

# CONTRACT LAW REVIEW 2008

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## INTRODUCTION

1. In this paper I review some recent contract cases from the New Zealand and United Kingdom Courts. The review begins with 2 recent decisions from the New Zealand Supreme Court and the House of Lords,<sup>2</sup> then highlights some recent cases in the Supreme Court concerning the interpretation and application of contracts relating to the sale of land.
2. All the decisions concern, either the application of well established general principles of contract law to particular factual situations, or the interpretation and operation of contracts, in particular, standard form contracts. The first 2 decisions illustrate the difficulties which can arise in applying the established general principles relating to the assessment of damages for breach of contract, and the implication of periods of reasonable notice, to particular factual situations. The remaining cases concern the construction and application of common forms of commercial contract. All the cases show, to a greater or lesser extent, the higher courts considering and balancing the needs for certain rules in commercial transactions with the need for a just decision in a particular case.
3. In examining the situations which have reached the courts, it should be recognised that, for the most part, the framework of legal principle regulating contractual obligations, established by the common law over many years and partially codified in New Zealand in the contractual statutes, provides a well established foundation for transactions. Commercial parties, with the assistance of their advisers if required, can generally order their affairs by reference to these established principles without having to resort to litigation or arbitration. Regular changes to fundamental principles by the appellate courts would indicate a system which was failing its users, and, as the courts have long acknowledged in formulating principles which govern commercial dealings, certainty in the rules applicable to contracts is important for those involved in trade and commerce. The first case reviewed – the House of Lords decision in *The Golden Victory*<sup>3</sup>, is an example of the kind of difficult decision which may be required where a rule, which generally is productive of certainty in commerce, is seen as not producing an appropriate outcome in a particular factual situation.

### ***The Golden Victory in the House of Lords***

4. As was outlined in last year's review<sup>4</sup>, this case concerned the application of the well established principles of contract law concerning the assessment of damages for breach of contract in a commercial context – the chartering of a ship. While the facts of the case were simple, they produced a point on which the House of Lords divided in dismissing the shipowner's appeal.<sup>5</sup> The different views in the House of Lords represent, in a general sense, a division between those who favoured the application of an established general rule which they saw as promoting commercial certainty, and those who were of the view that the established rule should give way to a more flexible approach so as to produce a just assessment of damages for breach of contract.

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<sup>2</sup> For ease of reference the paper from last year is included with this paper. The cases were reviewed last year when they were at Court of Appeal level,

<sup>3</sup> [2007] UKHL 12

<sup>4</sup> See paragraphs 7 and 18 of last year's paper.

<sup>5</sup> The case began as a maritime arbitrator. The arbitrator had found in favour of the charterer of the *Golden Victory* and this decision had been upheld by the High Court and Court of Appeal.

5. A charterer wrongfully repudiated (terminated) a charterparty which had four years to run. The owner accepted the repudiation and chartered the vessel out again into the market, and claimed damages assessed as at the time of the breach by reference to the losses on the balance of the charter. By the time the matter came to hearing before a maritime arbitrator under the arbitration clause in the charterparty, the second Gulf war had broken out. At the time of the breach of contract by the charterer, the arbitrator found that the outbreak of the Gulf war was no more than a "possibility". If the charterer had not wrongfully repudiated the charterparty, and it had continued, the charterer would have been entitled to bring the charterparty to an end on the start of the war by relying on a "war clause" in the charterparty. The question for the courts was whether the owner could claim damages assessed by reference to the whole of the charterparty period disregarding the outbreak of the war and the right to terminate under the contract, or whether the amount of damages had to be reduced because, by the time of the hearing, it was known that the charterparty could have been terminated by the charterer.
6. An award of damages seeks to put the innocent party in the same position as it would have been in had the contract been performed – to compensate for the value of the lost contractual rights.<sup>6</sup> Generally, damages for breach of contract, are assessed as at the date of breach by the party breaking the contract unless there are exceptional circumstances which justify a departure from this approach.<sup>7</sup>

### **Minority view**

7. Lord Bingham (with whom Lord Walker agreed) would have decided the case by reference to the established principles and would have allowed the owner to claim damages without a reduction to take account of the fact that the war would have allowed a legitimate termination of the charterparty. Where the charterer was in repudiatory breach, the owner was entitled to have the damages assessed as at the time of the breach unless, at that time, it was clear that the contractual rights would be diminished or be of no value or there was a recognised chance that this would occur.<sup>8</sup> In this case the outbreak of the war had been held to be "merely a possibility" at the time of the charterer's repudiation by the arbitrator with the consequence that the value of the contract rights at the time of repudiation was not diminished on account of the event. The owner was entitled, in Lord Bingham's view, to be compensated for the value of the rights lost at the time of the repudiation. This application of the established rules accorded with the need for certainty and finality in a coherent system of contract law, and it was contrary to principle to find that the accrued rights to claim damages vested in the owner at the time of the repudiation could be changed by subsequent events. Assessment of damages by reference to the position at the time of repudiation, would promote certainty, and allow commercial parties to assess and pay damages as at the time of repudiation. Disagreeing with the majority, Lord Bingham distinguished the cases where the courts have taken subsequent events into account in assessing damages as not being concerned with the assessment of damages for breach of contract where there had been repudiatory breach. He did not agree that earlier authority in the High Court had bound the arbitrator to reject the owner's arguments which were, in his view, well established on principle.<sup>9</sup>

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<sup>6</sup> *Robinson v Harman* (1848) 1 Ex 850 at 855 per Parke B.

<sup>7</sup> *James v Moolla Dawood Sons & Co* [1916] AC, 175, 179.

<sup>8</sup> See, eg. *The Mihilis Angelos* (1971) 1QB 164 a case of anticipatory repudiatory breach where it was held that a party could only recover nominal damages for anticipatory breach of contract where the evidence established that, had the contract continued, the innocent party would not have performed its obligation (to provide a ship) under the contract.

<sup>9</sup> *The Seaflower* [2000] 2 Lloyd's Rep 37 a decision which Lord Bingham regarded as a decision in which the established principles were applied to assess damages.

## Majority view

8. The central point made by the majority of their Lordships<sup>10</sup> was that the assessment of damages in contract seeks to value the rights lost, and that the rule that the lost rights have to be valued as at the date of breach should not be applied inflexibly. The majority held that, to apply the "date of breach" rule in the manner in which the minority would have applied it, was inconsistent with the general principle and the authorities. They held that where subsequent events clearly showed that the value of the contractual rights of the innocent party under a long term contract had, in fact, diminished in value by the time of the hearing, the court had to take this loss in value into account in assessing damages, even if, at the time of breach there was only a slight possibility of the event happening. The majority relied on a number of authorities where, in particular circumstances, the Courts had not applied the general rule that damages had to be assessed at the time of breach in order to arrive at a fair assessment of damages. None were directly on point. The opinion of the majority rested on the basic premise that, if contract damages could be reduced to take into account events which might happen after the date of breach where assessment was carried out at the time of breach, there should be no question that if events had, in fact, happened after the breach which reduced the value of the contract rights, they could be relied on to reduce the damages awarded. Where there was no need to try and look into the future, the court should be able to look at the facts of what had happened to value the contract rights lost.
9. The decision reflects the tension between certainty and flexibility which is present in many hard cases. It seems difficult to justify a flexible approach to the time for assessment of damages if one of the main objectives of the contractual rules is to allow commercial parties to make prompt decisions as to their contractual rights and obligations. As Lord Bingham pointed out, the effect of the decision is to make the situation where there is a repudiatory breach of a long term contract, fluid and more uncertain.
10. It should be kept in mind that, even if damages are assessed at the time of breach, it may be necessary to discount the value of the contract rights lost where a long term contract has been repudiated where future events which would devalue the contract are more than a possibility at the time of the breach. Similarly, where the contract broken could have been performed in different ways, damages will be assessed by reference to the mode of performance which would have been least onerous to the party in breach.
11. The Contractual Remedies Act 1979 does not affect the basic common law position on the assessment of damages for breach of contract, and a similar question to the one which arose in *The Golden Victory* could come before our courts. It is interesting to consider how our Supreme Court might decide such a case. Historically, many decisions of the higher courts in the United Kingdom have emphasised the need for certainty in the rules relating to contract law.<sup>11</sup> As has been outlined, the decision in *The Golden Victory* could be seen as creating uncertainty in an important area, and, where there is a wrongful repudiation of a long term contract, there may now be little incentive for a contract breaker to settle up and pay damages. The New Zealand Supreme Court has shown a preference for certainty in the rules relating to commercial dealings (admittedly in very different contexts) and it may be that the court would be reluctant to depart from the date of breach rule for the purposes of assessing damages in a similar situation.

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<sup>10</sup> Lords Scott, Carswell and Brown

<sup>11</sup> Going back to the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153.

**PAPER RECLAIM LTD v AOTEAROA INTERNATIONAL LTD<sup>12</sup> – implied periods of notice and the calculation of damages - Supreme Court decision**

12. While *The Golden Victory* shows that a written, standard form commercial contract is no antidote to litigation in an uncertain commercial world, the odds of such an outcome are greatly increased where an important commercial relationship comes to an end, and has not been documented by the parties. Two New Zealand companies - Paper Reclaim and Aotearoa - had such a relationship. From the mid-1980s Paper Reclaim had used Aotearoa as its exclusive agent for arranging the export sale of waste paper. Paper Reclaim collected and baled waste paper and Aotearoa exported it. In February 2001, Paper Reclaim wrote to Aotearoa saying that there was no long term contract between the parties, and that it would only give instructions to Aotearoa to apply on a sale by sale basis, and that Aotearoa was not to hold itself out as Paper Reclaim's agent.
13. Aotearoa sought to maintain the position that there was a long term contract between the parties which was not capable of being terminated and only cancelled the contract which it believed existed in reliance on Paper Reclaim's repudiation, in May 2002. Aotearoa sued for damages for breach of the contract.
14. In the High Court, the judge rejected the argument for Paper Reclaim that there was no long term agreement, and held that there was an oral long term agreement between the parties. The agreement was subject to an implied term that the agreement could be terminated on the giving of reasonable notice. The judge held that the period of notice which ought to have been given by Paper Reclaim under the implied term was one of 8 years. This period was the judge's estimate of the time which it would have taken Aotearoa to build up a business of the kind which had been wrongly brought to an end by Paper Reclaim. The High Court awarded damages to Aotearoa to be assessed by reference to the loss of profits over a period of eight years following.
15. On appeal by Paper Reclaim, the Court of Appeal upheld the High Court's finding that there was a contract between the parties which governed the arrangements for the export of paper, and that it was subject to an implied term that the agreement was terminable on giving reasonable notice. The Court of Appeal held that the period of notice of termination which should have been given was twelve months, rather than eight years. The Court held that the contract came to an end "no later than" the letter of 3 May 2002 when Aotearoa cancelled the contract and notified Paper Reclaim of this. Damages should be assessed on the basis that the contract should have continued after the letter from Paper Reclaim in February 2001 until Aotearoa accepted the repudiation (February 2001 to May 2003), with Aotearoa being entitled to its commission on sales which it should have had in that period, then, after that, Aotearoa should have damages on the basis that it was entitled to a reasonable period of notice (ie. 12 months from May 2003). Aotearoa appealed seeking to reinstate the finding in the High Court on the period of notice and Paper Reclaim cross-appealed on the notice period and on damages.

**Supreme Court**

16. Before the Supreme Court, it was accepted that there had been a continuing long term contract between the parties. The central points the Supreme Court had to consider were:
  - Whether the Court of Appeal had been correct in overruling the High Court Judge and replacing the eight years' notice period with one of twelve months.
  - Whether the Court of Appeal had been correct in the basis of assessment for damages for repudiatory breach.

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<sup>12</sup> SC 25/2006 and SC 28/2006 [2007] NZSC 26

- Whether there were relevant fiduciary obligations owed under the contractual arrangements which would mean that Aotearoa could sue for loss of profits and greater levels of interest.

### **The implied period of notice**

17. The Court held that the Court of Appeal had been correct in deciding that a reasonable period of notice in this contract was twelve months. The period of notice has to be assessed objectively in the context of the commercial relationship between the parties at the time the notice is given. The error by the High Court Judge was to apply aspects of the *dictum* of Lord Devlin in *Australian Blue Metal and Hughes*<sup>13</sup> "as if it was a statute". The High Court Judge had found that a reasonable period of time in which the innocent party to the contract would have been able to make "alternative arrangements of the sort similar to those which are being terminated" was eight years. The judge treated this as the time which would be needed to establish a business of the kind which was being ended by the notice. The question to ask is not how long it would take for the innocent party to build up the same or similar business, to create "a replacement trading situation", but rather how long a period of notice is required, objectively, to bring the existing contractual arrangements to an end. The Court of Appeal had been correct in agreeing with the observations of Penlington J in *Anchor Butter Co Ltd v Tui Foods Limited*<sup>14</sup> that relevant matters in determining the period included carrying out existing commitments, giving notice of the termination of supply to existing customers, bringing current negotiations to fruition and, where appropriate, obtaining the fruits of any extraordinary expenditure or effort carried out within the scope of the agreement. In this instance, there was no extraordinary expenditure or effort which had to be recouped.
18. The High Court Judge was wrong to find that the innocent party had to be given sufficient time to become a major player in the waste paper business. It would be unlikely that Aotearoa could ever replicate its role under the contract and it would have to move to a new business activity. The reasonable period of notice was one which gave it sufficient opportunity to wind down the existing arrangements and commence alternative trading. If the intention had been to have a period of notice which would be sufficient to allow the party to the contract to build up a business comparable to that which it enjoyed under the contract, then express contractual provision was required to achieve this aim. In entering into an informal oral arrangement, the parties assumed the risk that one or the other would be disadvantaged by the implication of a reasonable period of notice.

### **Assessing damages**

19. The next question was the calculation of damages for the wrongful cancellation of the contractual arrangements. The Supreme Court held that the Court of Appeal had misconstrued the effect of the letter of February 2001. While it could be argued that the letter was a notice of summary termination, the Court acknowledged that there were authorities to the contrary, and was content to treat the letter as notice of repudiation. The Supreme Court held that, the Court of Appeal had been incorrect to hold that damages should be calculated by reference to the contract continuing from the time of the letter until the time when Aotearoa had treated the contract as at an end and the 12 months notice period from that time. Whatever the status of the letter, it was evidence of repudiation and damages for the breach of the agreement were to be assessed by reference to the fact that, as at the time of the February 2001 letter, Aotearoa could have given a reasonable notice of 12 months under the contract. This accorded with the general principle that damages were to be assessed on the basis that the party found to have been in breach would have acted under the contract in the manner which was least detrimental to it. Paper Reclaim could, if it had adhered to the contract, have chosen to give twelve months' notice on 2 February 2001.

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<sup>13</sup> [1963] AC 74

<sup>14</sup> [1997] 3 NZLR 107 at page 124

20. Accordingly, even on the assumption that the letter of 2 February 2001 was no more than a repudiation of contractual obligations which was not accepted for a period of time, the outer limit of the period in relation to which Aotearoa's damages could be calculated, was the period of reasonable notice (12 months) which could have been given by Paper Reclaim in February 2001.

### **Breach of fiduciary duty**

21. Aotearoa also argued that Paper Reclaim was in breach of fiduciary obligations owed under the agreement which gave rise to the potential liability for an account of profits or additional damages. The Supreme Court held that the courts below had been too ready to style the arrangement as a "joint venture", and found that there was no fiduciary relationship under the contractual arrangements, save where Aotearoa was acting as agent for Paper Reclaim in carrying out some of its contractual duties. The Court could see nothing in the terms of the contract found to exist between Paper Reclaim and Aotearoa requiring the implication of any greater obligation upon Paper Reclaim "than to account in the event that the principal acted in breach of the contract of agency". The Court held that the Court of Appeal had been correct to reach the conclusion that the claim for breach of fiduciary duty failed. In the limited area in which Paper Reclaim owed fiduciary duties, there was no evidence of possible claims which went beyond the sums which could be claimed for commission in the 12 month period of reasonable notice.

### **SETTLING PROPERTY PURCHASES**

22. *Brett Ronald Larson v Rick Dees Limited*<sup>15</sup> concerned the question whether a purchaser had validly settled the purchase of ten home unit properties. The dispute concerned the interpretation and application of clauses of the REI/ADLS standard form agreement for the sale and purchase of land.
23. The Supreme Court had to determine whether ten contracts for the sale and purchase of home units had been validly cancelled by the vendor by reason of the purchaser's failure to settle in accordance with settlement notices. There were 2 main issues:
- Was the electronic transfer of funds a good tender of the purchase price?
  - Did the purchaser have to notify the vendor of the transfer of the funds within the time frame for settlement?

Clause 3.7 of the REI/ADLS standard form provides as follows:

3.7 On the settlement date:

- (1) The purchaser shall pay or satisfy the balance of the purchase price, interest and other moneys, if any, due as provided in this agreement (credit being given for any amount payable by the vendor under subclause 3.9 or 3.10); and
- (2) The vendor shall concurrently hand to the purchaser:
  - (a) the memorandum of transfer of the property provided by the purchaser under subclause 3.5, in registrable form; and
  - (b) all other instruments in registrable form required for the purchase of registering the memorandum of transfer; and
  - (c) all instruments of title –

the obligations in subclauses 3.7(1) and 3.7(2) being interdependent.

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<sup>15</sup> [2007] NZSC 39

24. The vendor argued that the electronic funds transfer was not permitted under clause 3.7, which only contemplated a "face to face" settlement. If that argument was not accepted, the vendor argued that the purchaser did not fulfil its obligation unless it gave a notice of the transfer of funds within the time for settlement, so that the vendor became aware that cleared funds had been transferred.
25. In the High Court, Justice Winkelmann heard evidence as to standard conveyancing practice which was to the effect that usually settlement took place face to face. However, settlements at a distance were now common because of the growth in various means of communication, such as fax. With the vendor's agreement, such methods of settlement could be used and, if they were, they would be a valid tender of settlement by the purchaser if he or she complied with the vendor's requirements in relation to remote settlement. In this case settlement had not taken place as originally agreed. Settlement statements were delivered by the vendor on 17 February 2004. The vendor's solicitors had written on 17 February 2004 requiring faxed confirmation that a bank cheque was in the purchaser's solicitor's trust account together with a faxed copy of the bank cheque, endorsed and stamped. On receipt of these documents, they undertook to forward the documents required under clause 3.7(2) to the purchaser's solicitor. The purchaser did not settle on 17 February 2004 and the vendor served settlement notices under clause 9 of the agreement for sale and purchase. The time for settlement was 5.00pm on 5 March 2004. The funds required to settle were electronically deposited into the trust account of the vendor's solicitors by 4.54pm on 5 March. It was acknowledged that there were cleared funds. After the transfer, the solicitors tried to confirm the transfer by fax but the fax machine was engaged. The confirmation arrived at 5.07pm. The vendor's solicitors cancelled at 5.04pm.
26. The High Court held that the letter of 17 February 2004 represented an agreed mode of settlement and that the purchaser had not met the requirements under the letter.
27. The Judge went on to hold that the parties had agreed that confirmation that payment had been made was part of the tender of settlement and that the agreement would not be completed until the fact of payment had been notified as agreed. The High Court had concluded that, because fax confirmation had not been received by 5.00pm, the vendor's cancellation was valid.
28. The High Court had also held that the transfer of funds by electronic means was not good performance under the agreement. The basis for this was the letter of 17 February which had specifically required the deposit by bank cheque. The claim for specific performance failed.
29. In the Court of Appeal the purchaser's appeal was allowed. Again, the court found that the letter of 17 February had contractual force. It held that the transfer of funds by electronic means was good payment under the letter of 17 February, because the letter contained no stipulation that a direct credit of a bank cheque was the only acceptable method of payment. In the court's view the letter was not intended to exclude clause 3.7 which required payment on or before 5.00pm. The court held that the irrevocable transfer of cleared funds on or before 5.00pm on the settlement date was good payment. It further held that notification and proof of payment was required, but was not an essential element of the obligations which the purchaser had to complete on or before 5.00pm. The purchaser had a reasonable time within which to notify the vendor of the payment after the payment had been made. The parties must have been taken to agree for a further reasonable period of time for notification because payment could have been made up to and including at 5.00pm. If payment had been made at 5.00pm, then faxed notification could not physically have been dispatched until after 5.00pm.

### **Supreme Court**

30. The Supreme Court held that there was no proper basis to conclude that the letter of 17 February was binding on the purchaser so as to require it to settle in the matter detailed in the letter. The letter made no provision that no other settlement method could be used, and the

purchaser's silence in relation to the letter until 5 March could not be said to amount to agreement to the conditions in the letter of 17 February in any event. The contractual provisions governing settlement remained as set out in clause 3.7. Paragraph 1 contained the obligation to "pay the balance of the purchase price". While clause 3.7(2) contemplated face to face settlement, it did not make that mode of settlement compulsory for the purchaser who could, in the court's view, elect for a remote settlement under which the purchaser makes payment of the settlement amount without concurrently receiving the documents specified in clause 3.7(2).

31. The purchaser was entitled under clause 3.7 to pay the purchase price in any form which legitimately constitutes a payment for this purpose. The court referred to its decision in *Otago Estates Limited v Parker*<sup>16</sup> in which it had held that, for the purpose of payment of the deposit under an agreement for sale and purchase, the requirement was for cleared funds (or a bank cheque as this was the practical equivalent of legal tender<sup>17</sup>). This decision related to the payment of a deposit under the REI/ADLS sale and purchase form and the court found it was equally applicable on settlement. A person entitled to payment was entitled to certainty of actual receipt of money. This could be achieved with the payment in the form of a bank cheque or some other form of transfer of cleared funds where there was no practical possibility of a reversal. In this case the evidence was that the transfer was irreversible, and the funds could have immediately been drawn upon. On this point, the court agreed with the Court of Appeal – there had been a valid payment under the contract.
32. However, the Supreme Court held that the purchaser was not entitled, by using remote settlement, to impose any "risk or disadvantage not present in the envisaged face to face settlement". Where there is a face to face settlement, the vendor has knowledge that cleared funds are available immediately on payment. Where a purchaser opted for a remote settlement, there was an obligation on the purchaser to give notice of the transfer before the deadline for settlement. This obligation is presumably to be implied on the basis of business efficacy (although the Court does not articulate the basis for this implication).
33. In this case, the purchaser failed to give notice to the vendor that payment of cleared funds had been made within the time limit for settlement and, accordingly, did not comply with the requirements for settlement under the settlement notices. Carrying out the obligation within a reasonable time after the settlement notice deadline had passed was not proper performance. To hold otherwise would "introduce a most undesirable element of uncertainty with vendors and provide room for much argument about how long after the deadline was acceptable as being close enough". The Chief Justice dissented on this point and on the result. In her view, there was no requirement to notify the vendor when payment was made to settle the transaction in clause 3.7 and there was no adequate basis to imply such a term where remote settlement was carried out. All that was required under clause 3.7 was payment within the time frame.
34. In its decision, the Court emphasises the need for certainty in the operation of important commercial agreements which are in common use.

#### **EXERCISE OF OPTIONS TO PURCHASE – PAYMENT – ADLS FORM**

35. As noted above, in *Otago Estates v Parker*, the Supreme Court held that, under the REI/ADLS standard form agreement for the sale and purchase of land, payment of the deposit could not be made by way of personal cheque. To fulfil the obligation of "payment" under the agreement, payment had to be made by way of cleared funds or a bank cheque. This, the court found, was the proper interpretation of the term "payment" under the standard form. The decision in *Otago Estates* has now been applied in the context of the exercise of an option to purchase land contained in a lease.

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<sup>16</sup> [2005] 2 NZLR 734

<sup>17</sup> *Williams v Gibbons* [1994] 1 NZLR 273 (CA)

36. Greenmount held commercial premises under a lease from Southbourne which contained an option to purchase the leased property in the following terms:

**47.1 Option to purchase**

The Landlord hereby grants to the Tenant or its nominee an option to purchase the property on the following terms: -

- (a) The option can only be exercised at any time within the first eighteen (18) months of the commencement date of the initial lease term in this Lease (time being of the essence).
  - (b) To exercise the option the Tenant or its nominee shall present to the Landlord within the aforesaid time limit, a signed and dated unconditional Sale & Purchase Agreement ("Agreement") with the following terms:
    - i. The form of the Agreement shall be the then current form of Sale & Purchase Agreement published by the Auckland District Law Society and the Real Estate Institute of New Zealand.
    - ii. The purchase price shall be \$3,500,000.00 plus GST if any.
    - iii. The deposit shall be \$350,000.00 and shall accompany the Agreement.
    - iv. The settlement date shall be twenty-eight (28) days after the date of the Agreement.
    - v. The interest rate for late settlement shall be 11%.
    - vi. If the nominee of the tenant fails to complete the Sale & Purchase Agreement the Tenant will remain liable for all the obligations on the part of the purchaser under the said Agreement.
    - vii. The Agreement shall be subject to this within Lease.
37. The last day for the exercise of the option was 31 October 2005. Greenmount's solicitor couriered the REI/ADLS standard form agreement completed and signed by Greenmount, together with a personal cheque drawn on Greenmount's account for \$350,000.00 to Southbourne's solicitor on 27 October 2005. The affidavit evidence showed that Southbourne's solicitor had first met with his client to consider the tendered agreement and cheque on the afternoon of 31 October 2005. The affidavits did not give an account of the discussion save that the solicitor was instructed to obtain counsel's opinion. There was no further communication until 4 November 2005 when the solicitor for Southbourne informed Greenmount's solicitor that, in its view, the option had not been properly exercised.
38. Greenmount asserted that the option had been validly exercised and sought orders for specific performance on a summary judgment application. In the courts below, Southbourne raised various arguments to resist the application. The main focus in both High Court and Court of Appeal was a clause which had been added to the tendered ADLS form in relation to GST. The High Court held that this additional clause meant that there was no valid acceptance under the option and declined the application for summary judgment. The Court of Appeal rejected this on the basis that the additional clause did no more than confirm the position as to GST under the standard form agreement. In relation to the tender of a personal cheque, the Court of Appeal found that the personal cheque was not valid tender under the option, but held that the vendor, Southbourne, was estopped from asserting that the personal cheque was an invalid method of payment by reason of its actions from the time when it received the cheque. This finding was based on a passage in the Supreme Court's reasoning in *Otago Estates Limited v Parker*:

A vendor who takes a personal cheque or knowingly allows his or her agent to do so, without objecting specifically to the form of tender of payment as soon as he or she is aware of it, must expect to be taken to have dispensed with the need for payment through legal tender or its equivalent. The vendor would then be estopped from asserting that the mode of payment did not comply with the contractual requirement.

39. The Court of Appeal allowed the appeal and granted the application for summary judgment. Southbourne sought leave to appeal on both the GST point and the *Otago Estates* point. The Supreme Court granted leave solely on the *Otago Estates* point.
40. On behalf of Greenmount it was submitted that the exercise of the option did not, on the true construction of clause 47, require the tender of the deposit. The option was exercised by tendering the agreement. If that was not accepted, it was submitted that the tender of a personal cheque as payment of the deposit was, in the circumstances on the true construction of the offer, a valid exercise of the option. Further, it was submitted that the Court of Appeal had been correct to conclude that Southbourne was estopped from denying that the personal cheque was valid tender.
41. The Supreme Court rejected the argument on the construction of the option, and held that the natural ordinary meaning of the option was that payment in the form of the deposit was required to accompany the tendered agreement and that both agreement and deposit were required to accept the option. The court also held that payment of \$350,000 meant payment in either cleared funds or a bank cheque.
42. The Supreme Court then went on to consider what it regarded as the heart of the appeal, namely, whether, on a summary judgment application, the Court of Appeal had been correct to find that Southbourne was estopped from asserting that the personal cheque was not valid payment under the option. The court held that, although the cheque and agreement had been tendered to Southbourne's solicitor, there was no general authority in the solicitor to accept or reject the cheque which meant that from the time he had received the cheque, there was a duty to make Southbourne's position clear in terms of *Otago Estates*. The court then held that, on the affidavit evidence before the court, it was not possible to say, with the required certainty for summary judgement to be granted, that Southbourne was estopped by its actions in the period before the time for acceptance expired. Accordingly, the case had to go to trial to decide whether there was a binding estoppel.
43. This decision (and *Otago Estates*) involve interpreting what the commercial agreements mean by referring to "payment" and/or by providing for payment of a sum of money. The Supreme Court was, of course, well aware of the general commercial acceptability of paying by personal cheque, but it did not accept the argument on construction that the option in Greenmount (or the lease in *Otago Estates v Parker*) should be construed as meaning that "payment" could include "payment" by personal cheque. This position is tempered by the estoppel referred to in *Otago Estates* which may prevent a person who takes a personal cheque from asserting his or her strict legal rights to receive payment in the legal sense. This estoppel represents the manner in which the court has chosen to acknowledge the general commercial expectation in relation to payment by personal cheques.
44. The question of what is meant by "payment" in a contract is a matter of construction. In the context of the contractual documents under consideration in these cases, the Supreme Court has adopted the strict legal sense of payment. Whether a contract will permit "payment" by means of the tender of a personal cheque (which is not, of course, payment in the legal sense) will remain a matter of the construction of that document, but these decisions indicate that, in our courts, "payment" will generally be held to mean payment in the legal sense of the transfer of money to the payee. Parties wishing to provide for a broader approach to payment should stipulate for this in their contracts, particularly where the contract contains provisions requiring payment within a certain time frame.

## CONSTRUCTION OF CONTRACTS

45. In *Wholesale Distributors Limited v Gibbons Holdings Limited*,<sup>18</sup> the Supreme Court dismissed an appeal concerning the interpretation of the terms of a deed of assignment of a lease. The dispute concerned the interpretation of a clause in a deed of assignment under which the assignee covenanted with the head lessee that it would be directly responsible to pay the rent due for the "remainder of the lease". The question was whether this covenant related to rent under the lease which was in being at the time of the assignment, or also included the payment of rent under a further lease which was to be entered into by the assignor with the lessor when the current lease ended.
46. While a literal approach to the wording in the deed of assignment would lead to an interpretation which referred only to the existing lease, the Supreme Court agreed with the majority of the Court of Appeal, that, in the commercial context, where the party assigning its interest was selling its business interest in the property under lease, and the assignee promised under the assignment to indemnify the assignor against any claim for rent under current and further lease, the interpretation which made business sense had to be preferred to the literal interpretation. Accordingly, the obligation undertaken by the assignee to the head lessor under the clause in the assignment was to be interpreted as meaning that it would be liable directly for rental under current and further lease. The Court acknowledged that there was semantic force in the literal interpretation of the clause, and the decision, in the Supreme Court was seen by Justice Tipping as close to the line between interpretation and rectification. However, the Court found that the literal construction, which was the basis of the judgment of Chambers J in the Court of Appeal, did not "reflect what the parties were seeking to achieve when they entered into the deed of assignment". The case is an example of a literal meaning of the words used having to give way to an interpretation which accorded with good business sense.<sup>19</sup>

### Subsequent conduct

47. The interpretation which gave a wider meaning to the words used in the deed of assignment was also said to be supported by the subsequent conduct by the parties. This point gave rise to further general consideration by the Court of the question whether the courts can examine the conduct of the parties after the agreement under consideration was entered into, as an aid to construction of the agreement. Three members of the Court made comments which generally supported the possible admissibility of such conduct on questions of interpretation, although only Justice Thomas found the conduct of assistance in the particular case. While Justice Thomas appeared to favour a broad admission of any subsequent conduct, Justice Tipping underlined that the conduct had to be the mutual conduct of both parties to the agreement so as to provide objective evidence of the parties' intentions. Justice Tipping noted that this approach to the admissibility of post – contract conduct was similar to the admissibility of conduct to establish an estoppel by convention.
48. While broadening the material which may be admitted on interpretation issues, the Court was anxious to underline the objective nature of interpretation exercises. In most cases, post-contract conduct will not have the necessary mutual character to be admitted, and, even if there is such mutual conduct, it may well be equivocal, and not clearly point to a particular meaning having been adopted by the parties.

### Supreme Court criteria for leave

49. As can be seen from this review, a number of contract disputes have reached the Supreme Court. The cases have concerned matters of general principle or the interpretation of standard forms under which commercial property is sold or leased. For leave to be granted in contract

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<sup>18</sup> *Wholesale Distributors Limited v Gibbons Holdings Limited* [2007] NZSC 37

<sup>19</sup> See, the well known *dictum* of Lord Diplock in *Antaios Cia Naviera SA v Sales Redererna AB*, [1985] AC 191 at page 201.

cases, the intending appellant will generally establish that it is in the interests of justice to grant leave by showing that there is a matter of general commercial significance involved, or that the decision in the courts below is so wrong that the miscarriage of justice ground is applicable<sup>20</sup>. The general commercial significance of an appeal may be established by the fact that the case concerns the interpretation of a standard form of contract in regular use, or that the case concerns the development or application of an important general principle of contract law. The fact that a case is highly significant commercially for the parties will not satisfy the requirement for the grant of leave. Cases which are "one-off" disputes on the meaning of a contract or document will not generally meet this test for leave, unless an issue arises concerning the general principles applicable to the exercise of interpreting a contract. The recent decision of the Supreme Court on the leave application in *Shell Petroleum Mining Company Ltd v Todd Petroleum Mining Company Limited & Ors*<sup>21</sup> provides an example of a large dispute which did not satisfy the criteria. In this matter, which concerned an intended appeal relating to the removal of Shell from its role as operator of the Maori field under the relevant contractual agreements, the Supreme Court declined leave to appeal, notwithstanding the commercial significance for the parties and large sums of money in issue, because a question concerning the interpretation of the contractual rights between two parties did not satisfy the requirements for leave.

**Paul David**

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<sup>20</sup> For the grounds upon which leave to appeal may be sought, see section 13(2), Supreme Court of New Zealand Act 2003.

<sup>21</sup> [2008] NZSC 36