IN THE SUPREME COURT OF NEW ZEALAND SC 105/2009

BETWEEN **MANA PROPERTY TRUSTEE LIMITED**

Appellant

AND **JAMES DEVELOPMENTS LIMITED**

Respondent

Hearing:	15 June 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	J M McCartney SC and D M McMorland for the Appellant C S Withnall QC with R Ahdar for the Respondent

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CIVIL APPEAL

MS McCARTNEY SC:

May it please Your Honours, Ms McCartney appearing with my learned co-counsel, Mr McMorland.

ELIAS CJ:

Thank you, Ms McCartney, Mr McMorland.

MR WITHNALL QC:

Please the Court, I appear for the respondent with my learned friend, Mr Ahdar.

ELIAS CJ:

Thank you, Mr Withnall, Mr Ahdar. Yes, Ms McCartney?

MS McCARTNEY SC:

Yes, may it please the Court. This appeal involves the terms of a sale and purchase agreement for a large track of industrial land in Cromwell. The agreement provided for sale of Lot 11 and provided as a description on the front page of the contract the area of 4.7161 hectares more or less. Clause 18.3 is at the heart of this appeal and that clause provided for a minimum of 4.7150 hectares, which is just 11 square metres less than the area found on the front page of the contract.

So, there are two issues in this appeal. The first is whether clause 18.3 was an essential term, with the consequence that the purchaser, James, was able to cancel for breach, and the second is whether, in any event, James was entitled to cancel for breach in the way that it did, which was pre-emptorily by a letter of 3 November 2008, or whether it first had to issue and wait for expiry of the settlement notice.

The proceedings, Your Honours, were commenced by summary judgment. Mana sought an order for specific performance of the sale and purchase agreement on the ground that James had wrongfully repudiated the agreement, and James' notice of opposition is at the casebook, which is the white book, at page 52, and the Court will see that by way of notice or by way of opposition, James raised the single ground that it was entitled to cancel because clause 18.3 of the contract was an essential term, that's 3(b). No other ground of opposition was raised in the notice of opposition and that remains the position to today.

Now, Your Honours, before turning to the key facts, may I just mention the history of the litigation? Mana was successful in the High Court, Associate Judge Osborne found in favour of Mana and an order for specific performance was made in Mana's favour. That order was the subject of an appeal to the Court of Appeal and James applied for a stay. The stay was ordered on terms and the terms of the stay are set out in the Court of Appeal's judgment, which is at casebook page 16 paragraph 15.

James did not comply with any of those terms, instead its shareholder appointed liquidators and the liquidators supported James' appeal. James' appeal was successful. However, prior to the appeal Mana applied to the High Court for a discharge from the specific performance order, instead seeking an order as to an inquiry for damages, and those orders were made by consent. We submit –

ELIAS CJ:

Where do we find those?

MS McCARTNEY SC:

May I pass it up, Your Honour?

ELIAS CJ:

Yes. It's not in the casebook?

MS McCARTNEY SC:

It's not in the casebook, but I do have a copy of the judgment of the Court.

TIPPING J:

Does anything turn on this, Ms McCartney?

ELIAS CJ:

It probably doesn't, I just want the record complete. Yes, thank you. And this all gets overtaken?

MS McCARTNEY SC:

Well, the issue is not overtaken.

ELIAS CJ:

No.

MS McCARTNEY SC:

The order for specific performance is overtaken.

ELIAS CJ:

Yes.

MS McCARTNEY SC:

But the issue remains the same as in the Courts below, which is whether clause 18.3 was essential, entitling James to cancel, and whether James could cancel summarily. So, unless Your Honours direct otherwise, we would like to address first the issue of essentiality, followed by the issue of the settlement notice.

ELIAS CJ:

Yes.

MS McCARTNEY SC:

And, just before going there, may I just highlight some of the key facts from the written submissions, where the key facts are set out, commencing at page 5 paragraph 15? At paragraph 15 reference is made there to a plan attached coloured blue to the sale and purchase agreement. Now, I regret that we do not have the blue coloured plan before this Court, but the document that is referred to is at page 157 of the case, and I do apologise for the condition of some of these documents, it seems that they were faxed backwards and forwards and the documents that are before the Court are the best documents that could be found. Page 157 was the plan that was attached to the sale and purchase agreement between the parties. That big block in black is Lot 11. There is a better plan before the Court, which is at page 86. I hope that Your Honours have page 86 following in sequence in the documents as, for some reason, mine follows page 100.

TIPPING J:

Likewise.

MS McCARTNEY SC:

I apologise for that, I don't know how that one happened. And that obviously is not the plan that was attached to sale and purchase agreement, it's the plan that came out with the original Certificate of Title, which had the wrong area in it. But it will be apparent that Lot 11 is considerably larger than Lot 5 above it, which was the lot where the boundary was going to be realigned, and to the right at the top of Lot 11 is a Lot 12 that belonged to the Central Otago District Council and it was that title that was realigned for the purpose ultimately of giving Lot 11 the requisite 4.7 or more hectares.

With reference to the contract that the parties entered into, it is in the casebook commencing at page 59 and the further terms of sale commence at page 68, and clause 16, headed "Subdivision" shows under it clause 16.1, which provides for the Central Otago District Council, CODC, to alter the boundaries between Lots 5 and 11 to enable Lot 11, which was being purchased by James, to become approximately 4.7161 hectares, and to do that the vendor, Mana, was to require the Council to vary resource consents that were already in place.

At clause 16.2 provision was made that once the territorial authority had varied the resource consent the vendor, Mana, will, "At vendor's costs, ensure the implementation of varied resource consents to carry out all requirements and complying with all conditions which the territorial authority has imposed in the resource consents, ensure the preparation of a survey plan according to the resource consents, ensure LINZ approve the survey plan, ensure the approved survey plan is lodged in LINZ and the approved survey plan is deposited and LINZ issues a separate Certificate of Title for the property."

Clause 16.3, which James has brought to the Court's attention, provides for the vendor, Mana, to grant or receive the benefit of all existing easements and rights and obligations which the territorial authority needs to satisfy as a condition of the resource consents or to deposit the approved survey plan and provides that the purchaser will not make any objection or requisition on the

vendor's title under clause 5.2 of the general conditions of sale about any of those easements, building loan restrictions, rights or obligations.

And, Your Honours, the critical clause 18.3 follows the section 18, purchase price, 18.1 providing that, "The area on the plan attached is approximate only and is subject to adjustment on final survey, that all measurements are subject to the final check by the CODC surveyor and/or LINZ and any variation which may be found to be necessary upon such check or which the above may require, 18.2 provides for compensation for those adjustments and 18.3 the parties acknowledge that the final area of the property as shown on the approved survey plan must not be less than 4.7150 hectares.

So, Your Honours, Mana, as it was required to do, got on to getting a variation of the resource consent and forwarded, as James requested, a copy of the resource consent to James, and that document is at page 154 and 156 of the case on appeal – I'm sorry, at page 78 of the case on appeal, which shows on the 2nd of November 2007 the surveyors applied to the Council for the varied resource consent. At page 79, second paragraph, the surveyors draw to the attention of the Council the main difference is that Lot 5 will be increased in area and the result is that Lot 11 of the original consent is reduced to an area now to become 4.7 hectares. And that document, as I have submitted, Your Honours, the evidence shows that it was forwarded to James at James' request and that was done on the 4th of February 2001. The document is at page 71.

TIPPING J:

That's 150 square metres short, is it, that 4.7 hectares?

MS McCARTNEY SC:

Yes, it is.

TIPPING J:

At that stage?

MS McCARTNEY SC:

At that stage. And with reference to page 71, Your Honours, the point that I'm making is, as can be seen at the bottom marked "B1", an email from Mr Skeates for Mana to Mr van Aart acting for James, "I enclose a copy of the council consent as requested." So from the 4th of February 2008, which was eight months before settlement or before the date that the Certificate of Title was provided to James, James was aware.

BLANCHARD J:

Well, that document at page 71 –

MS McCARTNEY SC:

Yes.

BLANCHARD J:

– is a copy of the council consent.

MS McCARTNEY SC:

Yes.

BLANCHARD J:

The document at page 78 is the application.

MS McCARTNEY SC:

Your Honour, I wonder whether I might just refer to the evidence? With respect, Your Honour's correct, the evidence in relation to this is at page 54 paragraph 13, in which Mr Skeates says, and this is unchallenged, "I forwarded the resource consent and application for the same to the defendant's solicitors, following a request by them for that information," and he continues, at the bottom of that paragraph, "I did not receive any response to this communication from the defendant's solicitors."

TIPPING J:

Are you going to build something out that, Ms McCartney?

MS McCARTNEY SC:

I am, Your Honour, because I'm just moving on to say these documents, in my submission, establish that as at certainly the date at document 71, which was 4 February 2008, that James' solicitor had the documents, and had this issue of minimum area been as critical as James is telling us –

TIPPING J:

Is there any evidence that this point was in his mind? In other words, that he appreciated that at this stage it was 150 square metres short?

MS McCARTNEY SC:

No, there's no evidence that the point was in anyone's mind at that time, Your Honour, simply that the document was sent to James. But the point, on behalf of Mana, that I make, Your Honour, is that if it had been a matter of critical importance one may expect that perhaps the solicitors might have looked at the documents –

ANDERSON J:

I thought that the complaint wasn't that it was 4.7 but that it was less than 4.7?

MS McCARTNEY SC:

No, that it was less than 4.7150.

TIPPING J:

That's the threshold below which –

MS McCARTNEY SC:

That's the threshold.

TIPPING J:

– it was not supposed to drop.

MS MARTLEY:

Below which it could not drop.

TIPPING J:

And here it was dropping below that threshold.

MS McCARTNEY SC:

Yes, and as I develop the test of this implied essentiality.

TIPPING J:

Well, it's quite a good start, in the sense that there was obviously no object raised at that point. But if you can't demonstrate that it was present to their mind, it weakens it, doesn't it?

MS McCARTNEY SC:

Well, everything from here on I, with respect, agree, everything weakens in terms of the lack of objection at this time or, as I go on to develop, the fact that there was nothing else that, from Mana's point of view, would have drawn its attention to the fact that this was of such critical importance.

TIPPING J:

Isn't it a matter of construction –

MS McCARTNEY SC:

Yes.

TIPPING J:

– subject to the surrounding circumstances, and you look first to see what you would draw from the words themselves and then you look to see what the surrounding circumstances, what that effect that might have on your preliminary view, if you like?

MS McCARTNEY SC:

It is, with respect, and it also is having regard to the test that's been developed over many years from implied essentiality. So one is asked to construct the contract having regard to the test for essentiality, which the Courts over many years have said is a test that requires that the parties, both parties, at the time the contract was made agreed that a breach of that particular term would go to the heart of the contract or the substance of the venture, such that any deviation would entitle the other party to cancel.

McGRATH J:

You will be addressing the meaning of section 7(4)(a) of the Contractual Remedies Act?

MS McCARTNEY SC:

Yes.

McGRATH J:

But can I just flag my concern that you will have to show me why this concept of evidence of essentiality is admissible and the basis on which you show it's admissible? Is it the context, is it intentions, or what is it that you're trying to bring in? Because it does seem clear to me that the parties are able to decide it's essential in terms of section 7(4)(a), whether or not objectively that's the case.

MS McCARTNEY SC:

Yes, and if I may just address that now, in terms of section 7(4)(a) the issue is expressed or implied agreement. In this case, I understand there's no difference between the parties that there was no express agreement.

TIPPING J:

Well, you won't necessarily take the view that I'm of that view at the moment, Ms McCartney, for what it may be worth.

MS McCARTNEY SC:

All right, thank you, Your Honour. Well, Mana's position, if I may say, Mana's position is that it's not expressly set out in clause 18.3.

TIPPING J:

Yes, I understand your submission.

MS McCARTNEY SC:

Yes, and for it to be expressly set out, we submit that clause 18.3 needed to be expressed as a matter of essentiality –

TIPPING J:

You don't submit that they have to use the word "essential" are you?

MS McCARTNEY SC:

Well, they don't have to, but if they had –

TIPPING J:

Oh, yes.

MS McCARTNEY SC:

– we wouldn't be here. And more than that, in the other clauses of the contract, where it is essential it is spelt out.

TIPPING J:

All right, well –

ANDERSON J:

On the other hand, if they'd put another 150 square metres in we wouldn't be here either.

MS McCARTNEY SC:

No, no.

ANDERSON J:

All the trouble caused by skimping at that point is extraordinary.

MS McCARTNEY SC:

Yes –

TIPPING J:

Can I come straight to the point that troubles me, Ms McCartney, is this, that you have in this clause 18 under what can loosely be called an "unders and overs" –

MS McCARTNEY SC:

Yes.

TIPPING J:

– provision, how more clearly could you state that you didn't want unders to be able to go less than so much? In other words, you wanted to draw a line between the under that was going to constitute compensation and the under that would give rise to cancellation. How more clearly could you do it than what we've got here?

MS McCARTNEY SC:

Well the under for compensation was clause 18.2, that Your Honour's identified.

TIPPING J:

Exactly.

MS McCARTNEY SC:

In –

TIPPING J:

But 18.3 limits the amount that it can go under.

MS McCARTNEY SC:

Yes.

TIPPING J:

So isn't it perfectly clear that the parties were saying, it's compensation up to such a deficiency and after that it's as essential – we can cancel it, it's all off, potentially?

MS McCARTNEY SC:

Potentially. Well, that is a potential interpretation, but it doesn't say it.

TIPPING J:

Well, with respect, I'm suggesting to you it gets extraordinarily close to saying it.

MS McCARTNEY SC:

Well, it could have said it, but it didn't say it. Everywhere else where they wanted it to be expressed as essential in a contract they have said it, so –

BLANCHARD J:

But is that in the printed terms or –

MS McCARTNEY SC:

In the printed terms.

BLANCHARD J:

They haven't done it in any special condition?

MS McCARTNEY SC:

No. In the printed terms wherever cancellation is available it's stated.

TIPPING J:

Unders and overs are traditionally tricky territory because you want to be able to say, so far we'll agree it's compensatable, but no further, and this is exactly the situation.

MS McCARTNEY SC:

And it is no further, but the issue is, and what happens if it goes further?

ELIAS CJ:

It's non-compensatable.

MS McCARTNEY SC:

It's non-compensatable, in accordance with 18.2 –

TIPPING J:

Well, it could be non-compensatable in the sense that you'd get away with it.

MS McCARTNEY SC:

No, but it is compensatable in terms of damages, damages under the Contractual Remedies Act. So what 18.3 has –

TIPPING J:

Are you drawing a distinction between compensation and damages here, Ms McCartney?

MS McCARTNEY SC:

No, between compensation as provided by clause 18.2, –

TIPPING J:

Yes.

MS McCARTNEY SC:

– which sets out exactly how much you're going to get, and if it goes further then the ability to switch to damages under the Contractual Remedies Act, if you elect to.

ANDERSON J:

But the damages would be compensatory.

MS McCARTNEY SC:

Yes, but it's not limited, if you like, to $95.42 per square metre. So, it's not as though it doesn't have a meaning at all, it does have a meaning, it's the flick of the switch from 18.2 to damages under the statue.

TIPPING J:

Well, how far lower can it go?

MS McCARTNEY SC:

How far can it go?

TIPPING J:

While it's still damages and not cancellation?

MS McCARTNEY SC:

The answer is, as far till there was a breach of substantial effect that under section 7(4)(b) an entitlement arose to cancel. So, it wasn't free-falling, at some stage the reduction in area would reach a point at which James could legitimately say, I no longer, I am now substantially affected by this breach and I'm going to elect to cancel, so it wasn't a free fall. The Court of Appeal has recorded in its judgment that his counsel was unable to explain where it stopped and, with respect, I was of the view that I had made the same submission, which is that –

TIPPING J:

They may not have thought that was a sufficiently clear touchstone, if you like.

BLANCHARD J:

Doesn't your interpretation render 18.3 meaningless?

MS McCARTNEY SC:

Well, with respect, no, it's still a bright line –

BLANCHARD J:

Well, it's not bright.

MS McCARTNEY SC:

It is a bright line, with respect, in terms of, you must deliver 4.7150 hectares, the settlement time being of the essence. How do you do that? Requisition for it.

TIPPING J:

It's a bright line between compensation and damages, -

ELIAS CJ:

Yes.

TIPPING J:

– which may or may not be a bright line.

MS McCARTNEY SC:

Well, we're talking here about – I'll come back to the law, but –

TIPPING J:

It's a bright line which is a completely blurry bright line, because you go on deducting damages or compensation at the same rate, because there's really no other measure that is ever likely to be applied, until you get to the point, as you put it, that there's a substantial breach, but that's not a bright line.

MS McCARTNEY SC:

No, but you do get to a point where you can cancel if it does –

TIPPING J:

Yes, but not on your analysis, just because there's a breach of 18.3.

MS McCARTNEY SC:

Well, may I make another suggestion, which is it is a bright line in terms of reduction of area being a requesitionable aspect of the contract. So, under clause 5.2, once this title was provided to James, James as the purchaser was entitled to deliver a purchaser's notice of requisition, it had five working days to do that –

TIPPING J:

What's the foundation for this requisition, what has happened to give rise to the right to requisition?

MS McCARTNEY SC:

The fact that a title is issued without the prescribed area in the title.

McGRATH J:

But that's not of contractual significance, is it?

MS McCARTNEY SC:

It's of contractual significance in that the contract, in its description of the area to be provided in the title, at page 59, provides for 4.7161 hectares more or less. Clause 18.3 is a further refinement of that description, in that it cannot be less than 4.7150 hectares.

McGRATH J:

Isn't the crucial point settlement rather than when a title issues?

MS McCARTNEY SC:

Well I, with respect, agree, but under clause 5.2 in terms of the critical – and the better page to look at this is at page 164. Once, in this case, because it's 5.2 sub-clause (2), "If a plan has been or is to be submitted to LINZ for deposit in respect of the property, then in respect of objections or requisitions arising out of the plan the purchaser is deemed to have accepted the title except as to objections or requisitions which the purchaser is entitled to make and notice of which the purchaser serves on the vendor on or before the fourth working day following the date the vendor has given the purchaser (a) notice the plan has deposited, (b)," as in this case, "notice that where a new title is to issue for the property the title has issued and a search copy of it as defined by section 172A of the Land Transfer Act is obtainable." So, in this case that is what happened. As soon as the plan deposited and the title issued, Mr Skeates acting for Mana sent a copy of the title to James, and that was under letter of the 21st of October, which is in the case at page 87. And the submission that I make in relation to whether clause 18.3 is an essential term is well, the requisitions clause in the contract, which wasn't in conflict with 18.3, entitled that moment for James to issue its notice, its purchaser's notice and require Mana to put that title in compliant order which meant it had to continue 4.7150 hectares, no less.

BLANCHARD J:

But if the vendor said, yes we accept that you have the right to requisition and you have requisitioned and we accept that requisition –

MS MCCARTNEY SC:

Yes.

BLANCHARD J:

– and then – and so it doesn't give a notice itself under 5.2(3)(a), so (b) applies. It's a requirement on the settlement that the objection or requisition shall be complied with but it doesn't comply. What's the remedy?

MS MCCARTNEY SC:

You mean if we went ahead and –

BLANCHARD J:

Yes.

MS MCCARTNEY SC:

– at settlement the vendor –

BLANCHARD J:

They hadn't fixed the problem, what's the remedy?

MS MCCARTNEY SC:

Well the remedy is at that time a notice entitling, and I assume if the – I'm sorry Your Honour I haven't looked at this, but I understand that where a purchaser – where a vendor agrees to put the title in order, that that's its obligation to do so. So it would be in breach of that obligation.

BLANCHARD J:

Yes, but what's the remedy for that breach, if in fact it's a very minor breach? Don't you come around in a full circle?

TIPPING J:

The remedy depends on whether it's an essential term that you've requisitioned for.

MS MCCARTNEY SC:

I am in a full circle. I am in a full circle. I'm, I anticipate, Your Honour, that in that case the purchaser would issue proceedings for a specific performance requiring the compliant title and it would be an issue for the Court as to whether or not specific performance would be ordered in circumstances as here, where the deficiency was so minor.

BLANCHARD J:

But wouldn't it just be specific performance with compensation for the deficiency in area?

MS MCCARTNEY SC:

Yes.

BLANCHARD J:

Because the deficiency is so small until you get to the substantial breach stage –

MS MCCARTNEY SC:

Yes.

BLANCHARD J:

So it really, that's why I'm saying on your argument 18.3 is meaningless.

TIPPING J:

I don't understand how this assists you on whether this term is, stipulation is essential.

MS MCCARTNEY SC:

Well –

TIPPING J:

That's my fundamental point. It's a very interesting and ingenious argument but where does it bite on the essentiality question?

MS MCCARTNEY SC:

Well on Mana's position, Your Honour, applying the test as it's understood at common law, it doesn't bite because it was never essential.

TIPPING J:

Oh yes –

MS MCCARTNEY SC:

It is left on a basis simply that it is a question of damages.

TIPPING J:

But what I'm asking you Ms McCartney is where – how does this requisition point assist you to show that the term was essential. Always was. It either was or it wasn't.

MS MCCARTNEY SC:

Yes.

TIPPING J:

It doesn't suddenly become.

MS MCCARTNEY SC:

Yes. Well my submission was directed at pointing out that if this, if this was important to – not important as an essential – this was viewed by James as important, James has the option of requisitioning for a title or a compliant title but as His Honour Justice Blanchard notes that may just take us around in circles.

TIPPING J:

It's an evidentiary point. That the fact that they didn't requisition suggests that they didn't regard it as all that important.

MS MCCARTNEY SC:

Because one would expect again if it was of the utmost importance to James, that James would have immediately issued a notice of requisition and I anticipate that my learned friend Mr Withnall may say to Your Honours, well isn't that what James did but the correspondence in this regard is very limited, involves five letters only –

BLANCHARD J:

Well we don't know at what point James woke up to the fact that the area was below 4.7150 hectares.

MS MCCARTNEY SC:

Is Your Honour referring to the earlier correspondence of –

BLANCHARD J:

Yes.

MS MCCARTNEY SC:

– February 2008?

BLANCHARD J:

We don't know whether they noticed that?

MS MCCARTNEY SC:

Well the evidence –

BLANCHARD J:

They may not have noticed it until they got the certificate of title, looked at the area and said, oh, it's less than 4.7150 hectares and they then requisitioned.

MS MCCARTNEY SC:

Yes and in fact that is Mr James' evidence at page 112 para 18, where he says, "I do not accept in any way that the agreement is affected by the subsequent actions of the defendant forwarding a copy of the resource consent decision on 4 February 2008."

TIPPING J:

I find it hard to get away from the proposition that sensible commercial people, never mind the comparative triviality of the difference, they decided in this contract to remove scope for argument as to whether a deficiency was

cancellable or compensatable and they've done that on the fulcrum of the minimum area. That's highly sensible, logical, avoid room for argument.

MS MCCARTNEY SC:

And with respect Your Honour the position of Mana is, well, that would apply if the land involved had been residential land or commercial land where density issues are relevant but in this case there were none and there was no reason, at the time that this clause was put in the contract, for both parties to agree that it carried that threshold of essentiality.

TIPPING J:

What was its purpose then, as a change from compensation? I honestly don't think they had in their minds, oh goodie it'll now become damages.

MS MCCARTNEY SC:

No I'm sure they didn't have that in their mind. Nor –

TIPPING J:

What is their rationale for making this cut off, if you like, if it isn't to avoid disputes about substantial breach?

MS MCCARTNEY SC:

Well I have to say, Your Honour, that I doubt that was their rationale either. I think that the clause went in without much consideration at all and –

BLANCHARD J:

Maybe but we have to make some sense of this.

MS MCCARTNEY SC:

And so we now put ourselves in the shoes of the parties applying the test that applies to imply essentiality and ask, did they both, at the time that they entered into this agreement, did they both agree that this clause 18.3 went to the heart of the contract, that any deviation at all would entitle James to cancel and Mana's position is, it didn't carry that weight.

ANDERSON J:

Did the submission require the words “must not” means “may”?

MS McCARTNEY SC:

It – no. The submission is that the parties did not say “and as a result cancellation follows.”

ANDERSON J:

“Must” seems pretty imperative though doesn’t it?

MS McCARTNEY SC:

Well with respect and so is “shall” and so is “will”. I mean it’s all language that’s imperative language. It’s a question a little bit of semantics really.

ELIAS CJ:

Well it’s a term, isn't it? It makes it clear it is a term of the obligation. I wondered whether, well this may be going way backwards, I wondered whether you take anything from, if you are able to take anything from the heading. That this is concerned with purchase price and that 18.2 is a mechanism for adjusting the purchase price leaving 18.3 as really the term that has to be fulfilled so that there’s a breach of the contract if it’s not fulfilled. That’s leaving aside questions of essentiality immediately for the moment. Because on that basis there is work for 18.3 to do and 18.2 is just really the price creep adjustment.

MS McCARTNEY SC:

Well, thank you, Your Honour.

ELIAS CJ:

Well, it may not be sensible at all, but it is notable that the heading is, although this may be one of those contracts that says you can’t take account of the heading, I’m not sure, but one would still look at the role that clause 18 as a whole plays in this contract, and it does seem to me to be about adjusting

the price according to the exact area that is eventually arrived at, in which case, 18.3 establishes the term of the contract.

McGRATH J:

Or the limits to which –

ELIAS CJ:

Yes.

McGRATH J:

– the price may be adjusted, is that another way of looking at it?

ELIAS CJ:

Yes, that's what I mean, which is really what –

McGRATH J:

The situation beyond which it can't go.

ELIAS CJ:

Which is really what Ms McCartney has been arguing for but by reference to a difference between damages and so on, and I'm just really wondering whether everyone's rushed their fences a bit as to whether it's a cancellable breach, and the prior question is, what is the characterisation of a breach of 18.3 as opposed to the adjustment that's provided for in 18.2.

MS McCARTNEY SC:

Your Honour, with respect, may I agree, and may I answer the question in relation to headings. At clause –

BLANCHARD J:

1.34.

MS McCARTNEY SC:

– 1.34, "Headings are for information only and do not form part of this agreement," but can I say –

ELIAS CJ:

Well, it's, information's quite good.

MS McCARTNEY SC:

I think information's important. I know in the High Court that Associate Judge Osborne didn't like me referring to the heading of this part, clause 18.

TIPPING J:

You would have told him he was better informed by doing so.

MS McCARTNEY SC:

But there's no reason why, in construing a contract, we can't take into account all the surrounding circumstances and information, and in this case, this clause starts with the heading "Purchase Price", which is what it's directed to, not "Area", which one might expect it to have been directed to if the essential aspect of it was going to be the amount of area.

ELIAS CJ:

Well, leaving aside essentiality, is it not open to be argued that 18.3 describes when you're into breach of contract, because before that is reached you're into adjustment of purchase price?

McGRATH J:

Yes.

MS McCARTNEY SC:

Yes, yes, and with –

TIPPING J:

Yes, I agree with that.

McGRATH J:

Yes, I do too.

MS McCARTNEY SC:

With respect, Your Honour, I'm grateful, and I agree with that.

TIPPING J:

But it doesn't, perhaps, and you'll need to build on this, of itself touch on whether the breach should be regarded as an essential breach.

ELIAS CJ:

But it takes away the argument that the structure of 18 means that any breach of 18.3 is essential, or at least it destabilised that rather powerful argument.

MS McCARTNEY SC:

Your Honours, can I come back to that?

ELIAS CJ:

Yes.

MS McCARTNEY SC:

But what I'd like to move on to is just the test for implied essentiality, if I may, and Your Honour's will have read that Mana rejects the Court of Appeal's approach to the test for implied essentiality in that the test is not set out at all, so the standard in the test is never actually judged with reference to the facts in evidence in this case. And may I submit, in relation to the Contractual Remedies Act, that where one's looking at cancellation, that the Act in fact states the law, the common law, on cancellation. And my learned friend, Mr Withnall, for James, says that it reformed the law. In my submission it did not, that what has been carried forward into the Contractual Remedies Act in fact was modelled on the common law as it

existed in relation to cancellation and that that is reflected in Burrows, Finn & Todd *Law of Torts in New Zealand*, which is at tab 16 of the bundle, which at para 18.2.2 –

ELIAS CJ:

Sorry, it's at tab 16.

MS McCARTNEY SC:

16?

ELIAS CJ:

Yes.

MS McCARTNEY SC:

Oh, I'm sorry. Yes, tab 16 of the bundle.

ELIAS CJ:

I wondered, you did actually say Law of Torts and I was wondering –

MS McCARTNEY SC:

Oh, did I? I'm sorry, *Law of Contract.*

TIPPING J:

It's the passage that you've cited in your paragraph 46 of your submissions that you're specifically referring to, is it, Ms McCarthy, at the –

MS McCARTNEY SC:

Yes, I am, thank you.

TIPPING J:

Yes.

MS McCARTNEY SC:

Thank you, Your Honour. "Preserves the common law concept of condition," so that section 7(4) –

TIPPING J:

I'm a little surprised that you would emphasise that because I would have thought at common law this was undoubtedly a condition, not a warranty. But obviously you're able to meet that instinctive reaction.

MS McCARTNEY SC:

I'm going to attempt to, Your Honour, yes, I am, because the submission that I'm making, Your Honour, is that section 7(4)(a) of the Contractual Remedies Act reflects what, in common law, was known as a condition, and it's the common law tests on conditions which are applicable in determining whether section 18.3 is to be applied as essential, therefore giving the right of cancellation.

And in the submissions that I've made, starting at paragraph 49, I've set out the statement of Chief Justice Jordan and the *Tramways Advertising Pty Limited v Luna Park (NSW) Ltd* (1938) SR (NSW) 632 case, which is a case that's well cited in the New Zealand cases dealing with essential term, and although that was from the Court of Appeal, the matter of *Tramways Advertising* went up to the High Court of Australia where that test was approved, although the decision was on appeal overturned.

And there's another judgment from the High Court of Australia, which I've included, *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322, which, similarly, confirmed the test as adopted by Jordan CJ. And the test, as set out at paragraph 49 comes down to recording that, "If the innocent party would not have entered into the contract unless assured of the strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight."

And with reference to the judgement itself that appears at tab 4 in volume 1, at page 641, at the bottom of that page, “The question whether,” and it goes on a little further to record, and I’m not sure that I’ve recorded this in the part set out at paragraph 49, “The test of essentiality, whether it appears from the general nature of the contract considered as a whole or from some particular term or terms, the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor.” And the part of it that I’m emphasizing is “ought to be apparent to the promisor.”

Your Honours, another one of the judgments in the bundle that I’d like to draw your attention to is the judgment of *Bentsen v Taylor Sons & Co* [193] QBD 274, 281, which is at tab 10 in the first volume, and I’m referring to page 281, where the Court of Appeal was addressing the issue again of whether this was an essential condition, an essential term. And it begins, “Of course it’s often very difficult to decide as a matter of construction whether representation, which contains a promise and which can only be explained on the ground that it is itself a part of a contract, amounts to a condition precedent, which is the same as a condition as we speak of it, or as only a warranty. There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances and then making up ones mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction one of the first things you would look at is to what extent the accuracy of this statement, the truth of what is promised would be likely to affect the substance and foundation of the adventure which the contractors intended to carry out. There again it might be necessary to have a course to the jury. In the case of a charter party it might well be that such a test could only be applied by getting the jury to say what the affect of the breach of such condition would be on the substance and foundation of the venture, not the affect of the breach which has in fact taken place, but the

effect likely to be produced on the foundation of the venture by any such breach of that portion of the contract."

And Your Honours that judgment was approved by the House of Lords in a number of decisions including the decision included in here of *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyds Rep 1; [1981] 1 WLR 711, 715 (HL) which is in the second volume at tab 14.

The second authority judgment that I'd ask the Court to have regard to in relation to the test for implied essentiality is *State Trading Corporation of India v M Golodetz Ltd* [1989] 2 Lloyds Rep 22, 277 at 282, and the part that I'd like Your Honours, to draw Your Honours' attention to is the part at page 282 in the first column. About a third of the way down beginning with a number of authorities, this is the judgment of Kerr LJ, again addressing the issue of implied essentiality and the test for it. "A number of authorities provide assistance on this question and summarised in *Chitty on Contracts* but I will mention two of them. First in his dissenting judgment in *Wallis v Pratt* [1911] AC 394, which was unanimously approved in the House of Lords on appeal, Fletcher Moulton J said that terms are conditions which go so directly to the substance of the contract or in other words are so essential to its very nature that the non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. Secondly, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 Lord Diplock said that the expression "breach of condition" should be reserved for situations, "Where the contracting parties have agreed, whether by express words or by implication of law, that *any* failure by any party to perform a primary obligation … irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligation of both parties remaining unperformed."

And continues, "These are two authoritative definitions of the nature and effect of contractual terms which are to be classified as conditions. In situations in which it is clear that the performance of such terms is in effect a condition precedent to the performance of one or more other terms by the

other party or to other actions which falls to be taken in pursuance of the contract in the ordinary course of business, the commercial necessity for this characterisation may be self-evident but in other situations the issue whether or not a particular term in the contract is to be characterised as a condition must inevitably involve a value judgment about the commercial significance of the term in question."

McGRATH J:

One almost wonders, Ms McCartney, whether those two, Kerr's LJ contrast invoking Diplock LJ isn't really reflected in section 7(4)(a) and 7(4)(b). 7(4)(a) is the situation where the parties or Diplock's words, by express words or implication beside any failure by one party to perform the primary obligation et cetera, and then when you come down to (b) you're getting to be more concerned and leave out the commercial significance of the term in question. I mean I really wonder, perhaps the draftsman has taken the idea from that because I come back to the question that really it, section 7(4)(a) appears to me to be solely a question of construction.

MS McCARTNEY SC:

Yes.

McGRATH J:

Now I'm acknowledging its construction in light of the circumstances, as the Australian case and others you say referred to it, but that's, those are really more subsidiary. We've got to focus on what the words mean and the immediate context of the whole of paragraph 18 because it looks as though 7(4)(a) is concerned to allow the parties to decide it's essential, whether or not objectively in the commercial circumstances it's essential.

MS McCARTNEY SC:

Well with respect Mana agrees but the problem is that the clause itself doesn't say this is essential so we have to look to see what construction are we going to put on the clause having regard to all the surrounding circumstances, the contract itself, the clause and everything else and I want I understand Kerr LJ

to be saying at page 282 of *Golodetz* is that he's saying that you stand back, you look at the term itself, you look at the surrounding circumstances and ultimately if nothing is compelling you make a value judgment based on what the commercial significance of the term was.

McGRATH J:

I think, if I may say so, I think I would characterise your argument as saying that you're not in the area that Lord Diplock was describing. This is not a case in which by express words or implication the parties have agreed that any failure to perform this particular obligation –

MS McCARTNEY SC:

Yes.

McGRATH J:

– will allow cancellation. You're really saying that the provision is not clear enough?

MS McCARTNEY SC:

Yes.

McGRATH J:

Yes.

MS McCARTNEY SC:

Yes and for that reason Mana's position is that you can't rely on essentiality –

McGRATH J:

Yes –

MS McCARTNEY SC:

– because –

McGRATH J:

I can see if you take that position then we're right into these questions of judgment of the circumstances and thus I think there is an issue as to whether you get us to that.

TIPPING J:

James' case relies solely on (a) doesn't it?

MS McCARTNEY SC:

It does.

TIPPING J:

Now (a) is intention?

MS McCARTNEY SC:

Yes.

TIPPING J:

(b) is effect.

MS McCARTNEY SC:

Yes.

TIPPING J:

So effect needn't concern us –

MS McCARTNEY SC:

Yes.

TIPPING J:

– because the intention of the parties has to be derived at the time they contracted.

MS McCARTNEY SC:

Yes, yes. I-

TIPPING J:

Isn't that – that's just to do more than flesh out what my brother McGrath was putting to you.

MS McCARTNEY SC:

Yes but for that reason I draw the Court's attention to *Bentsen* at page 281, making it clear that when you're dealing with the essential clause, and you're looking to see what the parties agreed, and it's not spelt out in the clause itself, this is the bottom – this is page 281, the bottom of the passage that I read out, as the Judge, Bowron LJ (11.28.38) said there, one of the factors that get taken into account as part of the overall determination as to the, the construction you put on the contract, is what, this begins, what the effect of the breach of such condition would be on the substance and foundation of the venture and as the learned Judge said, not the effect of the breach that has in fact taken place, but the effect likely to be produced on the foundation of the venture by any such breach of that portion of the contract and the way in which Mana puts it is –

TIPPING J:

But that's an effect-based approach.

MS McCARTNEY SC:

Because –

TIPPING J:

Effect may help you to get to intention, likely effect.

MS McCARTNEY SC:

Yes, contemplated effect, at the time the parties entered into the contract they stand back, because they both have to agree that it's essential, and one of the things that the Court's entitled to take into account, what was within their

contemplation as being the effect likely to be produced on the foundation of the venture.

TIPPING J:

Well I think your best argument is that which the Chief Justice is saying, quite honestly, which is that you don't get to a breach until you're below the 4.7150. Therefore, if you are, it doesn't automatically or essentially show that there's – sorry there's an essential breach. Now I'm not expressing a view on that one way or the other but I think that's your best escape from what appears to be something quite absolute if you like.

MS McCARTNEY SC:

I think that, I agree and I accept it. I accept gratefully what has been put forward but can I just, I'm sorry?

TIPPING J:

I was going to say that you would ordinarily infer, I would have thought, from this language that it was important to both parties that it didn't fall below that threshold.

MS McCARTNEY SC:

And I'm not going to strongly disagree with that but to say that that's just one of the factors.

TIPPING J:

Yes.

MS McCARTNEY SC:

As the High Court Associate Judge said, it's one of the factors, the language, but it's not dispositive. So I come then to this issue that I've just raised of commercial significance.

ELIAS CJ:

Ms McCartney?

MS McCARTNEY SC:

Yes.

ELIAS CJ:

I do – I should have apologised for the fact that we started late, it was necessary, but I did intend to take the morning adjournment at the usual time. Do you want to complete what you're saying or is it a convenient time to take the adjournment?

MS McCARTNEY SC:

It's a convenient time, thank you very much. I'm just about to move from essentiality.

ELIAS CJ:

Yes, that's what I thought.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.49 AM

MS MCCARTNEY SC:

Yes, may it please the Court. At paragraph 37 of the written submissions, we have set out the relevant sections of the Contractual Remedies Act and the section that we're addressing is section 7(4)(a), which provides, "A party may exercise the right to cancel if, and only if, 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." And what we emphasise there is that both parties must have expressly or impliedly agreed, and it's the performance of the term that's essential to the cancelling party.

And just before we adjourned, having regard to the language in clause 18.3 itself, and then having looked at the common law judgments and drawn

Your Honours' attention in particular to the judgment of *Golodetz* and the commercial significance of the term, we come to apply the test of implied essentiality. We submit that what's striking in this case is that James seeks to rely on clause 18.3 as an essential term, giving it a right to cancel, but there has been a complete failure on the part of James to give any reason why clause 18.3 was essential to it.

Now, in submissions now filed before this Court, James seems to be seeking to introduce as a purpose of clause 18.3 that it was to prevent Mana increasing Lot 5 to the detriment of Lot 11, but there's not evidence that that was an intention or there was any benefit in doing it.

TIPPING J:

Would the subjective reasons of James be admissible in interpreting the essentiality point?

MS McCARTNEY SC:

No, with respect.

TIPPING J:

Well –

MS McCARTNEY SC:

No, there's nothing else in the extrinsic evidence, either, that would give any weight.

TIPPING J:

Well, you've just criticised them for not giving their reasons.

MS McCARTNEY SC:

Oh, I mean sorry, I'm talking about addressing any evidence to commercial significance.

TIPPING J:

Oh, I see.

MS McCARTNEY SC:

I'm sorry, Your Honour.

TIPPING J:

Sorry, I misunderstand it. I beg your pardon.

MS McCARTNEY SC:

Yes, I did move on, but I should have actually just held with the commercial significance of the term.

TIPPING J:

Thank you. So he gives no reason as to why the term was commercially significant?

MS McCARTNEY SC:

Yes, because the point that Mana makes here, Your Honours, is that the land that was to be subdivided was industrial land, $4.5 million was the purchase price, plus GST, and there is no evidence of any feature of the land or any issue relating to subdivision which would in any way indicate why it was so important that the land had to be 4.7150 hectares, not less.

MCGRATH J:

Was your point, just make sure I'm clear on it, that it doesn't matter whether or not it's essential to Mana, the question is whether it's essential to James?

MS McCARTNEY SC:

Yes, but both parties have to agree –

MCGRATH J:

Yes.

MS McCARTNEY SC:

– that it's essential to James, but the point is that, in terms of the test, the performance of the term is essential to, as set out in the section, "him", and "him", in this case, is the cancelling party, the party seeking to cancel. But both parties must have agreed that the term was important.

BLANCHARD J:

Couldn't it, and I'm looking at the matter entirely objectively on the basis of the evidence that is admissible, but couldn't it have been chosen arbitrarily but, importantly, in order to create certainty, and keep the parties away from the murky decision about when there has been a substantial breach? In other words, deliberately fixed high so that there can't be any question of "am I entitled to cancel on the basis of a substantial breach because the area has dropped so much or not?" That would give it a commercial function.

MS McCARTNEY SC:

Yes, it would, but, with respect, against that consideration would be the fact that the area shown in the contract on the front page is 4.7161 hectares. The area in the clause, selected, if you like, arbitrarily, is 11 square metres less, and so in terms of putting some commercial significance on the 11 square metres, you have on the one hand the certainty, but on the other hand what Mana submits is a ridiculous discrepancy.

BLANCHARD J:

Well, it's to allow a little bit of adjustment but nothing more without the agreement of James.

MS McCARTNEY SC:

The evidence is that the parties understand in the subdivision that some land may be sacrificed by the Council's requirement to take account of a natural feature or walkway or something, and we're looking at 4.7161 hectares, and the allowance was 11 square metres.

BLANCHARD J:

Well, it may be that the figure arbitrarily chosen was, in fact, rather too tight, but that's what was chosen.

MS McCARTNEY SC:

But then the question is, and was it chosen as essential, having regard to the amount involved.

BLANCHARD J:

Well, one would have to think that normally you put in the minimum figure and it is intended to be essential. The only odd feature here is the one that you've just averted to. But I'm saying, objectively, they may have chosen to keep it very tight in order to get right away from any doubt about whether there was a substantial breach or a substantial adjustment being required.

MS McCARTNEY SC:

If that were the interpretation, it would be in conflict or seem to be in conflict with clause 16.3, which provided for no requisition in the event, and there's no evidence that this is what was the reason for the reduction in land. But in the event that some land had to be sacrificed to satisfy the Council's requirements that the parties both agreed that there would be no requisition and obviously no cancellation to follow the requisition.

BLANCHARD J:

Oh, but that, but 16.3's doing a lot of other work as well. It's talking about easements, building line restrictions –

MS McCARTNEY SC:

Yes.

BLANCHARD J:

– encumbrances, as well as rights and obligations.

MS McCARTNEY SC:

Yes, but it's there, I submit, for the vendor's benefit.

BLANCHARD J:

I don't think there's any conflict. There's no conflict between those two ideas.

MS McCARTNEY SC:

Well, with respect, there could be a conflict in the event, but here the parties are expressly agreeing that there won't be a requisition following cancellation.

BLANCHARD J:

But, as I say, 16.3 is about accepting existing easements and easements, building line restrictions or other encumbrances, rights or obligations. Until you get to the words "rights or obligations" you're nowhere near adjustments of area. You're talking about usability of the area which is handed over.

MS McCARTNEY SC:

I agree, with respect, but it could extend to reductions of area.

BLANCHARD J:

Well, possibly, but I think it's a bit much to say there's a conflict between the two clauses when 16.3 can operate in relation to a whole lot of other things as well.

MS McCARTNEY SC:

But, may I submit, conceivably, if an inconsistency between the two, clause 18.3 is going to be read as essential.

BLANCHARD J:

Well, so you say.

ANDERSON J:

Can parties agree that something is essential to one of them when, objectively, it's not?

ELIAS CJ:

Yes.

MS McCARTNEY SC:

Well, they can, but they would expressly agree it.

TIPPING J:

Well, I think they have, at least –

MS McCARTNEY SC:

Yes.

TIPPING J:

– tentatively.

MS McCARTNEY SC:

Yes, no, I understand that Your Honour, Justice Tipping, is of that view, but they would expressly do so, as my learned friend, Mr Withnall, in his submissions, the judgment of Justice McGechan, I mean, parties can agree to anything that's completely stupid, but they would expressly agree to it –

BLANCHARD J:

And often do.

MS McCARTNEY SC:

Because the Court wouldn't imply it, is what my submission is.

TIPPING J:

Yes.

MS McCARTNEY SC:

The Court doesn't imply stupidity.

MCGRATH J:

The issue here, I think, is whether the words amount to an express agreement.

MS McCARTNEY SC:

Yes.

MCGRATH J:

Because if they don't, then what you say about the objective significance of it then carries weight.

MS McCARTNEY SC:

And the language used has some of the features, as Justice Tipping would say.

MCGRATH J:

Well, it's the language in the context of the agreement as a whole.

MS McCARTNEY SC:

But if one extends to look at the surrounding circumstances, and remembering that the language of the statute itself requires that both parties agree.

TIPPING J:

If you can posit a commercially sensible reason, the fact that in other respects it looks a bit odd surely doesn't matter. I'm inclined to agree with my brother Blanchard, as I think I may have said earlier, that there is a commercially very good reason for this, even though in objective terms it looks, in other respects, a bit odd to be talking about 15 square, whatever it is, 11 square metres.

MS McCARTNEY SC:

Yes.

TIPPING J:

It's to stop argument.

MS McCARTNEY SC:

Well, if I may just complete this part of the argument, in terms of policy, and the policy aspects are recorded in the written submissions page 20 paragraph 82, and the submission of Mana is the Courts require high thresholds to be met by a claimant before the Courts will accept that the clause in question was impliedly of the essence of the contract, and at the Courts the tests involve such high threshold accords with the policy of the law that Courts should not be too ready to interpret contractual causes as conditions. I think in *Hongkong Fir Shipping v Kawasaki Kisen Kaisha Ltd* [1962] QBD 26 it says the Court should be chary of implying the clause that the parties were at liberty to include themselves and failed to do so. And, while the Court of Appeal addressed this issue on the basis of certainty, in our submission at paragraph 89, it needs to be put into the balance issues of justice, interests of justice, and in our submission the common law has traditionally recognised the justice of keeping parties to their bargain and the bargain in this case, I submit, is the bargain for the sale and purchase of the land, and at paragraph 90 the whole thrust of the sale and purchase agreement, we submit, is that there is express provision for essentiality and if cancellation is to follow then it is on written notice, giving the party allegedly in breach the opportunity to comply.

Just a short section on substantial performance of clause 18.3. We may not have made the submission clear, but Mana accepts that, if 7(4)(a) applies, what is required is strict and literal performance, not substantial performance, and it's because strict and literal performance is required in circumstances where here we're talking about a discrepancy availability of only 11 square metres, Mana's submission is that it could not have been strict and literal performance that was required so therefore it could not have been section 7(4)(a) that was being engaged.

And, if Your Honours please, if I may now turn to the next part of Mana's submission, which is at page 24, which is the second issue, whether in any event James was entitled to cancel the agreement by the notice it gave

on 3 November 2008 without prior issuance and expiry of the settlement notice. Now, the Court of Appeal in dealing with this aspect we submit, with respect, it misconceived the ground of appeal, equating non-performance of clause 18.3 with an automatic right to cancel, and Mana contends that there was no automatic right to cancel, that the date for performance of clause 18.3 fell on settlement, that time for which was of the essence.

TIPPING J:

Are you saying that essentially the same argument was addressed to the Court of Appeal as you're arguing now?

MS McCARTNEY SC:

Not in the refined way that was produced, Your Honour. The argument was that Mana had reasonable time to perform. In the course of preparing the submissions for this Court, the argument has been refined so that "reasonable time" was defined by the settlement notice, Mana accepting that a reasonable interpretation of what happened – and I'll come to it – was that Mana in fact did set a settlement date.

TIPPING J:

So, essentially, the argument has been significantly enhanced, if you like, for this Court?

MS McCARTNEY SC:

Yes, Your Honour, it has, because the emphasis in the Court of Appeal having been successful on essentiality and the High Court was on the essential clause.

TIPPING J:

Quite, quite.

MS McCARTNEY SC:

But this was a matter that was raised, Your Honour, in both Courts.

BLANCHARD J:

Is your fundamental argument here that even if this was an essential term, timely performance was not essential –

MS McCARTNEY SC:

Yes.

BLANCHARD J:

– any more than it is for conveying the whole property?

MS McCARTNEY SC:

Yes.

BLANCHARD J:

That's it in a nutshell.

MS McCARTNEY SC:

It is, it is, Your Honour. If I may just refer to the documents, as I say, there were just five letters that were sent, and the first letter appears at page 87 and that's the letter from Mana's solicitors to James' solicitor dated 21 October 2008, "I confirm that the Titles have issued and I enclose copy of CT identifier for 03267. In terms of the agreement for sale and purchase settlement is due Tuesday 28 October 2008. I will forward the settlement statement."

And the response is at page 88, letter dated 23 October 2008 from James' solicitors, "We have perused the Certificate of Title and the agreement for sale and purchase and note as follows: 1, the Certificate of Title fails to comply with clause 18.3 of the agreement for sale and purchase," and 2 deals with a servicing aspect, 3, the same thing, 4, "Please take instructions from your client as to what proposals they have for resolving these matters. In the interim, without prejudice to our client's rights under the agreement we believe it is prudent that our respective clients agree that settlement be

deferred until 14 November to enable discussions to be undertaken in an attempt to resolve the above issues."

And the letter that followed, 27 October at 89, where Mr Skeates referred to the shortfall, which in fact was 160 square metres not 60 square metres, and wrote, as I understand it, "There is no major consequence to the deficiency in area enabled to be addressed by compensation," fourth paragraph, "I note your advice," and number two, "My client is committed to working with your client to effect a solution to the situation," "Considers the extension of 12 working days to be significantly too long but happy to make representations."

And then the next letter that follows is again from Mr Skeates, at page 92, 31 October 2008, again asserting, second paragraph, "No major consequence," and the reasons why. And the last bullet point on page 93, "If the above is not acceptable to your client my client has requested a meeting in Christchurch next Monday, 3 November 2008, to sit down and resolve all outstanding issues." And then –

BLANCHARD J:

That seems to respond really to the last paragraph of the letter of 23 October, which reserves the rights under the agreement but really says, well, "We won't do anything until the 14th of November so that we can have discussions."

MS McCARTNEY SC:

Yes, with respect, yes, but also extends a little bit further in that it makes it clear that in relation to all of the issues that have been raised that Mana's willing to sit down and resolve all outstanding issues.

BLANCHARD J:

Yes, well –

MS McCARTNEY SC:

An agreement to meet.

BLANCHARD J:

Well, the last paragraph of the letter of 23 October is directed to all the issues as well.

MS McCARTNEY SC:

Yes, and so the parties do agree to meet and they agree to meet on 3 November 2008, and I think it was in Dunedin, and, as the evidence shows, while Mana and its solicitor and two representatives were flying to Dunedin to meet, the letter that follows, 3 November 2008 at page 94, was received, recording, "Further term of clause 18.3 has not been fulfilled. Accordingly, our clients give notice cancelling the agreement for sale and purchase."

TIPPING J:

Although it doesn't matter or it's not raised, this is almost an agreement to defer settlement here.

BLANCHARD J:

Yes, just looking, and I'm really studying the last paragraph of the letter on page 88 for the first time. If that didn't confirm that time was not of the essence, I don't know what did.

TIPPING J:

Well, it certainly set time at large, at least –

BLANCHARD J:

Well, I think –

TIPPING J:

– until the next date.

BLANCHARD J:

– we've got to be a little careful to distinguish between setting time at large and a situation in which time is not of the essence. I don't think that's setting time at large.

TIPPING J:

Well, my point is if it was of the essence for the earlier date, it's now postponed till the 14th arguably, or at least till the 3rd, which was the earlier, still of essence, but you couldn't cancel in the meantime –

MS McCARTNEY SC:

Well –

TIPPING J:

– surely?

MS McCARTNEY SC:

Mana, with respect, agrees.

TIPPING J:

But this is not your point.

MS McCARTNEY SC:

Well, this is –

BLANCHARD J:

This is a further point.

MS McCARTNEY SC:

This is a further point. I take it that my learned friend will draw the Court's attention to, without prejudice, to our client's rights under the agreement which appears in the last paragraph of 88.

BLANCHARD J:

Well, that's perfectly consistent with time not being of the essence.

MS McCARTNEY SC:

Yes.

BLANCHARD J:

In other words, we reserve the right to issue a settlement notice.

MS McCARTNEY SC:

With respect, we agree, so –

TIPPING J:

Well, no-one's suggesting that time was originally of the essence, are they, for the – or is that raised against you?

MS McCARTNEY SC:

I think that is what's raised against us, yes. That is my understanding, that it is raised against us that clause 18.3 not only is essential as to performance but is essential as to time.

TIPPING J:

Well, that, well, we'd better wait and hear.

MS McCARTNEY SC:

Just if I may before taking that next step, repudiation was raised in the High Court and dismissed and hasn't been pursued again, and –

BLANCHARD J:

Well, that's understandable. There's no repudiation here. This wouldn't meet the test in *DTR v Mona* or *Woodar v Wimpey* and all those other cases.

MS McCARTNEY SC:

I, with respect, agree, Your Honour. So we then come to the question, what time was prescribed for performance of clause 18.3, and my understanding is you look at clause 18.3 and you can see there's nothing –

TIPPING J:

Well, with respect, it's not for performance of clause 18.3, is it? It's for performance of the contract.

MS McCARTNEY SC:

Well, I agree, Your Honour, with respect.

TIPPING J:

18.3 has got nothing to do with the time at which you perform.

MS McCARTNEY SC:

No.

TIPPING J:

It's what your performance duties are.

MS McCARTNEY SC:

Yes, yes, well, I completely agree, with respect, Your Honour, and the performance that's required in relation to 18.3 can be seen to have a compliant title. If it's looked at in the way James is putting it, it's to have a compliant title and –

TIPPING J:

How does James get round, and I know it's not for you to say, but just, can you explain in advance, if you like, how James purports to get round clause or condition 9 if the sale is not settled on the settlement date, and then, et cetera? I mean, it wasn't, but to cancel you had to issue the notice, that's the whole purpose of clause 9. How do they get round that by saying that time was of the essence for performance under 18.3?

MS McCARTNEY SC:

They say time is of the essence for performance under clause 18.3. They say the time for performance with reference to clause 16 was the date at 16.2.5 that the approved survey plan issued, and on the same date they say the compliant title had to not just be performed but, in fact, as a matter of time of the essence, had to be available.

TIPPING J:

I see.

MS McCARTNEY SC:

And they say in relation to the settlement notice that if they had issued a settlement notice at that time they would have been affirming the contract.

TIPPING J:

What?

BLANCHARD J:

Oh, well, that'll be interesting.

MS McCARTNEY SC:

Well, it's not my argument, it's not our argument, obviously.

MCGRATH J:

No, no, no, it's essentially that's the first three propositions are really saying the cancellation is valid?

MS McCARTNEY SC:

Yes.

MCGRATH J:

Because they had cancelled before the date for settlement specified, hadn't they?

MS McCARTNEY SC:

There was a date specified for settlement, which was the 28th of October.

MCGRATH J:

Yes.

MS McCARTNEY SC:

And that's the document at page 87.

MCGRATH J:

Yes.

MS McCARTNEY SC:

That date, with reference to page 88, was the subject of a request for an extension.

MCGRATH J:

Yes.

MS McCARTNEY SC:

With reference to 89, Mana agreed, although did not agree the date to which the new settlement date would occur. But in any event, the date for performance of clause 18.3 on Mana's argument was the date for settlement, time of which was of the essence, and the only way under this contract that time could be made of the essence for performance was by the issuance of the settlement notice.

None was ever issued. With reference to page 94, the Court can see that what happened next was a peremptory cancellation without the prior issuance, let alone the expiry, of the settlement notice. And for the reasons that are set out, and the written submissions in which Mana has addressed, the argument made at the time for performance was when the approved survey plan was deposited, Mana's position has consistently been that the letter of 3 November 2008 was premature and invalid.

We understand that, in this Court, James may be arguing anticipatory breach. It hasn't been argued before, but to the extent that that were raised, Mana's position is, well, obviously James wasn't in a position to say that Mana could not produce good title because Mana went ahead and did that, and did so within reasonable time.

TIPPING J:

Within the 10 days?

MS McCARTNEY SC:

No, a settlement notice had not issued.

TIPPING J:

No, no, I know it wasn't, but if it had been, your ability to perform was within the 10 days?

MS McCARTNEY SC:

No, it wasn't within, I think it's 12 working days.

TIPPING J:

12, well, 12, was it not?

MS McCARTNEY SC:

It wasn't within the 12 working days, but we weren't, in fact, required to settle within 12 working days.

TIPPING J:

No, no, I understand, but it was quite soon after it, wasn't it?

MS McCARTNEY SC:

Very soon afterwards, I think the date was –

TIPPING J:

No, I'm sorry, that was my next question.

BLANCHARD J:

I had the impression that you actually got the plan deposited within 12 working days, the new plan, but I didn't really sit down and do a proper calculation.

MS McCARTNEY SC:

I think that may have been slightly optimistic towards us, but we worked –

BLANCHARD J:

From the 3rd to –

MS McCARTNEY SC:

Oh, I'm sorry, Your Honour, from the 3rd we did, yes.

BLANCHARD J:

Yes.

MS McCARTNEY SC:

From the 3rd, I'm sorry, I was, yes.

BLANCHARD J:

If you had been given a settlement notice on the 3rd –

MS McCARTNEY SC:

Third, yes.

BLANCHARD J:

– you would have complied with it, I think.

MS McCARTNEY SC:

Yes.

TIPPING J:

So I think that was my approach, too.

MS McCARTNEY SC:

Yes. If the settlement notice had been given on the 3rd, as the chronology shows –

TIPPING J:

When they purported to cancel, if they'd given the settlement notices, you say they should?

MS McCARTNEY SC:

Yes.

TIPPING J:

Yes.

MS McCARTNEY SC:

And I could expand this area, but I'm not sure whether I'm required to perhaps – it may be more helpful to listen to hear what James wishes to say in relation to the settlement notice before taking the matter any further.

Can I just say in relation to two other matters, unless Your Honours would like to hear further from me on settlement notice, requisitions. We have passed up a chronology and a planner, which is the timeline, but unless the Court wishes to hear from me on requisitions, it hasn't been raised as a notice of opposition, and there are no written submissions in relation to it, although the reservation of the right to argue it. And would the Court wish to hear from me on requisitions now?

ELIAS CJ:

No, I think that we can pass on that for now.

MS McCARTNEY SC:

Thank you. And the only other matter that I'd like to raise which I haven't clearly raised is the settlement date which was shown in the contract on the front page was shown as 30 June 2008, whereas, per clause 15.1, whichever is sooner, in fact it was changed so that whichever was the latter. And we make that point because the Court of Appeal thought that the date for settlement had passed when, in fact, it hadn't.

TIPPING J:

So they went back to what they had originally?

MS McCARTNEY SC:

They did.

TIPPING J:

They got it right the first time.

MS McCARTNEY SC:

They did.

BLANCHARD J:

And that's at page 154, isn't it?

MS McCARTNEY SC:

It is, 154 and 156.

TIPPING J:

And that's what made it the October date –

MS McCARTNEY SC:

Yes.

TIPPING J:

– that's referred to in that letter of page 87?

MS McCARTNEY SC:

Yes.

TIPPING J:

Yes.

MS McCARTNEY SC:

Yes.

TIPPING J:

But there was no suggestion in that letter that time either was or was being made of the essence?

MS McCARTNEY SC:

No, none whatever. Your Honours, is there anything else that I may wish address?

ELIAS CJ:

That's fine, Ms McCartney, thank you.

MS McCARTNEY SC:

Thank you, may it please Your Honours.

ELIAS CJ:

Yes, Mr Withnall.

MR WITHNALL QC:

May it please Your Honours. I'm thinking of reversing the order in which I had intended addressing the issues because I think it may be better to address the issue which has just been discussed immediately and then come back to the question of the categorisation of clause 18.3 of the contract.

Firstly, on the issue of time, I want to take Your Honours, again, through that sequence of correspondence, beginning at page 87 of the case. The letter of 21 October, "In terms of the agreement for sale and purchase, settlement is due on Tuesday 28th October." Now, this letter also triggered the time for the requisitions and objections clause, in terms of the contract.

TIPPING J:

Are you arguing that that letter either affirmed or made time of the essence?

MR WITHNALL QC:

No, Sir, I'm not, because what I need or what I'm going to emphasise is that the question of breach of a specific and essential term of the contract is a different issue from settlement of the transaction. The settlement notice procedure and its common law equivalent of time notice, making time of the essence, because all that clause 9 does is provide a contractual method of making time of the essence and fixing what is a reasonable time –

ELIAS CJ:

Which is the date, sorry, that you say that the breach occurred? Was it when the plan came back or was it when the settlement statement was received?

MR WITHNALL QC:

No, the breach occurred when the plan was approved.

ELIAS CJ:

I see.

MR WITHNALL QC:

James became aware of the breach when it searched the title, following receipt of the letter of 21 October, and I say the breach occurred then because if one looks at clause 18.3 of the contract it specifically requires that the final area of the property, "As shown on the approved survey plan," must not be less than 4.7150 hectares. "Approved survey plan" is defined, it's

defined in clause 15.1,"'Approved survey plan' means, 'the survey plan referred to in clause 16.2.5'."

BLANCHARD J:

I'm just looking for it.

MR WITHNALL QC:

Page 68 of the case, if Your Honour pleases.

BLANCHARD J:

Could you just repeat what you said, please?

MR WITHNALL QC:

Yes. Clause 18.3 provides that the final area of the property, "As shown on the approved survey plan," must not be less than 4.7150. "Approved survey plan" is defined by 15.1 as, "The survey plan referred to in 16.2.5." 16.2.5 provides that it is one of the obligations of the vendor to deposit the approved survey plan in LINZ and for LINZ to issue a separate Certificate of Title for the property. That's the point at which a settlement date is triggered, when there is notice received by the purchaser that the title has issued. "Approved survey plan –

McGRATH J:

That's under clause…

MR WITHNALL QC:

Yes, under clause 15 –

ELIAS CJ:

It's the definition, is it, of "settlement date"?

MR WITHNALL QC:

Yes, yes.

McGRATH J:

Okay, thank you.

BLANCHARD J:

But that's not the final step, is it?

MR WITHNALL QC:

It’s not the final –

BLANCHARD J:

Because, as has been pointed out, the purchaser has a right to requisition –

MR WITHNALL QC:

Yes.

BLANCHARD J:

– that the existence of that right, which was exercised here, is itself an indication that the vendor can still fix the problem, if it’s able to.

MR WITHNALL QC:

Yes, yes, I accept that, Sir, that because there is the right to requisition, and of course there is the right to requisition at common law anyway under the general rule, the vendor is given the opportunity to redress what is a breach. But the breach has occurred because the vendor has not complied with its obligations under clause 16 and 18.3 jointly.

BLANCHARD J:

But it’s a fixable breach, even –

MR WITHNALL QC:

It’s a fixable –

BLANCHARD J:

– if it’s a breach of an essential term, it’s fixable.

MR WITHNALL QC:

Yes.

BLANCHARD J:

And the question is whether time is of the essence for fixing it.

MR WITHNALL QC:

Yes, and, in my submission, time does become of the essence for fixing it, by virtue of the time limits under the requisitions clause.

BLANCHARD J:

Well, maybe you'll have to take us to that.

MR WITHNALL QC:

Yes. 5.2, I'm looking at –

BLANCHARD J:

Under that you've got to get your requisition in within five working days.

MR WITHNALL QC:

Yes.

BLANCHARD J:

And you did.

MR WITHNALL QC:

Yes. The letter of the 23rd of October, in my submission, cannot be anything other than an objection to title. It says, "Your title does not comply with the contract. What are you going to do about it?" That's within the five working days. The vendor then has a further five working days within which to reject the objection or requisition, and that's what it did on the 27th of October, the letter at 89, "I acknowledge that the title is 60 square metres –

TIPPING J:

Well, they acknowledge, then, that they are in breach?

MR WITHNALL QC:

Yes.

BLANCHARD J:

That's an acceptance.

TIPPING J:

Yes, that there was the right to requisition.

MR WITHNALL QC:

Well, no, with respect, Sir, one has to read the whole of the letter, and I want to take you through that. It says, "I acknowledge that the title is 60 square metres, in fact it's 160 –

ELIAS CJ:

Sorry, page…

MR WITHNALL QC:

Page?

ELIAS CJ:

Sorry, I'm behind.

MR WITHNALL QC:

89.

ELIAS CJ:

Thank you.

TIPPING J:

But they're acknowledging a breach and then they're saying there's not a great problem from it, in their view, and, "Let's get together and see if we can sort it out." Where does that take you, Mr Withnall, as to essentiality of time?

MR WITHNALL QC:

Where it takes us, if Your Honour pleases, is that they say, we're in breach, but it doesn't matter, we're not going to fix it.

BLANCHARD J:

Well, they're not saying that –

MR WITHNALL QC:

As I understand it, there is no major –

BLANCHARD J:

They're proposing that it be fixed in a particular way, but they're not being adamant about it. I don't know that you can argue that the first words of 5.2(3) are operating. They say, "If the vendor is unable or unwilling to remove or comply."

MR WITHNALL QC:

Yes.

BLANCHARD J:

I don't think they're indicating an inability or, indeed, an unwillingness, they're just suggesting that it can be fixed by monetary compensation.

MR WITHNALL QC:

If the letter stood on its own, that is an interpretation, but the letter was accompanied by a settlement statement for settlement on the 28th.

ELIAS CJ:

But what about the urgent representations to the council?

MR WITHNALL QC:

Sorry, Ma'am?

ELIAS CJ:

The urgent representations to the council.

MR WITHNALL QC:

I don't know what happened to the urgent representations –

ELIAS CJ:

No, but isn't that an indication that –

MR WITHNALL QC:

Yes.

ELIAS CJ:

– they're looking to fix the matter?

MR WITHNALL QC:

No, Ma'am, with respect, that is referring to paragraph 2 of the letter of the 23rd.

ELIAS CJ:

I see, yes, thank you.

MR WITHNALL QC:

Paragraph 2 is "Servicing Issue."

ELIAS CJ:

I see, thank you.

MR WITHNALL QC:

"My client is committed to working with your client and," et cetera, "urgent pre-settlement." "Pre-settlement, urgent."

TIPPING J:

Are you saying, Mr Withnall, that as I understood the words, as I understand it, there is no major consequence, the matter is able to be addressed by monetary compensation?

MR WITHNALL QC:

Yes.

TIPPING J:

Is in effect, I know it's not repudiation, is, in effect, a repudiatory statement that they're not going to fix it, full stop?

MR WITHNALL QC:

Yes, I am, Sir.

TIPPING J:

But you have to argue that, don't you?

ELIAS CJ:

Well, it's an indication that they think, unwisely, that the matter is under 5.4.

MR WITHNALL QC:

Yes.

ELIAS CJ:

As it's turned out, otherwise –

MR WITHNALL QC:

So what we're saying is, we don't have to fix this, we don't have to comply, we're going to offer you monetary compensation under 5.4.

TIPPING J:

But where do you get time being of the essence, Mr Withnall? That's the crunch point. All this may be very wrong and naughty, but surely you have to give them a notice unless you can show that time became of the essence in such a way that you can pre-emptively cancel?

MR WITHNALL QC:

If Your Honour will just let me develop this a little further, I think I can take you there.

TIPPING J:

All right, of course I'm happy for you to develop as you choose, but –

ELIAS CJ:

This is put forward on a mistaken apprehension of the law?

MR WITHNALL QC:

Yes, so I'm not –

ELIAS CJ:

Not settled really, until *Property Ventures*.

MR WITHNALL QC:

I'm not seeking to rely on that as a repudiation of the contract.

ELIAS CJ:

No, oh, I see, thank you.

MR WITHNALL QC:

What I'm saying is that there was a breach of the obligation under clause 18.3, which breach was permitted when the survey plan was deposited and which came to the purchaser's attention when it searched the title. It then issued an objection to title.

By the letter of the 27th of October, and the accompanying settlement statement for settlement on 28 October, the vendor indicated that it was unwilling to comply with the requisition or the objection. That was a vendor's notice under clause 5.2 of the contract.

The next step in the contractual procedure is that the purchaser then has five working days within which to waive the objection. The purchaser did not waive that objection. Because the purchaser did not waive the objection, each party had the contractual right to cancel, and that is what the purchaser did. It exercised the right to cancel.

TIPPING J:

And that's a right under clause five point –

MR WITHNALL QC:

2.3, Sir.

TIPPING J:

Point two point three.

BLANCHARD J:

That depends upon –

MR WITHNALL QC:

C.

BLANCHARD J:

That depends upon an acceptance that the vendor has indicated an inability or unwillingness to comply with the requisition?

MR WITHNALL QC:

Yes, and it further indicated that by its letter of 31 October, page 92, "Further to your letter dated 23 October, our letter dated 27 October and various telephone calls, having sought additional legal opinions we maintain

that there is no major consequence to the deficiency in the area for the following reasons:"

TIPPING J:

Sorry, the page, I've missed it, Mr Withnall.

MR WITHNALL QC:

92, if Your Honour pleases.

BLANCHARD J:

That repeats and fleshes out the argument they were making before.

MR WITHNALL QC:

Yes.

BLANCHARD J:

But it finishes, "If the above is not acceptable to your client, my client has requested a meeting in Christchurch," et cetera, "to sit down and resolve all outstanding issues."

MR WITHNALL QC:

Yes. Now, it's a question of what is meant by "If the above" because it could be referring to the bullet point above.

BLANCHARD J:

All right.

MR WITHNALL QC:

But the use of the word "all outstanding issues" tends to point the other way.

BLANCHARD J:

I think it would have to be extending to this.

MR WITHNALL QC:

Yes.

BLANCHARD J:

So I don't read that as them saying we're unable or unwilling to comply with the requisition. They've suggested a method of satisfying their client, but I don't think that they're unequivocally saying that they're unwilling to comply with the requisition. Indeed, they're saying, well, let's talk.

MR WITHNALL QC:

In my submission, if one reads all this documentation together, what the vendor is clearly saying is that, your concerns can be met by clause 5.4, that is what we are offering –

BLANCHARD J:

They're trying to persuade –

MR WITHNALL QC:

Yes.

BLANCHARD J:

– your client to accept that solution, but I don't see them, particularly in light of the second letter, the one of 31 October that you've just drawn attention to, to be being quite adamant about that, because they're saying, let's sit down and talk.

MR WITHNALL QC:

If the requisition has been accepted, which would have to be the corollary to what Your Honour Justice Blanchard is saying, then the vendor had to cure the deficiency in title, but the contract provides –

BLANCHARD J:

Well, in fact it did.

MR WITHNALL QC:

Yes, but if they're not –

BLANCHARD J:

It doesn't have to cure the deficiency in title within the five working days.

MR WITHNALL QC:

No, it has to give the notice.

BLANCHARD J:

Well, it doesn't have to give any notice at all. It can remain silent and if it does so then it's deemed to have accepted the requisition and it's got to fix the problem.

MR WITHNALL QC:

Yes.

BLANCHARD J:

Well, that's what, in fact, what happened.

MR WITHNALL QC:

That's what happened, but there was no way that the purchaser could know at the time that it had that ability to fix it. Now, in my learned friend's –

BLANCHARD J:

Well, does that matter?

MR WITHNALL QC:

Yes, it does, in my submission. There is an important piece of information which my learned friend Ms McCartney gave the Court this morning. She told the Court that the extra land which was used to fix the problem actually came from lot 12, which was owned by the Central Otago District Council. In order to fix the problem, not only did the vendor have to acquire land from the Central Otago District Council, it had to get an amended resource consent.

Now, in my learned friend's submissions she cites from the Australian case of *Bell v Scott* (1922) 30 CLR 387 in a passage which was cited by

Justice Quilliam in *Jenkinson v Krchnavy* [1979] 1 NZLR 613, and I think I can put my hand on that in just a moment. Paragraph 115.

ELIAS CJ:

What, of the appellant's submissions?

MR WITHNALL QC:

Of the appellant's submissions.

ELIAS CJ:

Yes.

MR WITHNALL QC:

Page 27. The question of whether a purchaser who becomes aware of a defect of the title but does not requisition for the same can cancel pre-emptorily was addressed in *Jenkinson v Krchnavy* where Knox CJ stated, "In my opinion – " and in *Bell v Scott*, where Knox CJ stated, "It is clear that where there is a contract for the sale of land and time is not of the essence of the contract, the purchaser is not entitled before the time for completion has arrived to treat the contract as no longer binding on him unless it is quite clear that the vendor has no title to the property sold or to a material portion of it, or that his only title is contingent on the volition of a third person." The ability of the vendor to comply was dependent on the volition of a third person.

TIPPING J:

I've got a more fundamental problem before we get to this, Mr Withnall. You seem to have assumed that the letter of the 27th of August, document 89, was a vendor's notice under clause 5.2(3), line 23, yet the vendor in that notice gives notice either that it is unable or unwilling to remove the case. It goes back, I think, to a matter my brother Blanchard raised. I don't see the letter of 27 October is at all naturally falling within the concept of such a notice. It suggests that the matter can be fixed by compensation, it suggests a discussion to walk through, but it doesn't say, I am unable, or I am unwilling, in any substantive sense at all, and I just don't think one can assume quite as

readily as your argument seems to that this was a vendor's notice under the provision that we're looking at because, unless it's a vendor's notice, the rest of the clause does not follow.

MR WITHNALL QC:

I accept that it has to be –

TIPPING J:

Yes.

MR WITHNALL QC:

– a vendor's notice, but my submission is that, in the context in which it is given, responding to an objection to title, this is clearly saying, "I am unwilling."

TIPPING J:

It has to be unwillingness, doesn't it, it can't be inability, it's not saying, "I am unable, sorry."

MR WITHNALL QC:

It doesn't –

TIPPING J:

No.

MR WITHNALL QC:

– indicate inability, it –

ELIAS CJ:

It's on the mistaken assumption that the matter is covered by clause 5.4, a mistake I certainly think is quite reasonable, but I would say that. But does your client write back saying, "It's not within 5.4, please fix?"

MR WITHNALL QC:

My client has always taken the view that it's not within –

ELIAS CJ:

No, but has it written saying, "Your letter to us is written in error?" It simply writes back saying, "You're in breach of 18.3, we're entitled to cancel." That's –

MR WITHNALL QC:

The correspondence does refer to telephone conversations. Because this proceeding commenced by way of summary judgment, of course we do not have all the evidence, so I cannot –

ANDERSON J:

Can one –

MR WITHNALL QC:

– answer Your Honour's question directly one way or the other.

ANDERSON J:

Can one infer from the reference to telephone conversations followed by an agreement to meet and talk about things, that the purchaser was leaving options open?

MR WITHNALL QC:

The purchaser was endeavouring to reach an accommodation. But the other issue that I wanted to deal with immediately, it's sort of the way I originally planned to deal with it, refers to the question of what happened to the settlement date? Because, in my submission, the settlement date was neither extended nor put at large by that exchange of correspondence. The requisitions issue had not been relied on by the purchaser in either Court below, it arose because the appellant raised the issue of the requisitions clause in submissions, so it's –

BLANCHARD J:

Very unwise.

MR WITHNALL QC:

Yes, so it's really a response to that.

BLANCHARD J:

It gave you a bright idea.

MR WITHNALL QC:

But coming back to the question of time for settlement, the letter at page 88, 23rd of October, "In the interim, without prejudice to our client's rights under the agreement, we believe it is prudent that our clients agree that settlement be deferred until the 14th of November." Now, that's an express reservation of all rights, making the proposition, which was not accepted by the vendor, 89, "The matter is able to be addressed by monetary compensation, I enclose my settlement statement, which provides a discount at the rate referred to in clause 18.2," everything else. "My client considers an extension of the settlement date by 12 working days to be significantly too long but is happy for me to make urgent pre-settlement representations," in other words, representations "before" the settlement date. So, I submit that it is not possible to infer an agreement to extend the settlement date or that the settlement date was put at large.

TIPPING J:

You can only peremptorily cancel, so far as I can see, Mr Withnall, if you're within this requisitions business, otherwise you have to make time of the essence by a proper notice, don't you?

MR WITHNALL QC:

At common law, if Your Honour pleases, there is the doctrine of rescission brevi manu…

BLANCHARD J:

I think that went with the Contractual Remedies Act.

TIPPING J:

A very short hand.

MR WITHNALL QC:

There has been some dispute about –

BLANCHARD J:

Yes.

MR WITHNALL QC:

– whether it has survived that, but –

BLANCHARD J:

But even so, and looking at test in *Bell v Scott*, you can say, can you, that it was quite clear that the vendor had no title to the property sold or to a material portion of it? Or that its title, its only title, was contingent on the volition of a third person. Wasn't there another area of land that could theoretically have been used to do the adjustment?

MR WITHNALL QC:

Yes, there was, but it's the second limb of that that I rely on, the fact that it would have had to have obtained a new resource consent, a new subdivision consent, from the council.

BLANCHARD J:

Well, that was –

MR WITHNALL QC:

And in that respect it was subject to the volition of a third person.

BLANCHARD J:

That's…

TIPPING J:

That's a different type of volition, I think.

BLANCHARD J:

Yes.

MR WITHNALL QC:

Yes.

McGRATH J:

There's a passage in *Bell v Scott* goes on, I don't know if you've got the – we have the judgment before us – at page 392, this is something you may want to just look at over the lunch hour, "It has no application in cases where there are outstanding interests which the vendor has the power of getting in, the fact the legal estate is outstanding does not make out a case of no title at all. If the vendor's inability is not clear the purchaser must wait." That's at page 392. I think we've got to look at this passage in the round.

MR WITHNALL QC:

Yes, I'm obliged, Your Honour, I have –

TIPPING J:

Mr Withnall, what's worrying me here is that this contract is a standard form and it's traditionally viewed as saying you can only cancel in terms of it, everyone thinks that way. Now, in terms of it there are two ways of cancelling, so far that you've drawn attention to. A "requisition cancellation", if I can call it that for short, which I am very dubious that you can establish, and, two, a cancellation pursuant to none, which is what we're arguing about. Now, is there any other way under this contract that you can peremptorily cancel, in terms of the contract.

MR WITHNALL QC:

Well, let me step back one step in what Your Honour's just put to me, because the procedure under section 9 is simply a contractual version of a common law right to cancel, after having given notice making time of the essence.

TIPPING J:

Yes, because in equity actually, rather than common law, but never mind about that subtlety.

MR WITHNALL QC:

Yes, but the procedure notice making time of the essence and clause 9, the settlement notice procedure, address the issue of failure to settle on the settlement date. Clause 9 –

TIPPING J:

Which is what happened here.

MR WITHNALL QC:

– begins with those words, "If the sale is not settled, then the party not in default may issue a notice."

TIPPING J:

But isn't that what happened here?

MR WITHNALL QC:

No, Sir, with respect.

TIPPING J:

All right, well, explain why.

MR WITHNALL QC:

You have a right of cancellation in three instances: if an essential or substantial term of the contract is broken you have a right to cancel; if the other party repudiates the contract you have a right to cancel; if there is a

misrepresentation which meets the essentiality or substantiality tests, you have a right to cancel. Now, the argument that one cannot cancel a contract without notice making time of the essence for settlement is an argument that in every one of those three cases the law requires that the innocent party call on the defaulting party to correct either the breach or the misrepresentation or the repudiation. Why should there be any difference, conceptually, in what the law requires for breach, repudiation or misrepresentation? What happens when there is a failure to settle is at the time of the failure to settle there has been breach of a term, time for which is not of the essence. That's an entirely different thing for breach of a separate and independent stipulation in the contract. Because time is not of the essence of the obligation to settle on the settlement date, that is why notice is required. In some circumstances time may be of the essence, simply by a matter of construction of the contract in light of the contractual matrix, especially in commercial contracts.

TIPPING J:

Is your argument come down to this, that because when that plan was deposited and the title was issued, there was the breach at that point, you say, of an essential term?

MR WITHNALL QC:

Yes.

TIPPING J:

There was no locus poenitentiae, no opportunity to remedy in the vendor. I suspect that's really the kernel of your case.

MR WITHNALL QC:

Well, it is, but except for, as Justice Blanchard put it out, the contract provides for a requisitions clause –

TIPPING J:

Yes.

MR WITHNALL QC:

– and the opportunity was offered, but what was coming back from the vendor was, "We don't have to fix it."

TIPPING J:

Well then it comes down then, doesn't it, to whether or not you're entitled to cancel under the requisitions clause?

BLANCHARD J:

I don't think the vendor was saying, "We don't have to fix it." The vendor was exploring whether it could get an agreement that the problem be met with compensation. But it was obviously not rigid in its insistence upon that, the second letter by itself reveals that fact.

MR WITHNALL QC:

Nonetheless, in my submission, Sir, there was a breach of an essential term and –

BLANCHARD J:

But the fact there's a breach of an essential term doesn't mean the time for the performance of the essential terms was itself essential.

MR WITHNALL QC:

It would have – what I have to say is –

BLANCHARD J:

I mean, put it this way –

MR WITHNALL QC:

– it would have been essential as a matter of construction, were it not for the requisitions clause.

BLANCHARD J:

If your client had given a settlement notice and when the settlement notice had expired the vendor was saying, “Look, we can give you everything except a small amount of area, which is really of no significance,” your client could have said, assuming that it was an essential term, “No, no, that's not good enough, even if it is only a minor breach, time is now essential for the performance of that term, it’s an essential term, we’re cancelling.” But you had to get time essential before you could reach that point.

MR WITHNALL QC:

I’m just thinking that through, if I may.

BLANCHARD J:

I know it’s contrary to the sentence that you quote from my book about 23 years ago.

MR WITHNALL QC:

Yes, Sir, I was just about to remind Your Honour of that.

BLANCHARD J:

But having had this – well, I thought you were, so I –

MR WITHNALL QC:

Cut off at the pass.

BLANCHARD J:

I’ve made many errors in my time and I suspect that's another one of them. Having had my focus rather sharpened by the facts of this case, I think I repent of that sentence, but you may persuade me after lunch that in fact I was right all along.

MR WITHNALL QC:

Well, I'll take that as an invitation if I may, Sir, to suggest this is an appropriate time to take an adjournment.

ELIAS CJ:

All right, we'll take the adjournment now. You don't have to try too hard to persuade us that Justice Blanchard was right. Thank you.

COURT ADJOURNS: 12:57 PM

COURT RESUMES: 2.14 PM

ELIAS CJ:

Yes.

MR WITHNALL QC:

Please Your Honours, I want to take Your Honours to my written submissions, and the scheme of the submissions becomes important and, I think, answers the problems that have been raised.

I ask Your Honours to turn to paragraph 56 under the heading, "Time for Compliance". First, may I summarize the appellant's case on this point. At 57 I have set out what my submission is regarding the time for compliance with clause 18.3 as a matter of construction. In that first sentence, I have said "As at the date of approval of the final survey plan." That is not strictly accurate because the clause refers to the final area on the approved survey plan, not final survey plan, the approved survey plan, and I've already taken the Court to what that means, and its date.

I can then take the Court to paragraph 59 where I say, "The settlement notice procedure does not apply to breaches other than failure to settle on the settlement date." Now, the settlement notice procedure is a prerequisite to the exercise of the contractual right of cancellation and to the contractual remedies which are provided for under clause 9.

James was not relying on the contractual right of cancellation. It was relying on its statutory right of cancellation under the Contractual Remedies Act. I've gone on to say section 7, subsection 3 of the Act expressly contemplates cancellation for breach before the time for performance because it provides that a contract may be cancelled where a term is broken or it is clear that a term will be broken. An anticipatory breach is preserved by the Contractual Remedies Act itself, and therefore I submit it's clearly inconsistent to hold that there is an obligation to make time of the essence for settlement in respect of any breach or, as I have said, any of the grounds of cancellation which the Contractual Remedies Act provides.

Paragraph 60, I've just really summarised that, except to go to affirmation. Now, if a party is in breach of a contract and has a right to cancel for that breach under the Act, to say for the other party, "I am ready, willing and able to settle and I require you to settle," is, in my submission, a simple affirmation of the contract. It's totally inconsistent –

TIPPING J:

If you're simply setting up the criteria for cancellation, surely you haven't affirmed until you have chosen which route to take. This is simply, if it's needed at all, is simply setting up the grounds or the right to cancel.

MR WITHNALL QC:

If Your Honour pleases, you're setting up the right to cancel for a different breach. You are setting up a right, a contractual right, to cancel for failure to settle on the settlement date.

TIPPING J:

There was a case that I sat on in the Court of Appeal where the question was whether a notice under the Property Law Act for the purpose of giving you certain rights to cancel a lease could be viewed as an affirmation, and the Court held definitely not. Now, it seems that this argument is similar, that the very taking of a procedural step necessary to set up the ground is itself the affirmation. I would have thought that was, with respect, unsound.

MR WITHNALL QC:

Again, with great respect, Sir, I do submit that the ground for cancellation has already occurred. It is not necessary to set up a ground for cancellation.

TIPPING J:

But why are you giving the notice, assuming you are, you do. You're giving it because it's a pre-condition to cancellation, and you don't have to elect until you've reached the point when you have the right to cancel. That's what we said in *McDrury* and somebody or other it was.

MR WITHNALL QC:

What I am submitting, if Your Honour pleases, is that, if there has been a breach of an essential or a substantial term, or there has been a repudiation, or a misrepresentation which meets the substantiality and essentiality tests, the ground for cancellation is already established, the Contractual Remedies Act provides the right to cancel. The settlement notice procedure sets up an entirely different ground of cancellation, namely the fact that you have not settled in accordance with the contract on the settlement date when time was of the essence.

BLANCHARD J:

If we were to accept your argument, it would cause enormous problems in a situation where there may or may not have been a repudiation, because the innocent party, the one who thinks there may have been a repudiation but it is not quite sure, would be being told you've affirmed because you issued a settlement notice, whereas in fact the settlement notice is a means of demonstrating that, indeed, there has been a repudiation.

MR WITHNALL QC:

A means, yes, I agree, Sir, a means.

BLANCHARD J:

It's not the only means.

MR WITHNALL QC:

It's not the only means, but, where there has been a breach of an essential term or a clear repudiation, the defaulting party says, "I'm not settling, full stop, contract's off."

TIPPING J:

You are not electing, by giving the notice. You only elect following the notice not bearing fruit, and you then have to decide whether to cancel or affirm.

MR WITHNALL QC:

Well, in my submission, Sir, one can elect without giving the notice.

TIPPING J:

Oh, yes, leave aside the question as to whether you have to give a notice, but if you do, I can't see how the doing so constitutes the election.

MR WITHNALL QC:

Once again, I come back to my submission that you are then putting aside the originating breach and setting up a different breach.

BLANCHARD J:

I just find it very difficult to accept that proposition. It's contrary to everything I've understood, and I've got to say it's contrary to what I told a conference yesterday in a paper that I prepared before I saw your submissions. Traditionally, a settlement notice has never been regarded as an affirmation of anything. It's simply a device to demonstrate that a situation will exist at the end of the 12 working days enabling cancellation. It's not at all inconsistent with the fact that there might already be an ability to cancel. But the advice that I was giving yesterday, and it's standard advice, is give a settlement notice, don't run the risk of just cancelling, otherwise you might end up in the Supreme Court.

MR WITHNALL QC:

Yes, and that has a resonance. But in my submission, the argument that you must give a settlement would create huge problems also.

BLANCHARD J:

Well, I don't think anyone is suggesting you always have to give a settlement notice. There will be cases in which you can safely say, well, I don't need to give a settlement notice because the repudiation is so clear, or, it is quite impossible for the other side to remedy their defect within the 12 working days, so I can proceed to cancel without. But it's not something to be done lightly.

MR WITHNALL QC:

No, I accept that, Sir, and the party giving or taking this step without giving the notice does run the risk of being wrong. But if the term, indeed, is essential, and there has been a breach of it, then the Act gives a clear right of cancellation for breach of that term, quite independently of any contractual rights. I then want to revisit, for a moment, this question of the effect of the requisitions clause, because in my written submissions, my primary argument is that the requisitions clause did not apply in this contract. It is inconsistent with, and contradictory with, other clauses in the contract. If I can take Your Honours to paragraph 47. The requisitions clause is a standard clause, and therefore subject to any inserted term. We've already discussed section clause 16.3, the purchaser will not make any objection or requisition on the vendor's title under clause 5.2 about any of those easements, building line restrictions, encumbrances, rights or obligations. Now, what "rights and obligations" extends to there is not entirely clear, but assuming it refers to rights or obligations as a result of any requirements of LINZ or the local authority, then the evidence doesn't establish why the reduction in area occurred. So we're not really in a position to answer that. But more importantly, going on to paragraph 50, the definition of settlement date, and further to 15.1, is inconsistent with the requisitions clause. Settlement date is five working days after notification that a search copy of the title is available, and that simply does not allow time for the three periods of five working days

in clause 5.2.3, in which to accept or reject the objection. That is further emphasised if one goes to – and this is not in my written submission – clause 3.16 of the contract provides that where transfer of the property is to be registered against the title yet to be issued, and a search copy is not obtainable by the fifth working day prior to settlement date, unless the purchaser elects settlement shall take place on the agreed date, the date will be extended to until the requisitions procedure in the clause 5 is complete. Now, that clause doesn't apply, because settlement date was five working days after notification that title was available. So the two are quite inconsistent. But furthermore, I would submit that 18.3 in itself –

BLANCHARD J:

Just a minute. Are they inconsistent?

MR WITHNALL QC:

Yes, in my submission they are, Sir, because the title –

BLANCHARD J:

Well, if the purchaser puts in a requisition, isn't it electing that settlement will not take place on the agreed settlement date, and there will be a deferment. Correspondingly, if it decides not to put in a requisition, then it can go ahead, the settlement date remains the fifth working day.

MR WITHNALL QC:

But this clause only applies, Sir, where a title is not available five working days before the settlement date. The settlement date here is triggered by the availability of title. So 3.16 has no application.

TIPPING J:

Well, what are you trying to make out of 3.16, then? I'm sorry, I'm getting a bit lost here. It's getting far too intricate for my simple mind.

MR WITHNALL QC:

It is part of my submission, it's an additional part of my submission, that the requisitions clause does not, in any event, apply.

TIPPING J:

Contrary to your wanting to rely on it for another reason?

MR WITHNALL QC:

At 54, I said assuming that the requisition clause did operate.

TIPPING J:

Oh. I thought you wanted it to operate because you wanted this as a ground of cancellation.

MR WITHNALL QC:

No, it's simply an alternative, and as I indicated before lunch, I only raised this because in the appellant's written submissions, the appellant said the deficiency in title was a requisitionable issue. My response to that is to say it's not, because the clause doesn't apply. It's inconsistent with the express terms of the contract, including 18.3 itself. But if it does, then the argument was that the right had been exercised, and there was a right to cancel. The respondent's case has been, from day one, that it was relying on its statutory right of cancellation under section 7(4) of the Contractual Remedies Act.

TIPPING J:

Doesn't that breach, that breach of the essential term, have to continue until settlement? Isn't this coming close to the heart of it? You say once there's a breach, it doesn't matter that it's capable of remedy before settlement. That's the heart of your argument?

MR WITHNALL QC:

Yes, that's the heart of the argument, Sir. It would be tremendously inconvenient if a party, an innocent party, faced with a breach of contract, was required to wait or to give the other party an opportunity to remedy it.

ELIAS CJ:

Why, if it is capable of remedy, would that be so? I mean, there may be some cases, of course. But in this, even though I understand your point, that the – well, I think I understand the argument that the breach was disconnected from whatever the obligations were on settlement, because it arose with the depositing of the plan, or whatever, at the earlier stage. But on that basis, what – your argument is that you just don't get to requisition at all?

MR WITHNALL QC:

Yes, yes.

TIPPING J:

Could your client, on your argument, if I may follow that out, would have been able to cancel immediately upon the plan being deposited and the title issuing?

ELIAS CJ:

Yes.

MR WITHNALL QC:

Yes, on my submission. That is the case. That is the fork in the road to which the Court referred in record. A party faced with a breach –

TIPPING J:

It might be an anticipatory fork, Mr Withnall.

ELIAS CJ:

But what's the problem?

MR WITHNALL QC:

Well, if Yogi Bear – my learned friend, Mr Rather, quotes Yogi Bear, who says, “If you reach a fork in the road, take it.”

ELIAS CJ:

I wish I’d thought of that rejoinder.

TIPPING J:

Mr Rather should be mentioned in Dispatches for that one.

MR WITHNALL QC:

The election need not be taken immediately, and, indeed, this was discussed, particularly in Your Honour Tipping’s J decision in *Holmes v Booth*.

TIPPING J:

You were in that, weren’t you?

MR WITHNALL QC:

Yes, I was in that, Sir. I said Your Honour was right.

TIPPING J:

Well, it’s nice that somebody did.

MR WITHNALL QC:

Or Your Honour said that I was right. I’m not sure which way around it was.

BLANCHARD J:

His Honour has been saying he’s right continuously.

MR WITHNALL QC:

Yes. But an election must be made, because the longer it goes on, the greater the risk of the innocent party being held to have affirmed.

ELIAS CJ:

But what's the problem, really? Because the – although you say the breach occurs when the title is issued and it's defective, if one – that's a little artificial, because, really, the harm is suffered if the vendor isn't able to convey the title as he's contracted to deliver it. So although you are making a big point about a disconnect between when the breach occurs and settlement, in substance, that's really all that the purchaser can complain about, isn't it? If the vendor ultimately can't give proper title.

MR WITHNALL QC:

On the facts of this case, Your Honour, there was – the purchaser had no way of knowing whether this breach could be remedied or not.

ELIAS CJ:

So why not make time of the essence?

MR WITHNALL QC:

Because, in my submission, the purchaser did what it was entitled to do, exercise its statutory right of cancellation. That's why it's given that right. If it doesn't exercise that right, and allows time to go by, it runs the risk of having affirmed a contract, and thereby being confined to a remedy in damages.

TIPPING J:

I don't think this has a relationship with the essentiality argument. I don't think it was essential that the area be fulfilled at the point you're referring to. I think it was essential that it would be fulfilled on settlement.

MR WITHNALL QC:

With respect, Sir, the contract specifically provided that the area was to be on the approved plan of subdivision.

TIPPING J:

It wasn't essential. But it was essential that it be on settlement. There is a link. I think your client is trying to have it both ways. You're saying it was

essential that it be there at that particular earlier time, when it's the Chief Justice's point is that when it really bites is on settlement. Because I don't think I'd be with you that it was essential for that earlier time.

MR WITHNALL QC:

Well, I'm relying, Sir, on the express words on the contract. The final area –

TIPPING J:

Well, they don't make it essential at that earlier time. By implication, they may make it essential for settlement, if we're looking at the time at which performance is essential.

MR WITHNALL QC:

The purchaser could not know whether the essential term had been complied with until the title issued. Settlement was due five working days after notice that the title was available. So even assuming that the purchaser searched the title on the first of those working days, settlement was only four days away, and there were some particular reasons for settlement to be prompt, because, as Mr Skeates said in his affidavit, he was due to settle – it's at page 55 of the case, paragraph 16. He was due to settle the purchase of Lot 11 from the council on the same day. That maybe raises an argument – well, it depends on what the parties knew, both knew, at the date of the contract. But maybe even time was of the essence for settlement in this contract, because it's not an immutable rule.

BLANCHARD J:

If we were to hold that, it would affect a huge number of contracts, fulfilment of which is dependent upon an earlier contract.

MR WITHNALL QC:

I'm not advancing that as an argument, Sir. What I am saying is that the scheme of this contract was that the subdivision had to be carried out. It was totally under the control of the vendor. There was this essential term that the area must not be less than 4,150 square metres.

BLANCHARD J:

What had to be conveyed was a minimum area?

MR WITHNALL QC:

Yes.

BLANCHARD J:

But that didn't have to happen until settlement had to occur, in other words, until time became of the essence for settling?

MR WITHNALL QC:

No, it didn't have to be conveyed until that time, but the parties expressly contracted that the title, when it issued, had to show that area.

BLANCHARD J:

Yes, but it’s a question of what title had to be conveyed. The vendor had to have the correct title, the title with the correct area, minimum area, available on settlement, just as they had to have any sort of title available on settlement. But time wasn’t of the essence for that.

MR WITHNALL QC:

Well, I submit, Sir, that the short period between title becoming available and settlement having to take place, as contracted by the parties, meant that it was.

ELIAS CJ:

Well, you’re treating it as an anticipatory breach.

MR WITHNALL QC:

Yes.

ELIAS CJ:

I'm just thinking that, really, your argument, although you say it's turning on the terms of this contract, and it does to a certain extent, because you're relying on cancellation under the Contractual Remedies Act, your proposition is of general application, and I'm just trying to think through the implications. Effectively, you're saying that any breach capable of – which may be capable of remedy before the date of completion can be acted on by the other party to cancel the contract. It just doesn't seem right.

MR WITHNALL QC:

Well, with respect, Ma'am, there is –

ELIAS CJ:

You'd have to say it wasn't capable of fixing.

MR WITHNALL QC:

Well, with respect, Ma'am, there is – I submit it would be putting a gloss or an interpretation on the plain words of the Contractual Remedies Act.

ANDERSON J:

Why would it be essential to the purchaser that the plan had minimum area before settlement, when there was no consequence, in fact, for your client until the date of settlement? Why would the mere fact of it coming into existence be essential?

MR WITHNALL QC:

Because that's what the parties specifically contracted for, but also, Sir, I would submit that this is a fairly major transaction, and it's a commercial transaction, and the parties have specifically made this provision so that the purchaser would know what the position was before settlement.

ANDERSON J:

I can understand why it might be regarded as essential to receive title on settlement with that minimum area, but I have more difficulty in seeing how it

could possibly be regarded as essential when it had carried no consequence until settlement, and I wonder, then, whether one might have to interpret the 18.3 as effectively meaning this will be the area handed over on settlement.

BLANCHARD J:

Well, I have no doubt that's what it does mean.

MR WITHNALL QC:

Well, I submit, with respect, that it does not mean that, because it has specifically referred to a defined term, the approved plan, and that means the plan, because you can't get – I don't see how it could ever be contemplated as being reasonable possible that you're going to get a re-subdivision and a new resource consent within five working days.

BLANCHARD J:

Well, that's assuming that time is of the essence. The purchaser – the vendor has, in fact, got some leeway because time isn't of the essence, and there's going to have to be a process gone through.

TIPPING J:

The context of 18.3, as the Chief Justice has pointed out for other purposes, but the point is valid here, is payment of the price, and assessment of the price. Now, that is something that takes place on settlement. It doesn't take place when the title comes out of the Land Transfer office. I just think, with great respect, Mr Withnall, you're putting a very artificial twist on this to say that this is focused discretely on the time of issue of title, rather than settlement. But I understand the argument.

MR WITHNALL QC:

Well, I do that, Sir, only because of the express words of the clause.

TIPPING J:

Yes, quite.

ELIAS CJ:

But if you're right, and time was very important, and the upper obligations were pressing, why not simply make time of the essence, and hold the vendor to producing the complying transfer at settlement, and if not, cancel?

MR WITHNALL QC:

Simply because, Ma'am, in my submission, the innocent party has a right to elect whether to proceed, and to give the defaulting party the opportunity to rectify it, knowing that it's totally unlikely, highly unlikely, to get a resource consent on a new subdivision through in 12 working days.

BLANCHARD J:

Mr Withnall, what would have been the situation if the vendor had got its incorrect plan deposited on the 30th of April?

MR WITHNALL QC:

On the 30th of April?

BLANCHARD J:

Yes. Would you be saying, oh, no, that's a final plan, you've got no opportunity of correcting the situation? The significance of the 30th of April is that it's two months before the 30th of June, which is one of the alternatives for the settlement date.

MR WITHNALL QC:

I think my answer would have to be, Sir, that that's a hypothetical one, and it's not the situation we're dealing with. What we're dealing with here is -

BLANCHARD J:

Well, look, the clause has to have the same meaning, and the same function, regardless of when it actually comes to operate. It can't change its meaning and function.

MR WITHNALL QC:

Yes, I see. I understand now what Your Honour is putting to me. My submission would be, Sir, that it wouldn't make any difference, because –

BLANCHARD J:

So having deposited a plan and said, that's our plan, the vendor is trapped.

MR WITHNALL QC:

Yes.

BLANCHARD J:

Can't say, oh, oops, we'll fix that.

MR WITHNALL QC:

No. The whole process was in the control of the vendor. The vendor knew before the plan deposited.

BLANCHARD J:

Yes, but you're saying the vendor could not rectify that situation before the 30th of June, on my hypothetical?

MR WITHNALL QC:

It could rectify it, provided the purchaser didn't exercise its right to cancel. But it comes back to the particular terms of this contract.

BLANCHARD J:

It seems an awfully strange reasoning – reading of the relevant clauses, I'm afraid I have to say.

TIPPING J:

It really depends on the words "final area of the property" as shown on the approved survey plan, focused solely and immediately on the date when the survey plan is approved, and the title accordingly issues.

MR WITHNALL QC:

Yes.

BLANCHARD J:

So if the surveyor makes a mistake, and the vendor doesn't notice it, it can't be corrected?

MR WITHNALL QC:

Correct, Sir. That is the assignment of risks which the contract provided for.

TIPPING J:

That cannot be, with great respect, Mr Withnall, have been the intended purpose of that clause. It's just extreme.

MR WITHNALL QC:

It may be extreme, Sir.

TIPPING J:

But it's there for the unders and overs purpose. It isn't there to pin you to the area at the date on which the plan is deposited. It can't have been intended to say that, unless you've got some incredibly persuasive reason why that should be inferred as an additional purpose, if you like, apart from the obvious one.

MR WITHNALL QC:

In my submission Sir that clause has to be read in conjunction with clause 16 which put the onus on the vendor of giving this subdivision 3 and getting it right. This was a situation in which –

TIPPING J:

You're putting me off the idea this is an essential term by this argument because of the consequence.

MR WITHNALL QC:

Well let me just divert to that for a moment Sir because these two things are inter-related.

TIPPING J:

They are.

MR WITHNALL QC:

What we're dealing with here is a contract in which an existing lot in a subdivision is being further subdivided to allow an adjoining lot to be increased by some 5,000 square metres and I say that because in the case on appeal there is the application for consent and it refers specifically to Lot 5 being increased from 2,230 square metres to some 7,000 square metres. In that context, and the contract also says that the anticipated area of the balance of Lot 11, will be 4.7161 square – ah, hectares. Against that the parties specifically provide that there shall be no more than 11 square metres less than that anticipated area. The clause provides the benefit to the vendor of being able to take part of this existing land, go through the subdivision process and add land to another lot which it's going to sell. The quid pro quo for that is that the amount of land it can take is limited, strictly limited, to – so that Lot 11 doesn't go below 4.7150. now that's the context in which clause 18.3 is operating and when I say 18.3 that includes the words, "The final area as shown on the approved survey plan."

ANDERSON J:

The use of the word "final" indicates that there might be some stage before finality in relation to the approved plan. Do you think it might indicate this means at settlement this will be the area shown on the approved plan?

MR WITHNALL QC:

No Sir because that's not what the clause says. The final area is the area on the approved survey plan as defined which means that plan and no other plan. It doesn't mean a subsequent plan or plans.

ANDERSON J:

Why does it say final?

MR WITHNALL QC:

Sorry?

ANDERSON J:

Why does it say final?

MR WITHNALL QC:

It says final to make it clear that this plan must confer – conform with the term. That is final. When the – the approved survey plan is deposited, that is the final area. On that plan not on some other plan.

ANDERSON J:

How could it be anything else but the final one? It can only be one?

MR WITHNALL QC:

Yes but the appellant's argument, Sir, is that it doesn't mean that's the final one. It means they have to be given an opportunity to go back and do another one, another subdivision, another resource consent.

ANDERSON J:

Can you have more than one approved plan? You could have more than one approved plan, couldn't you?

MR WITHNALL QC:

No Sir. No in my submission, in the scheme of section – of clause 16 –

ANDERSON J:

I mean generally speaking I mean?

MR WITHNALL QC:

Oh generally speaking, yes.

TIPPING J:

They could be in succession. One can be approved and then you have another one that's approved in substitution.

MR WITHNALL QC:

Yes but this contract was concerned with one specific plan defined as being the plan provided for by clause 16. This was not a contract in which the vendor was given – was being given the opportunity to chip away and to try it on by taking a bit more and seeing if it could get away with it. This was a contract in which the vendor had the obligation to get it right, and the means of getting it right, because it had the control over the process. That was its obligation, was to get it right. That's an essential term, did it do that, as part of a carefully constructed contractual scheme and part of that was getting it right the first time. When that plan issued it had to get it right. That's why this contract is so different from your usual subdivision contract which allows for unders and overs. This was a specific situation for a re-subdivision to take land from the lot being sold and add it to another lot but with specific restrictions, a coherent scheme, and clause 18.3 is part of that scheme, both as to the area and as to the time.

It had taken something like, where are we, I just want to have a look what the date of the contract was, I think it was 18 months, to get to this point.

BLANCHARD J:

It was October 2007.

MR WITHNALL QC:

October, yes, to get to the point of having this subdivision done.

BLANCHARD J:

There's nothing particularly unusual in that I would have thought?

MR WITHNALL QC:

No Sir. But settlement was to be only five days after this finally happened.

BLANCHARD J:

Again nothing particularly unusual about that.

MR WITHNALL QC:

Normally Sir, with respect, it's – well normally settlement wouldn't – well clause 3.16 would operate in the usual – usual subdivisional situation.

TIPPING J:

I'm not really too worried about what happens ordinarily Mr Withnall. We've simply got to try and make proper sense of what these people wrote down in their context.

MR WITHNALL QC:

And in my submission Sir that is the only –

TIPPING J:

Yes well I understand the argument.

MR WITHNALL QC:

Yes. Now in the course of doing that I have effectively covered the ground I wanted to cover in respect of the essentiality point, the substance, I'll call it the area point of 18.3. The clause has to be construed against that background of facts. Would it be helpful if I just ran through those again just briefly as bullet points?

ELIAS CJ:

It would for me Mr Withnall, others may have followed it more closely than me but if you could summarise it.

MR WITHNALL QC:

Yes. The land was part of an approved subdivision being purchased from the Central Otago District Council. Lot 11, the lot in question, was to be reduced to allow the vendor to increase Lot 5 from 2,120 square metres to 7,484 square metres. And Lot 11 was then to become approximately 4,7161 ha and the documents I mentioned a moment ago, if I can just refer the Court to those, page 79 and page 84 of the case. At page 79 the main difference from the original resource consent is that Lot 5 will be increased in area from the existing 2,120 square metres to an area of 7.484 and then there is a plan at page 84 and you'll see there that it doesn't actually show the entirety of Lot 11. There's Lot 11 around here. Lot 5 must have originally been there because that would make it equal in area to –

TIPPING J:

The plan on page 100 is much easier to –

MR WITHNALL QC:

Sorry?

TIPPING J:

The plan on page 11, Mr Withnall, is much easier to demonstrate your point.

MR WITHNALL QC:

Thank you Sir, I'm obliged.

TIPPING J:

It eliminates the sort of irrelevant part of the subdivision for our purposes and focuses on Lots 11 and 5.

MR WITHNALL QC:

Ah yes. Yes. You can see Lot 5 now becomes an L-shaped lot whereas clearly before it was roughly equivalent in area to 6 and 7. There's a fair chunk coming out of Lot 11 to become part of Lot 5. Now for that to happen a further resource consent was required, clause 16. The obligation to obtain the

consent to deposit the plan and obtain titles was that of the vendor. The vendor had complete control of that process including the title issue. The purchaser had none. There was provision for compensation at a square metre rate for any variation from 4.7161, up or down, and against that background the parties expressly agreed that the minimum area of Lot 11 was 4.7150 and they did that using what, in my submission, is the strongest mandatory language one can use, "must not be less than". "Must" in this situation I submit, is synonymous with, "It is essential that." In other special terms, or inserted terms in this contract, the parties used the word "will". In this clause they used the word "must" and while I accept that the word in itself does not answer the question, it is the language of the contract in the matrix of facts.

TIPPING J:

Did the purchaser have any interest in the size of Lot 5?

MR WITHNALL QC:

In terms of the contract – no, no, none at all. Sorry I didn't quite understand Your Honour for a moment. Yes but no the purchaser had no interest in the area of Lot 5.

TIPPING J:

So you can't rely on a point like that, it was in the purchaser's interest that Lot 5 be – no, it works with other way round, doesn't it?

MR WITHNALL QC:

It works the other way Sir.

TIPPING J:

Yes.

MR WITHNALL QC:

It was in the vendor's interest –

TIPPING J:

Yes, no sorry, I misled myself Mr Withnall.

MR WITHNALL QC:

And that's why I struggled for a moment.

TIPPING J:

Yes, yes, fair enough.

MR WITHNALL QC:

So those are the key, the key things. The only other thing I think I really want to say is this. That it is well settled that the question of whether a term in a contract meets the essentiality test is by a process of construction. The language of the contract, in its context, in the context of the contract as a whole, and in the context of the admissible matrix of facts. That being so I submit it is quite unnecessary and in fact clouds the issue to talk about tests such as root of the contract, heart of the contract, would not have entered into the contract. Those are not tests, in my submission, they are metaphors for construction having regard to the words of the contract and the matrix of facts and that's what the Court looks at, not at some so called test.

And in that regard I would respectfully commend the Court to the judgment of Kirby J in the *Koompahtoo Local Aborigine Council v Sampire Pty* [2007] 233 CLR 115, at 137 case. There are, if I may beg the Court's indulgence just to take you briefly through some of the passages in that, it's tab 13 in volume 2 and it's the last judgment. It's not a dissenting judgment because they all reached the same conclusion but four of Their Honours by a different route to that of Kirby J. Firstly at page 154, paragraph 100, His Honour said, "I have reservations that the reasoning of Jordan CJ in *Tramways Advertising* supplies the relevant test. This is so notwithstanding its adoption in other cases – " and then he referred to Murphy's J decision in *DTR Nominees* where that, where the Judge said, "The test is so vague that I would not describe it as a test. It diverts attention from the real question which is whether the non-performance means substantial failure to perform the

contractual obligations. The enquiry for motivation is not the real point. Numerous purchasers may enter into similar contracts with widely different motives."

TIPPING J:

What you're essentially saying is when it's a question of express essentiality, which I now apprehend you really to be saying, you don't need to go to these wider questions of implication.

MR WITHNALL QC:

Whether it's expressed or implied because it's a question of agreement.

TIPPING J:

Yes.

MR WITHNALL QC:

Don't go to those things, they simply cloud the issue and –

TIPPING J:

But you've got to have an understanding of what is meant by essentiality before you can determine whether the parties have agreed on it.

MR WITHNALL QC:

Yes but paragraphs 101, 102, I don't know whether Your Honours want me to take you through those, but they –

TIPPING J:

I, with great respect, don't think the precise so-called tests or – it's really a matter of interpretation –

MR WITHNALL QC:

It is.

TIPPING J:

– of what these people were on about.

MR WITHNALL QC:

Yes and that's a matter of construction of the contract.

TIPPING J:

Applying proper constructional principles.

MR WITHNALL QC:

Absolutely Sir, yes, and really that's what Kirby J is saying. The argument for the appellant appeared to be, although I think it may not be the case now, but at least it may have been, appeared to be that there is some form of intermediate or innominate term –

BLANCHARD J:

What Kirby J says in paragraph 101 is that you should enquire into the objective significance of breach of the term in question for the parties in all the circumstances.

MR WITHNALL QC:

Yes.

BLANCHARD J:

What was that objective significance here in your view?

MR WITHNALL QC:

The objective significance was, and its commercial significance, objectively was that it removed room for dispute. As one of Your Honour said, I think in fact it might have been Justice Tipping and Justice Blanchard, get out of the murky area of what's a substantial breach.

TIPPING J:

I would have thought, with respect, that is the primary reason they have it there –

MR WITHNALL QC:

Yes.

TIPPING J:

– just as a matter of ordinary common sense, just knowing about how these things can go wrong.

MR WITHNALL QC:

Yes.

McGRATH J:

And that's why it was essential to both parties in fact, not just to the vendor?

MR WITHNALL QC:

Not just to the vendor, it was essential to both because it –

McGRATH J:

And that's what's, of course, crucial in 4(a), yes.

MR WITHNALL QC:

They knew where they stood. This was a four and a half million dollar contract between commercial parties. It's important for the contract to provide what their rights and obligations are with exactitude.

TIPPING J:

It might be able to be added, just to be a little provocative, but if this isn't enough to do it, you've almost got to use the word "essential".

MR WITHNALL QC:

Yes and in this context "must" I submit is a synonym for "essential" but the whole – particularly paragraphs 106, 107, 108 and in 108 in particular Kirby J referred to our Contractual Remedies Act. He said, "Several additional factors militate against the incorporation of the so called intermediate term into Australian law."

TIPPING J:

Well we either have a cancellable term or we don't. There's no suggestion –

MR WITHNALL QC:

He went on to say, "It's inconsistent with the approach of the legislation then of a breach of contract in particular context," that's Australian legislation there, it's there referring to the various state Sale of Goods Act, then went on to say, "It is not reflected in the general clarifications of contractual remedies law adopted in some common law countries," referring specifically to the New Zealand Contractual Remedies Act. We have two categories of term, essential and non-essential, and non-essential, the right of cancellation, only arises when the consequences of the breach are substantial. Essentiality is not affected by that at all and particularly, it says, "Consequential reasoning, consequentialist reasoning, should be eschewed when considering questions of essentiality."

TIPPING J:

Well, that's not quite right, is it? You surely should be able to take into account what the parties may have foreseen, if you like, to be the consequences of breach. Here, that sits with your thesis, because they would foreseen potential serious arguments.

MR WITHNALL QC:

Yes, yes. I think that probably concludes, unless there's anything further?

ELIAS CJ:

Thank you, Mr Withnall. Yes, Ms McCartney.

MS McCARTNEY SC:

Yes, may it please Your Honours, addressing firstly the issue of the settlement notice and the submission that Mana makes, is that breach of clause 18.3, if performance was essential, does not mean time for performance was itself essential, and in order for the Court to make a finding that time was essential, as in a pre-emptory cancellation was available, it's necessary to look at the words of clause 18.3, and we submit that there's nothing in the clause itself as to time, which indicates time is essential. As a result, James is back in a situation where it has to show that time was impliedly essential, and that is the issue that we've been discussing this morning as to the test for essentiality going to the substance of the venture and, as His Honour Justice Anderson asked Mr Withnall, "What was it about performance on time that was so essential to James? Why did James require clause 18.3 to be performed at any time before settlement?"

The submissions that have been made by Mana in this regard as to time are set out from paragraph 114 of the written submissions and it is that, leaving aside the infelicitations of the draughtsperson, the purpose of clause 18.3 was to have a compliant title, that is, a title containing a minimum area, and at paragraph 115 is a fundamental proposition, the obligation to provide the compliant title arose at settlement, time being of the essence. So, the time for performance of clause 18.3, that is, to provide the title containing the description that was required, was on settlement, and time for performance arose, in accordance with the rules of equity as to performance of settlement in a sale and purchase agreement, that is, time was not initially of the essence and could only become of the essence by issue of a settlement notice. And we reject the proposition that the settlement notice could issue under general law.

The whole purpose of clause 9 is to introduce a clear, certain process, which overcame the uncertainty as to what constituted reasonable time and which existed in equity. James, of course, did not issue a settlement notice, and in this Court for the first time it seeks to rely on the requisitions clause. Now, I'm

not sure to what extent the requisition clause continues to be relied upon, but we did pass up for the Court a separate document, which I made available to my learned friend this morning, dealing with requisitions, and the first page headed "Requisitions" and then there follows a planner –

TIPPING J:

No, this is –

ELIAS CJ:

Public holidays and school terms.

TIPPING J:

Very interesting.

ELIAS CJ:

2008.

MS McCARTNEY SC:

There's a reason for that, because it shows Labour Day was on the 27th of October, in terms of computation of time.

TIPPING J:

Yes, thank you.

MS McCARTNEY SC:

So, to the extent that cancellation under the requisitions clause remains a ground relied on by James, the situation in terms of the requisitions clause and the chronology is on the 21st of October, there's the letter giving them the notice of Certificate of Title. That, in terms of clause 5.2(2), triggered the five working days for notice by the purchaser. And the letter of the 23rd of October, which is at the case page 88, is the one in which James raises the issue of the Certificate of Title not complying and asks that instructions be taken, and I'll develop this in a moment, but Mana says that's not a purchaser's notice under the requisitions clause. But just assuming for

the moment that it is, under clause 5.2(3), the vendor then has the option of serving its own notice and it has five working days to do that, and this is the reason why I've pointed out the 27th of October was Labour Day, because it's one of the days excluded under the definitions section of the contract.

The first letter came back then from Mana, and that's the letter in which Mana asserts that there's no major consequence, at page 89. And I'm not sure whether James relies on that as being a notice of inability or unwillingness but, in any event, we submit it doesn't matter how that document's construed because on the 31st of October 2008 at pages 92 and 93, and still within the five working days, the vendor, Mana, comes back and at the end of that letter says, "If the above," and we submit that means all the above, "is not acceptable to your client, my client has requested a meeting to sit down and resolve all outstanding issues."

So, we submit that to the extent the requisitions process was engaged, which we deny, within the time provided Mana, as vendor, had provided its notice, which was a notice indicating willingness rather than the other way round, and upon receipt of that notice, under the terms of the contract, the obligation on Mana was to have a compliant title on settlement and with reference to the next document, which is document 3 November 2008, at page 94, Mana sought to cancel, the Court can see the cancellation was not based on the requisitions clause but on failure to comply with clause 18.3, and that letter, when it was received, was received before the five working days for cancellation in any event, so it was invalid on that basis.

But under the chronology that's set out in the box on the page headed "Requisitions", Mana's position is that it denies the requisition process was engaged. We have taken the Court to the notice of opposition that's been filed by James, it's based on one ground only and not cancellation under any requisitions clause. There is no evidence from either party that the correspondence was intended as notices under clause 5.2 and, in that regard in particular, I draw the Court's attention to Mr James' evidence at page 113 where, at paragraphs 20 and 21, he refers to receiving the letter of

21 October 2008 and makes no indication at all, gives no indication at all, that he responded under the requisitions process. He simply said, "I considered the defendant's positions pursuant to the agreement. The letter gave no indication of intention to rectify the default," and that's all he says. And we submit that had he been engaging in the requisitions process he would have said something to the effect, "James responded by issuing a notice under clause 5.2." And then, in relation to Mr James' evidence, on page 114 at paragraph 25 he sets out the defendant's basis for entitlement to cancel, and it will be seen nowhere there does he engage the requisitions clause. So, for that reason, Mana submits that requisitions as a ground for cancellation never came into it.

Addressing the next submission from James, which is that Mana could not give good title and on that basis James was entitled to cancel, I understand that this argument is an argument based on anticipatory breach and, Your Honour Justice McGrath, I'm grateful for pointing out in relation to *Bell v Scott* and the statement or passage from the judgment that is relied on by the appellants and their submissions at paragraph –

BLANCHARD J:

115.

MS McCARTNEY SC:

– 115, thank you, Your Honour, in fact goes further, and we cut it off a little bit too early, because with reference to tab 32, which contains the judgment in *Bell v Scott* and page 392 first column, the part that is reproduced in the submissions goes down only to the reference *Webster on Conditions of Sale,* But in fact the passage continues, "If the vendor shows that he is neither able to convey the property himself nor able to compel a conveyance of it from any other person, the purchaser may repudiate the contract before the time for completion has arrived. But this principle has no application in cases in which there are outstanding interests which the vendor has the power of getting in. The fact that the legal estate is outstanding does not make out a case of no title at all. If the vendor's inability is not clear, the purchaser must wait."

TIPPING J:

Well, that's the key point, isn't it? You've got to demonstrate unequivocal, either unwillingness or inability.

MS McCARTNEY SC:

Yes, with respect.

BLANCHARD J:

Isn't your best factual point on that that there was alongside this property Lot 5?

MS McCARTNEY SC:

Lot 5 and Lot –

BLANCHARD J:

Which could have been reduced.

MS McCARTNEY SC:

Your Honour, I don't want to discuss Lot 5 because there's no evidence about Lot 5, without my sort of speaking from the bar –

BLANCHARD J:

I'm not asking you to.

MS McCARTNEY SC:

All right.

BLANCHARD J:

But there it sits. It's not obvious that the vendor has an inability to do a boundary adjustment.

MS McCARTNEY SC:

And a boundary adjustment was what happened –

BLANCHARD J:

I'm told the boundary adjustment was –

MS McCARTNEY SC:

Lot 12.

BLANCHARD J:

– actually was a different lot.

MS McCARTNEY SC:

It was.

BLANCHARD J:

But there was Lot 5.

MS McCARTNEY SC:

Yes.

BLANCHARD J:

The vendor may have been unhappy about doing an adjustment with Lot 5, but it's not obvious that it couldn't do it.

TIPPING J:

If the purchaser was insisting that the purchaser really had to give the vendor the opportunity of performing, by the notice of procedure, that's really the nub of this case, isn't it?

MS McCARTNEY SC:

It is.

TIPPING J:

On this issue.

MS McCARTNEY SC:

It is, that is the nub of the case, that the vendor was entitled to have the opportunity to perform and, in fact, on the facts of this case, the vendor's in the happy position of being able to say, "And it could perform." And in terms of the time, Your Honour Justice Blanchard, looking through the calendar that's been passed up, the date that the Certificate of Title, the second one, the compliant one, was produced was 19 November and, on our calculation from 3 November that was 12 working days.

TIPPING J:

And it doesn't matter to you, if you're right on this, whether it was an essential term or not?

MS McCARTNEY SC:

Yes, that's so.

TIPPING J:

Strictly speaking.

MS McCARTNEY SC:

Yes, well, that's so long as the essential term is viewed in the way that we ask the Court to view it.

TIPPING J:

Yes, quite, yes.

MS McCARTNEY SC:

And just dealing with the question of getting the boundary alignment, my learned friend Mr Withnall submits that a new resource consent was required. The evidence isn't of a new resource consent, the evidence in that regard was that it was a boundary adjustment –

TIPPING J:

Well, it would be a variation, wouldn't it, of the existing consent?

MS McCARTNEY SC:

I, with respect, would think so. The evidence –

TIPPING J:

It was so fundamentally different, but they were likely to –

MS McCARTNEY SC:

It wasn't going to take the time that I think has been conveyed that it was going to take, and obviously it didn't –

TIPPING J:

No.

MS McCARTNEY SC:

– is the other thing. So, we submit that, in terms of James' submission, that clause 18.3 was a separate and independent term of the contract which, if essential on breach, gave the vendor an immediate right to cancellation. We maintain that it was not a separate and independent term of the contract, it was part of the description of the title which Mana was to have on settlement, and the substance of the obligation under clause 18.3 was the time for performance was settlement and the rules of equity therefore applied. No notice was issued, the cancellation was premature and was invalid.

Just a couple of small points, Your Honours. In relation to – I probably shouldn't go here – but in relation to the handbook, Blanchard's handbook, which is at tab –

BLANCHARD J:

You're right –

TIPPING J:

I've been waiting for this line all day, Ms McCartney.

BLANCHARD J:

It's my chance to say I'm not dead.

MS McCARTNEY SC:

I wonder whether I can say that a warning notice is not required if the stipulation broken by the other party is an essential term, time for performance of which is of the essence, and –

BLANCHARD J:

I'd like to think that's what I meant.

MS McCARTNEY SC:

Well, reading the balance of what follows, Your Honour, we believe it is.

BLANCHARD J:

You're too kind.

MS McCARTNEY SC:

With respect.

TIPPING J:

I wouldn't have that confidence, but I think it now is in retrospect.

MS McCARTNEY SC:

Excuse me, may I just confer? No, unless there's anything else, thank you, Your Honours, those are the submissions for the appellant.

ELIAS CJ:

Thank you, counsel, for your submissions, we'll take time to consider our decision in this matter. Thank you.

COURT ADJOURNS: 15.29 PM