applied for leave to appeal to this Court against the Court of Appeal judgment. In the purchasers' notice of application for leave to appeal, they stated that they sought leave to appeal "against the whole of the decision of the Court of Appeal" and that they sought, amongst other things, the reinstatement of the High Court judgment.

[30] In the submissions in support of that application, the concentration was on the failure to provide a proper certificate of practical completion. The purchasers wished to argue that this was an essential term and strict compliance was required.

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[36] At [79]. In particular, the Court rejected the purchasers' contentions as to adverse GST implications arising from the lack of a management agreement: see at [77]–[78].
[37] See [82]–[85].
[38] At [83].
[39] At [86].
[40] At [86].

They also wished to argue that the certificate was a condition precedent that had to be fulfilled before the vendor had a right to call for settlement.[41]

[31] Station resisted the application for leave on the basis that no issue of general or public or commercial importance arose and that the issues had been adequately ventilated in the Courts below on the basis of settled principles.

[32] This Court granted leave to appeal on the broad question of whether Station was entitled to cancel the agreements for sale and purchase.[42]

Submissions on appeal before this Court

The purchasers' submissions

[33] In their submissions on the substantive appeal before this Court, the purchasers argued that both the obligation to procure the contractual certificate of practical completion and the performance of the additional terms in the side agreements were essential terms. In support of the contention that the side agreement obligations were essential and material, the purchasers relied on the findings and reasoning of the High Court.[43]

[34] The purchasers further contended that all of the side agreement obligations were required to be performed prior to settlement and that Station had indicated that it was unable to perform these obligations. It had thus repudiated the contracts at the latest on 7 August 2008 when Station's solicitors wrote to the purchasers stating that the date for settlement was 14 August 2008.[44] It was submitted that there was no evidence that the set offs envisaged by the Court of Appeal would have been instituted by Station and, indeed, every indication in the evidence that they would not have been.

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41 There were other grounds which have no relevance to this recall application.

42 *Kumar v Station Properties Ltd (in rec and liq)* [2013] NZSC 81. The Court refused to grant leave to appeal on two other proposed grounds of appeal as they did not satisfy this Court's leave criteria: at [2].

43 In their submissions, the findings and reasons are set out at [123] to [129] of the High Court judgment: *Station Properties* (HC), above n 2.

44 These letters were noted by this Court in its substantive judgment: see *Station Properties* (SC), above n 1, at [28] and [85].

[35] The purchasers' oral submissions were consistent with their written submissions.

Station's written submissions

[36] Station's primary submission in its written submissions on appeal was that it was entitled to cancel the sale and purchase agreements on the basis of repudiation by the purchasers. The purchasers had made it clear that they did not think they were required to settle the purchases and that they would not (or could not) do so. It was therefore not necessary to consider whether Station was ready, willing and able to perform its obligations at the time it cancelled the contracts.

[37] Station contended that, in any event, nothing had been put forward by the purchasers to disturb the finding of the Court of Appeal that Station was ready, willing and able to settle. Station could and would (as the Court of Appeal found) have provided a valid certificate of compliance and would have been willing to settle on the basis of performance of the additional terms in the side agreements and/or a reasonable allowance for their value. In Station's submission, the parties had not agreed that the side agreement terms were essential and the consequence of breach of those terms would have been minor and not substantial.

Station's outline of oral submissions

[38] On the day of the hearing, counsel for Station, Mr Goddard, helpfully supplied this Court with a written outline of his oral submissions. The outline had five main headings. Under the fourth heading, "Side agreements/additional terms", it was argued that the purchasers could only cancel for anticipated non-performance of these terms if s 7(3)(c) and 7(4) of the Contractual Remedies Act 1979 were satisfied. There were a number of limbs to this argument. First, Station contended that it was not clear that these terms would be breached in August 2008 or in April 2010. Secondly, none of these terms were agreed to be essential. Nor would the effect of non-performance be substantial. As a result, Station contended the purchasers had no right to cancel. Further, while it was accepted that the purchasers may have been entitled to require an allowance to be made on settlement by way of set-off, this was never sought by any of the purchasers.

[39] It is worth noting three points in relation to this outline: first, there was no specific mention of the management agreement issue under the fourth heading; secondly, the heading uses the wording ("side agreements") that the Court of Appeal used when referring collectively to the one per cent fee, the furniture package, and the arrangement of a management agreement; thirdly, the use of the words terms, and the reference to the ability to claim an allowance by way of set-off, appears contrary to Station's position on this recall application that it was an essential part of its argument in this Court that there was no obligation to arrange a management agreement.

Station's oral submissions

[40] Station's oral hearing argument on the appeal essentially followed the points made in the written submissions and the outline. Most of the oral submissions were concerned with the allegedly repudiatory conduct of the purchasers.[45]

[41] It is worth summarising the oral submissions that were made on the management agreement in some detail as that is where Station maintains the argument was put that there was no obligation to provide a management agreement, contrary to the "concession" recorded by the Court of Appeal in its judgment.

[42] Mr Goddard began his oral submissions on this point by arguing that the purchasers had failed to show that the effect of being deprived of the management agreement was substantial. He said that:[46]

> As a matter of common sense it's difficult to see how they could show that being offered the option of a management agreement in circumstances where the terms were completely up in the air would have any particular value to them because the value of the agreement would depend on its terms. Some management agreements would have little or no value; some might have a negative value.

[43] He was challenged on that submission by members of the Court suggesting that, in the context of this development and assuming the object of the investors

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[45] On this issue, the majority of this Court held that, while the purchasers refused to settle on an erroneous basis, they did in fact have a proper basis for refusing to settle in light of the fact that Station had made it clear it was not going to provide a management agreement: see *Station Properties* (SC), above n 1, at [95]–[101].

[46] *Kumar v Station Properties Ltd (in liq)* [2013] NZSC Trans 23 [*Kumar* (SC Transcript)] at 104.

(some not local) was to rent out the units, a management agreement would have been "pretty important" in that it would have provided "an immediate income stream and if it happened to be with a branded organisation then so much the better".[47]

[44] In response Mr Goddard noted that the management agreement was "to be offered as an option" and that this meant that the management agreement would not necessarily encompass the whole of the property.[48] Secondly, it was submitted that it was difficult on the language of the letters "referring to this intention" to consider the term essential.

[45] It was submitted further (in response to a suggestion from William Young J) that, if the purchasers had indicated that the management agreement was important and that they would not settle without it, Station's lender might well have made an arrangement with a real estate agent to manage the property. Additionally Mr Goddard stated that the lack of a management agreement was not mentioned by the purchasers in their affidavits or in their notice of opposition to summary judgment as a reason for not settling.[49]

[46] Mr Goddard took the Court to the 20 September letter and email.[50] Mr Goddard agreed with a suggestion made by William Young J that all this was "[p]retty loose". Mr Goddard then examined the sale and purchase agreements and referred to cl 28.2 submitting "what is important about this clause which is in the signed contract is that it talks about the vendor may procure".[51] He went on to say:[52]

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

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47 At 105 per Arnold J.
48 At 105–106.
49 At 106.
50 Summarised above at [7]–[13].
51 *Kumar* (SC Transcript), above n 46, at 108.
52 At 108–109 (emphasis added).

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

[47] Mr Goddard submitted that it was not "clear that the terms would be breached in August 2008".[53] He said that there was every reason to think that, if the purchasers had either formally tendered settlement or had refused to settle until the terms were complied with, then the lender would have resolved those matters. He then moved to the question of whether the terms were agreed to be essential. In relation to the management agreement, he said:[54]

> I have touched on that in relation to the management agreement and suggested that against [t]he backdrop of the mix of provisions in the formal contract and in the correspondence, [one] could hardly suggest that it was essential.

[48] Mr Goddard also submitted that:[55]

> So, as a matter of construction of the contract, as a matter of commercial commonsense, the substance of this was a promise to convey a property with certain attributes that was substantially complete and that was what the Station was offering to do. All the rest of these were side agreements, additional terms, incidental provisions. They weren't agreed to be essential and … "The effect of non-performance would not be substantial." … There was no evidence whether quantitative in terms of valuing [the management agreement] or qualitative to suggest that the sort of arrangement that might have been put in place, consistent with this contract, had some material value to the purchasers and *it certainly would've been open if it was an obligation to provide such an agreement at all, and the principal agreement suggests that it wasn't*, but if it was required then it could've been met by the sort of arrangement with a local real estate agent … which would not have had a material value-enhancing value. …
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> There was no, no detail that would enable one to say that it would have significant value if performed, *and that is very consistent with the way in which it was approached in the principal agreement where it just said "may" provide one.* But even if it was "must" there's no room to say that it had to have certain attributes which would ensure that it was valuable and value enhancing.

This Court's judgment

[49] The majority judgment proceeded on the basis that it was not in contention that there was an obligation to provide a management agreement. The majority said

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53 At 109.
54 At 110.
55 At 110–111 (emphasis added).

that Toogood J's finding that the three additional terms were part of the contractual arrangements between the parties "was not challenged in the Court of Appeal or before this Court".[56]

[50] William Young J also operated on the assumption that it was not in dispute that there was an obligation to provide a management agreement, although he expressed the view that, had it been, he may well have been inclined to find that it was not.[57]

[51] In the Court of Appeal judgment, there was a clear statement that it was no longer in dispute that the additional obligations in the side agreements, including the provision of a management agreement for the complex, were binding and part of the sale and purchase arrangements.[58] That this was the case is consistent with counsel accepting in the Court of Appeal that on settlement there would have to have been an allowance for the lack of a management arrangement (if one could not have been arranged).[59]

[52] It was not, however, just on the basis of the "concession" recorded in the Court of Appeal judgment that the majority judgment proceeded in the manner it did but also on the basis that Station had not heralded in its written submissions, either on leave or on the substantive appeal, that it wished to argue in this Court that there was no obligation to provide a management agreement.[60]

[53] Indeed, Station's written submissions proceeded on the basis that it was accepted that there was a contractual obligation to provide a management agreement. In particular:

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56 *Station Properties* (SC), above n 1, at [41]. See also [43], [51], [76], n 59, [85] and [90] per the majority.

57 At [114], [116] and [119].

58 See above at [24]. The Court of Appeal did record an argument by Station that cl 28.2 of the sale and purchase agreement meant that the Station merely had an option to provide a concluded management agreement at the time of settlement but the Court did not find it necessary to come to a final conclusion on that point: see above at [25].

59 See above at [26] and [28].

60 In terms of the majority's original judgment: see *Station Properties* (SC), above n 1, at [41], [43], [76], n 59, [85] and [90]. With regards to William Young J's dissenting judgment: see [114], [116] and [119].

(a) The management agreement was grouped with the one percent fee and the furniture package, and all three were collectively referred to as the additional terms;

(b) Station's position was that the additional terms could either be performed or that some allowance could be made for their non-performance, which is consistent with them being contractual obligations; and

(c) Where Station's written submissions discuss the management agreement in isolation, the point raised was that the purchasers had not attempted to put a value on having a management agreement arranged pre-sale. The passage concluded: "[s]o there is no reason to think that breach of this term would cause any loss to the purchasers".

[54] In addition, in terms of s 7 of the Contractual Remedies Act, Station's argument that the parties had not agreed, expressly or impliedly, that the additional terms were essential and that the consequences of breach of the additional terms would be minor, is contrary to Station's proposition that they were not contractual terms.

[55] The argument as to the provision of a management agreement being at the option of Station was only raised in oral submissions and in response to questions from the Chief Justice and Arnold J as to whether the obligation to provide a management agreement, in the context of a development at issue in this case, would have been material in its own right.[61]

[56] The oral submissions seemed to be reprising the argument recorded in the Court of Appeal judgment in relation to cl 28.2 of the sale and purchase agreement.[62] The lack of clarity as to the terms of any management agreement was mentioned but this seemed more to be in the context of the argument that the failure to provide the management agreement was not material, rather than in support of the argument that

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[61] See above at [42]–[44]. Material in the sense that it was, expressly or impliedly, agreed to be essential or that the effect of non-performance was substantial.

[62] *Station Properties* (CA), above n 3, at [24]. See above at [46].

Station had the option rather than the obligation to provide a management agreement.[63]

[57] The argument made in oral submissions as to the effect of cl 28.2 was addressed in a footnote in the majority's judgment.[64] It was stated that cl 28.2 is referring to a different type of management agreement, being a standard type of management arrangement that bodies corporate often make.[65] This is now accepted by Mr Goddard.

[58] William Young J, in his judgment, agreed with the analysis of cl 28.2 and the distinction drawn by the majority. He said:[66]

> 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 ... .

[59] As to the nature and extent of Station's obligation to provide a management agreement, the majority held that what was envisaged was "serviced rental accommodation by an established operator" and, contrary to William Young J's view,[67] the obligation could not "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)".[68]

The recall application

[60] In its application for recall of this Court's judgment Station's position was that this Court had operated under a mistaken assumption that the existence of an obligation to provide a management agreement was not in issue before the Court of Appeal and this Court. It asked for a new judgment that would determine:

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63 See above at [48].
64 *Station Properties* (SC), above n 1, at n 59.
65 See at n 59 of the majority's judgment.
66 At [105].
67 At [120] and [121].
68 At [90].

(a) whether Station was obliged under the sale and purchase agreements to enter into a management agreement prior to or at settlement. Station's position is that there was no such obligation;

(b) the content of any such obligation, if the Court finds that such an obligation existed. Station argues it was at most required to offer an option to enter into such an agreement to each purchaser and was not obliged to ensure that a management agreement was in place for all apartments in the complex;

(c) whether Station had made it clear that it would breach any such obligation in July/August 2008. Station says that it had not done so; and

(d) the implications of these findings for the conclusions reached by the Court in relation to the entitlement of the purchasers to cancel their agreements with Station.

Should the judgment be recalled?

[61] We agree, after having been provided in the course of the recall application with the submissions made both orally and in writing before the Court of Appeal, that Station did not concede in the Court of Appeal, contrary to what was said by the Court of Appeal, that it had an obligation to provide a management agreement. Rather it argued that it had an option to do so.

[62] Now that we are apprised of the true position, we will reissue our judgment and remove the references to the concession in the Court of Appeal. The changes made are outlined in the Appendix to this judgment.

[63] We do comment, however, that it was never indicated in the leave submissions, the written submissions, the outline of oral submissions or indeed in the oral submissions before this Court that the concession recorded by the Court of Appeal had not been made or that Station took exception to what the Court of Appeal said in this respect. This Court is entitled to rely on what is said in the judgments in the courts below, unless it is explicitly challenged in this Court.

[64] We do not, however, consider that we should recall the judgment to deal with the substantive arguments that Station now wishes to make. The Court of Appeal did not make any definitive finding on whether there was an obligation or an option to provide a management agreement.[69] Therefore, if Station wished to argue that it only had an option to provide a management agreement, then it needed to signal this in its written submissions. This is required by r 20A of the Supreme Court Rules 2004 which provides:[70]

> **20A Notice in respondent's submission that judgment will be supported on other grounds**
>
> If a respondent does not wish the judgment appealed from to be varied but intends to support it on another ground (*being a ground that the court appealed from did not decide* or decided erroneously), the respondent must give notice of that intention in the respondent's written submissions.

[65] As we have noted, the purchasers' submissions on the application for leave to appeal concentrated on the lack of a proper certificate of completion.[71] It was clear, however, from the purchasers' submissions on the substantive appeal that they were challenging the findings of the Court of Appeal, not just in relation to the certificate of practical completion but also in relation to the failure to perform the side agreements, including the provision of a concluded management agreement. This was of course within the scope of the leave granted (and Mr Goddard does not contend otherwise).

[66] We accept that, because of the focus of the purchasers' leave submissions, it was not necessary for the management agreement argument to be signalled in Station's leave submissions (although it may have at least been mentioned out of an abundance of caution). However, it was clear from the purchasers' submissions on the substantive appeal that the purchasers were alleging a breach of the side agreements (including the management agreement) and asserting that these terms were essential.

[67] Station argues that r 20A did not apply because of the breadth of the leave question. We do not accept that submission. Natural justice requires that appellants

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69 See above at [25]–[26].
70 (Emphasis added).
71 See above at [30].

have notice of and therefore a fair opportunity to address all points the respondent wishes to make.[72] The Court too must know what it is being asked to adjudicate on. This is important both for the oral hearing and for preparation of the judgment. The need to comply with r 20A is arguably even greater when the leave question is couched in general terms so the ambit and limits of the arguments that will be made in relation to that general question are known in advance of the hearing.

[68] The point about the management agreement being at most an option was only raised in oral submissions near the end of the oral argument. It arose in the context of answering questions about the materiality of the obligation. It was not signalled at the beginning of the oral hearing as a matter that would be covered. The argument that there was an option seemed to be argued on the basis of cl 28.2 (consistently with how it was argued in the Court of Appeal). Despite it not having been signalled in the written submissions, and despite the manner in which it arose, this argument was dealt with in the judgment.

[69] We accept that there may have been indications in the oral submissions that the argument was wider than cl 28.2 but parties cannot expect the Court to conduct a minute examination of the transcript of the oral hearing to identify possible arguments that have not earlier been heralded. In this case, any such expectation is particularly unreasonable in light of the recording of the concession in the Court of Appeal that was never explicitly challenged in this Court. In addition, as outlined above, Station's written submissions had proceeded on the basis that there was a contractual obligation to provide a management agreement,[73] as had the written outline of the oral submissions.[74]

[70] The application for recall also seeks to raise the point that Station did not repudiate on the basis that the obligations under the side agreements were due to be performed at the time of settlement and that time had not yet arrived. It also

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[72] Station also contends that the purchasers recognised that this issue remained live on the appeal to this Court. In support of this contention, Station quotes one sentence from the purchasers' written submissions and one sentence from the purchasers' counsel, Ms Kelly, at the oral hearing. This conclusion cannot be inferred from the sentences relied on and, in any event, Station did not raise the issue as required by r 20A of the Supreme Court Rules.

[73] See above at [53]–[54].

[74] See above at [38]–[39].

submitted that the obligation could have been satisfied relatively easily. However, these issues were clearly covered in the majority judgment[75] and the first point was signalled as being at issue in the purchasers' submissions on appeal. The fact that a party wants to relitigate a point does not justify a recall.[76]

Comments on substantive points made

[71] At the hearing of the recall application Mr Goddard asked the Court to recall its judgment to engage with the version of the argument put forward at the original hearing of the appeal as to whether there was an obligation to provide a management agreement "or better still the more developed version that I have had the opportunity to outline today".[77] Even had we considered that there were grounds to recall the judgment, there was in any event nothing put forward by Station in its more developed argument at the recall hearing that would have led the majority to come to a different conclusion.

[72] As to the main issue of whether Station had an option or an obligation to implement a management agreement, mandatory language was used in the contractual documents:

(a) the 20 September email said that provision had been made for the management arrangement to be run from unit three and Station said that "the management rights will be sold to the highest bidder".[78] It also said that a management agreement "will be made available during construction";

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75 *Station Properties* (SC), above n 1, at [83]–[85] and [94]. See also above at [59]. We comment that the conclusion of the majority as to the extent of Station's obligation is supported by the evidence; for example, the 20 September 2005 email and letter referred to serviced apartments, that a unit had been set aside for the management of the complex, and said that the management rights would be sold to the "highest bidder". The subsequent conduct of Station confirms the majority's conclusion; for example, Station's email to the purchasers, dated 12 April 2006, stated that Station was in negotiations with Stella Resorts group; this email was set out in this Courts substantive judgment, see *Station Properties* (SC), above n 1, at [81] per the majority and at [109] per William Young J.

76 *M v Refugee Status Appeals Authority* [2011] NZCA 441 at [3]. See also for example *Thomas v Accident Compensation Corporation* [2014] NZCA 186 at [6] and *Corbett v Patterson* [2014] NZCA 145 at [4].

77 *Kumar v Station Properties Ltd (in rec and liq)* [2014] NZSC Trans 27 at 95.

78 See above at [7]. The 20 September 2005 letter also said that the air conditioning and furniture packages had to be included: see above at [9].

(b) the price list stated that the air-conditioning and furniture packages were required for the use of the units as serviced apartments;[79] and

(c) the agreement instructions said that a property management agreement "will be offered pre-settlement". It was also stated that the furniture package "will be mandatory".

[73] While we recognise that the letter dated 20 September 2005 said that Station "intends to arrange for the benefit of its shareholder as an option a serviced apartment management agreement", we see the word "intends" as another way of saying that Station "will provide". The use of the word "intends" was appropriate in that context because such an agreement was not yet in place. Given this, it is also understandable that its terms were not yet certain or clear.[80]

[74] In addition, the reference to an option in this letter was not an option for Station but for purchasers.[81] The fact that some purchasers may have opted out from having their unit managed as a serviced apartment does not detract from having the complex run as serviced apartments under a management agreement for those owners who wished to avail themselves of that option.

Result and costs

[75] The judgment of this Court will be reissued with the changes and additions set out in the Appendix to this judgment. The application for recall is, however, dismissed.

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79 See above at [11].

80 In any event, as this Court recognised in *West City Construction Ltd v Levin* [2014] NZSC 183 at [31], there are contractual uncertainties and formalities that are "perfectly capable of being resolved by a court". In this case, the management agreement obligation was one which was capable of being resolved by reference to typical management arrangements for serviced apartment complexes. If Station had provided a management agreement prior to settlement, the purchasers would only have been entitled to refuse to settle if the terms of that agreement were totally outside what could be considered reasonable market terms. In fact Station had been negotiating with recognised managers and "brands" for the management of the complex and had chosen Select Hotels as the operator of choice: see *Station Properties* (SC), above n 1, at [81]–[84].

81 And possibly, as Toogood J found, only future purchasers: see above at [15]. The fact that there was an option for purchasers meant that there would have been an incentive for Station (and any manager appointed) to ensure that the terms of the agreement were reasonable.

[76] The purchasers are entitled to costs. Such costs must reflect the fact that an oral hearing on the application was held and that preparation for the hearing of the application had to be undertaken on an argument the purchasers did not have a proper opportunity to address in the course of the hearing of the substantive appeal.

[77] Costs of $10,000 plus usual disbursements are therefore awarded to the purchasers.

WILLIAM YOUNG J

[78] It is now accepted that the Court of Appeal was wrong to treat the respondents as having conceded that Station was under an obligation to arrange a management agreement for the complex. In correcting the statement of concession but in otherwise declining to recall the substantive judgment, the majority in the present application for recall treat the error as not having been material to the result on the case as it was argued. The majority takes the view that the arguments the respondent now seeks to raise at a further hearing should the recall application be granted were arguments which could and should have been advanced at the hearing of the appeal.

[79] I agree that the arguments should have been put to the Court at the substantive hearing. There was no substantial challenge in the respondent's written submissions to the management agreement obligation finding of Toogood J which was relied on by the appellants. The very limited challenge made by Mr Goddard QC in his oral submissions was largely premised on the cl 28.2 argument which was addressed succinctly and correctly rejected in the substantive judgment. It is possible to construe some of the comments made by Mr Goddard in his oral submissions as going beyond reliance on cl 28.2. These, however, were so fleeting and fragmentary that it could not fairly be said that, in deciding the case as it did, this Court failed to deal with an argument which was properly on the table.

[80] While I agree that judgments should not generally be recalled to allow a new argument to be advanced, there are some particular and unusual features of this litigation which lead me to conclude that this consideration should not be controlling here.

[81] It seems that the respondent did not advance arguments which were available to it because it did not anticipate the view adopted by the majority. That may have been largely because counsel mistakenly considered the cl 28.2 was applicable and provided an answer to the contention that the management agreement obligation was sufficiently material to warrant cancellation. There were, however, other contributing factors which are not attributable to that misconception.

[82] The appellants' arguments in relation to the management agreement obligation have evolved. Their pleading as to the content of the obligation was that the respondent would arrange an 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".

The focus of this pleading was on GST consequences and this would appear to be the way this aspect of the case was presented in the Court of Appeal judgment, which recorded the argument and succinctly rejected it (at [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.

[83] Another contributing cause is the lack of precision in both High Court and Court of Appeal as to the management agreement obligation.[82] Toogood J was not explicit as to the nature of the management obligation. And, unfortunately, as recorded above (at [24]–[26]) the Court of Appeal's judgment gave mixed signals as to whether it proceeded on the basis that there was a management agreement obligation and, if so, as to its content. As to this, I think it particularly relevant that at [76], the Court of Appeal commented:

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[82] As to which, see the points made by me at [111]–[114] of my substantive judgment.

> Even assuming, contrary to [the respondent's] submission, that the obligation was to actually have a management agreement in place, we find ourselves in disagreement with the view of the Judge that this was a material factor. We are satisfied on the evidence that, had the [purchasers] 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.

This description would be inaccurate if applied to the management agreement obligation accepted by the majority in the substantive judgment. That is because, by August 2008 and subsequently, Station was self-evidently unable to put in place such a management agreement of the kind envisaged by the majority.

[84] Although the appellants' written submissions to this Court were sufficiently broad in scope to cover the point that the obligation to provide a management agreement was essential, there was substantial focus on the contention that respondent's breach lay in insisting on settlement in full while, at the same time, refusing to comply with the side-agreements.

[85] The end result is that the case was decided on a basis which was not the subject of full argument. This is because counsel did not appreciate the significance of the point which was to be decisive with the majority of the Court. In many cases such a misunderstanding will be answered by saying that the respondent had the opportunity to put forward at the appeal the argument it now wishes to advance. But in the unusual circumstances of this case, I do not see this answer as conclusive. The way the case evolved and was treated in the courts below, as described above, made it understandable that counsel did not anticipate the significance of the decisive point in the substantive reasons of the majority. In my dissenting reasons I expressed my suspicion that was the case. I now rather regret not suggesting that we go back to counsel to explore the question whether there was indeed a misunderstanding. The concession attributed by the Court of Appeal to the respondent may have been material to the fact that it did not occur to me to do so. In this very unusual situation, I am of the view that the fact that judgment has been delivered should not, of itself, preclude that course being taken now.

[86] In their reasons, the majority conclude that the approach they took in the substantive judgment was correct. It is fair to say that I am far from satisfied that that

is so. But given that this is the view of the majority, there would now be no point in recalling the judgment; this given that (a) the arguments on the key issue lie within a comparatively narrow compass and (b) we have now heard from counsel for Station on that issue.

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Appendix

[87] The following changes are made to our judgment of 15 October 2014.

(a) At [7] the third sentence is modified (the addition is in italics):

"Station accepts that it was in breach of the relevant contractual obligations *(with one possible exception)*, but says that the appellants did not refuse to complete as a consequence of those breaches but for other reasons."

(b) At [41], the following sentence is deleted:

"This finding was not challenged in the Court of Appeal or before this Court."

(c) At [43] the following is added to the first sentence:

", although in relation to the management agreement it argued that it had an option to offer a management agreement rather than a firm commitment to do so."

(d) At [46](d) the following is added at the beginning of the subparagraph (the additions are in italics):

"The Court *did not decide Station's "option" argument, but proceeded on the assumption that Station had a contractual commitment to offer a management agreement. It* accepted that Station had nominated a manager ..."

(e) At [51] the second part of the paragraph is modified (the additions are in italics, footnotes are omitted and deletions struck out):

Toogood J did, however, find that Station had a contractual obligation to perform the side agreements, also a finding that was not ~~appealed~~ *challenged*

on appeal, except to the extent that Station argued it had an option rather than a commitment in relation to the management agreement. 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 *(if the option argument is rejected) to* have a management agreement in place to enable the apartments to be operated as serviced rentals.

(f) Footnote 38 has been altered to read as follows (additions in italics):

"*Station Properties* (CA), above n 2, at [15] *and [82]*. *As earlier noted (at [46](d) above), the Court of Appeal did not determine Station's option argument: see [23]–[24] and [76] of Station Properties (CA)*."

(g) There are additions in [76] (additions in italics, footnotes omitted and deletions struck out):

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 *and* the provision of a $30,000 furniture package. *As to the management agreement, in his oral submissions Mr Goddard reiterated Station's Court of Appeal argument that it had an option to offer a management agreement rather than an obligation to do so, relying in particular on cl 28.2 of the agreement. But it is apparent that cl 28.2 is not relevant as it addressed a different type of management agreement. Accordingly, we accept Toogood J's findings that the side agreements were binding on Station, including in relation to* the arranging of a management ~~contract~~ *agreement* enabling the units to be operated as serviced apartments. The question is then whether Station's failure to comply with ~~them~~ *the side agreements* 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.

(h) A new footnote has been added (footnote 59) and reads as follows:

Clause 28.2 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". Mr Goddard emphasised the word "may". Unfortunately, the draft management agreement referred to in cl 28.2 was not annexed to the agreements provided to the Court, but it is clear from the body corporate rules that it was not the type of management agreement at issue in these proceedings, a conclusion which William Young J also reaches: see below at [105].

(i) A new footnote 60 has been added and reads as follows:

See *Station Properties* (HC), above n 1, at [61]–[66] and [75], and [123]–[127], where the management agreement is addressed.

(j) In footnote 61 (previously footnote 59) the words "undisputed either in the Court of Appeal or in this Court" and "*Station Properties* (CA), above n 2, at [3]" are deleted. The words "references above at n 60" are added at the end of the footnote.

(k) At [85] the words "would not have a management agreement in place" are replaced by "would not have arranged a management agreement". In addition the word "accepts" in the last sentence are replaced by "has not effectively challenged".

(l) At [86] the words "have a management agreement in place" is replaced by "arrange a management agreement".

(m) At [88] in the last sentence the words "put a management agreement in place" are replaced by "arrange a management agreement".

(n) The previous footnote 64 is deleted. A reworded version now appears as footnote 59: see above at [87](h).

(o) At [90] in the last sentence “effectively” is inserted before “challenged”.

(p) The last sentence of [114] is deleted.

(q) At [116], the words in the last sentence “sought to challenge the finding” is replaced by “mounted a full-scale challenge to the finding”.

(r) At [119] the word “seriously” is added in the first line after “It follows that had Station”.