A No 112/82

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN CITY REALTIES (DEVELOPMENTS) LTD

Plaintiff

AND INDUSTRIAL HOLDINGS LTD

Defendant

Hearing: 14-18, 21-23, 28 and 29 November 1983
1- 2 March 1984

Counsel: D L Mathieson and G J Burston for Plaintiff
G P Barton and J G Fogarty for Defendant

Judgment: 31/5/84

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JUDGMENT OF EICHELBAUM J

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## Background

The Printing & Packaging Corporation Ltd (PPL) is the successor to the stationers who in recent years have traded under the name Whitcoulls. The latter have long occupied retail premises fronting Lambton Quay. At the rear the property extends to Gilmer Terrace. Erected on the rear portion was a building, parts of which had reached the end of their useful life. PPL decided to redevelop the building, and the plaintiff company undertook so to arrange. The plaintiff was a wholly owned subsidiary of City Realties Ltd. At the time Brierley Investments Ltd had a substantial although not a majority stake in both City Realties Ltd and PPL. For purposes of the present narrative, for the most part no distinction arises as between City Realties

Ltd and its subsidiary, and except where it matters, I will use the abbreviation CRL to refer to the plaintiff.

## The development contract

The defendant (IHL) carried on business as a builder and developer from a Christchurch base. On 14 July 1981 CRL and IHL entered into a contract under which IHL undertook to redevelop the property for a consideration of $672,000, later amended to $679,500. Briefly, the following was involved. CRL undertook to arrange the demolition of the older portion of the building. Then, the specifications called for IHL to construct a new wall on the north face (the space formerly occupied by the demolished portion), generally refurbish the existing three floors, superimpose a fourth floor, install a lift, and create car parks on the north and south sides. The price quoted was a fixed one in all respects except for agreed variations. The contract had annexed to it preliminary plans and specifications only. IHL was to obtain CRL's approval to final detailed plans and specifications, such approval not to be unreasonably withheld.

At the time of entering into the development contract CRL already had a tenant, Brickell Moss & Co, willing to occupy the entire top two floors. It was contemplated that the tenancy would commence on 1 March 1982. CRL thereupon entered into a contract with PPL for the provision of the entire project for

a fixed price of $890,000. The document was not put in evidence, but I infer that in general terms it required CRL to provide a fully completed building, tenanted at least in part.

The CRL - IHL development contract (to which I will refer as the development contract for brevity) did not contain any explicit provision as to a completion date. The terms of the written contract required IHL to obtain all necessary approvals, which of course included a building permit from the local authority, the Wellington City Corporation (WCC). Construction was to commence as soon as the permit had been issued. Work was then to continue with all reasonable speed so as to complete the building within five calendar months of the issue of the permit, subject to delays caused by specified excepted causes or other matters beyond the contractor's control.

## The encroachment

The site in question had a peculiarity. Adjoining land formerly part of the same property had been sold to the Bank of New South Wales around 1970, when the Bank erected a building fronting Lambton Quay, adjacent to the Whitcoulls shop. This transaction left the building now to be redeveloped encroaching on the Bank's newly acquired land to the extent of some 1.2 metres. A deed entered into at the time, involving additional parties and a number of other considerations, gave formal permission for the encroachment. Arising out of the proximity of

the two properties, the redevelopment scheme raised two issues. First, the addition of a new floor was at least arguably outside the scope of the encroachment permitted by the deed. Secondly, the plans envisaged that (in order to increase the available floor area) the new fourth storey was to be cantilevered out and thus in any event would encroach on the Bank's air space by an additional 1.5 metres. These aspects were apparent from the plans with the result that the WCC would not issue a building permit until the Bank's consent had been obtained. In a letter dated 29 July 1981 CRL undertook to approach the Bank for its consent prior to the commencement of construction.

The space affected by the proposal was of no intrinsic interest to the Bank. It was above a driveway giving access to the Bank's building from the rear. But there was a history, of which CRL's manager, Mr Patterson, was unaware. The impetus for the 1970 transaction was that the Bank needed to acquire some land from Whitcoulls so as to have rear access to its proposed new building. As part of the consideration, the Bank permitted Whitcoulls to occupy a portion of the ground floor of its building rent free for the life of the building. This enabled Whitcoulls to enlarge their retail premises by some 900 square feet by extending into the Bank's adjacent property. I will refer to the area in question as "the retail extension". Mr Patterson drily said this seemed an onerous arrangement and the Bank had a long memory. Now that the roles were reversed, and Whitcoulls' successors wanted something from the Bank, it took the opportunity to

raise the issue. I add, with reference to Mr Patterson's remark, that the Bank seemed quite willing to compensate Whitcoulls for the loss of the rent-free space; what it wanted to achieve was, ultimately, to regain it for its own use.

Mr Patterson wrote to the Bank for its consent on 20 August 1981. The Bank replied immediately that it was taking legal advice, and that its agreement should not be anticipated. On 13 October the Bank wrote again, stating that it would not give permission. On 27 October, there was a meeting between Mr Patterson and Mr Egan, the Bank's officer in charge of premises. It is clear that while the project was in its early stages Mr Patterson took the view that the obtaining of consent was a formality. He learned of the 1970 background when he enquired of Mr Crimp, PPL's secretary, on receipt of the Bank's letter of 13 October. At the 27 October meeting it was made plain to him that the retail extension was the real reason for the objection.

The general thrust of Mr Patterson's evidence on this aspect was that as a result of the 27 October meeting, he knew he could secure the Bank's consent by relinquishing the retail extension. That proposition I accept. It was supported by the evidence of Mr Egan, who was an entirely reliable witness. On that base, Mr Patterson sought to convey the view that so far as the question of obtaining the Bank's consent was concerned, that problem had then been overcome, and from that point of view the project was ready to proceed. Indeed he went so far as to maintain that from 27 October, he had what he described

as "an agreement in principle" with the Bank. With that thesis, I am unable to agree. I will proceed to develop my reasons.

## Negotiations with the Bank

Although Mr Patterson had correctly pinpointed the reason for the Bank's objection, and the key to overcoming it, simply to agree to quit the retail extension could not have been a palatable solution. In the first place the space was not in Mr Patterson's control; to give it up required the authority of the Managing Director of PPL. There was no evidence regarding the potential inconvenience and loss of business to Whitcoulls' shop but in monetary terms, the retail space was said to be worth $20,000 per annum in rent. So it was not surprising to hear Mr Patterson say that he wished to prolong the negotiations with the Bank so as to conclude them to maximum advantage. To that end, some discussions were held with more senior officers of the Bank, evidently to endeavour to obtain a more favourable bargain than was offering through Mr Egan. In a letter dated 26 November PPL, writing to the Bank direct, offered to open discussions for the handing back of the retail space at the time of the redevelopment of Whitcoulls' premises, a point likely to be reached within a few years. The consideration to be paid to Whitcoulls for relinquishing the space was to be determined by negotiation. Evidently the Bank had proposed that

there be provision for arbitration, as PPL said that it was not prepared to agree to that course. The Bank replied on 3 December insisting on an arbitration clause, and requiring that the arrangements be recorded by a formal deed. That PPL did not find this immediately acceptable is evidenced by the fact that as late as 24 December there was a discussion between an officer of the Bank, and the Managing Director of PPL, at PPL's seeking, the object of which could only have been to endeavour to obtain better terms than had been required by the Bank to date.

On 13 January CRL wrote to the Bank conceding the requests for both the arbitration clause and the deed. The Bank wrote to PPL cautiously seeking an assurance that that indeed represented PPL's position. PPL did not respond for about three weeks. On 4 February it replied with the required confirmation. The Bank by letter dated 8 February informed the WCC that it withdrew its objection to the issue of a building permit.

## Mr Patterson's view of hold-up

Under cross examination, when documents were put to him from his company's own files, some of which were not made available to the defendant until the trial was in progress, Mr Patterson had to agree that while negotiations with the Bank were proceeding, he had consistently blamed the Bank,

and only the Bank, for the delay in commencing work. He did so in reports to his own Board, in writing to his solicitors, and in communications with PPL. He implied the same in his letters to the Bank of 26 November 1981, and 13 January 1982. It is significant I think that in evidence he claimed that he told Mr Wyatt, the Brickell Moss representative, otherwise but Mr Wyatt, whose evidence I accept, denied that Mr Patterson had attributed the delay to IHL. This is of importance because on any view, it was clear that Brickell Moss's plans were being disrupted through no fault of their own, and I am sure that Mr Patterson would have proffered any credible reason that might explain the situation. Even as late as 26 February, when reporting to PPL and his own Board, Mr Patterson referred only to the Bank's objection, and said nothing against IHL, this at a time when on his own showing he had become disillusioned with IHL and was exploring other alternatives for carrying out the project.

Faced with the numerous occasions when he had stated that the delay was attributable to the Bank (on one occasion he wrote that it had "blackmailed" CRL) Mr Patterson said, or was compelled to say, that he had been under a misapprehension in this respect. He said that this continued until he learned of information obtained during preparation for trial as to the course of events disclosed by the Council's records. In short he maintained that at the time, that is late 1981 and early 1982, he was under the impression that the Bank's attitude had in fact been the only matter holding up progress. That of course is consistent with what he said and wrote at the time. It was the

plaintiff's case at the trial however that in truth it was rather factors within the control of IHL, relating to the satisfying of Council requirements, that had delayed the issue of the permit. It is necessary therefore to turn to the evidence in that regard.

## Dealings with local authority

The obtaining of permission from the local authority involved two distinct phases, town planning consent and a building permit. The former was granted on 14 August, tagged (as is generally the case) with various conditions. Two of these were the subject of continuing submissions or negotiations, the Council's requirement of a verandah, and the necessity for agreement to be reached on the rental of the Council's air space where a portion of the proposed fourth floor overhung the footpath. Neither had been resolved when in March 1982 CRL dismissed IHL (I use that as a convenient description, and without intending to pre-empt any of the issues). I am satisfied that the verandah and the lease of the air-space were irrelevant to the delay in the commencement of building operations. First, it was CRL's responsibility to resolve these matters. Secondly, had they presented any real obstacle, they could speedily have been overcome. The evidence in this regard was quite clear and I do not think it necessary to deal with these aspects in any greater detail.

The Council's procedure for the processing of a building permit was that this was done in a number of separate departments; in some cases simultaneously, in others successively. The application for the permit was received on 10 September 1981. It was referred first to the town planning department, and to the District Engineer's. The former gave approval on 15 September, subject to the addition of the verandah. The District Engineer did not give approval until 15 December. His set of papers then went on to the structural engineer. The latter approved on 18 January 1982, subject to some conditions. At the time the building department of the Council was busy. However, on average a permit application would have taken two to three months. If pressure was applied it could be got through more quickly. Eight weeks would not have been an unreasonable time to allow. In fact, so far as the senior building inspector recalled, no requests for urgency were made. The evidence did not explain the apparent delay in the District Engineer's office. However the senior building inspector said, and it was not challenged, that had pressure been applied the matter could have been hurried through that department. At the same time the application was being dealt with in the plumbing and drainage department which raised a number of points that needed attention by IHL. It is possible that the District Engineer's office was aware of this. At any rate there is no reason to think that the delay in this department was of any significance. So far as structural matters were concerned, everything was straightforward.

Turning to the plumbing and drainage side, the assistant chief plumbing and drainage inspector, Mr Bevin, deposed that on 6 October he rang IHL with a long list of points that required attention, none of intrinsic difficulty. IHL responded promptly, dealing with most of them satisfactorily. However, there were a couple on which Mr Bevin had to write back. Then, disagreement arose over the type of urinal to be supplied. IHL wished to install a wall-hung model, which was unacceptable to the Council. IHL took the argument to the point of lodging an appeal to the Health Department, which ultimately was withdrawn. I am satisfied that so far as plumbing and drainage requirements were concerned, IHL could have obtained approval on or about 4 December 1981. The question of the urinals, and a point relating to sewerage which the Council raised belatedly, remained to be dealt with after that date but had there been a pressing desire to commence work on the building I am satisfied that these could readily have been overcome, or alternatively the Council would have given an approval subject to suitable conditions that protected its position.

It would be fair to say that on the evidence, in the latter part of October and throughout November, IHL did not hurry to meet the relatively minor requirements that stood in the way of plumbing and drainage approval. To understand why this was so it is necessary next to examine the interchanges between CRL and IHL in greater detail.

Interchanges between CRL and IHL

By way of background, I mention that Mr Smith and Mr Patterson had known each other for a few years, and had had previous satisfactory dealings. In a letter of 8 June 1981, which set out its proposal, IHL spoke of a period of eight weeks to develop full working drawings and a construction period of five months at most. It was made clear that the period required to obtain a permit was in addition. The permit application was despatched almost exactly eight weeks from the execution of the development agreement. The fact that the Bank's consent was not immediately forthcoming was then already known to CRL. As has been seen, CRL did not attack that problem with any sense of urgency. For IHL's part, it allowed a few items to drag along but I am satisfied that they could and would have been disposed of immediately had they been the only matters holding up progress.

It is not certain just when Mr Smith learned of the problem with the Bank. I believe he knew in September that consent had not yet been obtained. It is also likely that he was made aware of the Bank's letter of 13 October, in which it declined consent, at or about the time of receipt. At some stage, possibly around this time he caused his own Bank Manager to make a discreet enquiry (as it happened, IHL banked with the Bank of New South Wales) but I do not think that he could have known the exact nature of the Bank's attitude any sooner than Mr Patterson learned of it, that is to say on 27 October. There must have been immediate communication between CRL and IHL because by 30

October we find IHL writing to say that it understood there might be a delay arising out of the rejection of the proposed overhang, and redesign associated with it. IHL said :-

> " . . . it will be necessary for us to recover all escalations in costs prior to commencement of construction. "

Mr Patterson did not reply. He said that he did not take the letter seriously, as Mr Smith (who was not the writer) knew that his request for a redesign of the top floor was just a "strategy" and that the intention always remained to proceed with the original design. I am afraid I am unable to accept Mr Patterson's evidence on this point. Given that he perceived, on 27 October, that he could obtain the Bank's consent by relinquishing the retail space, he did not then know whether such course would be acceptable to PPL. The long delay before PPl finally committed themselves to it suggests that they were not at once receptive to the idea. As at 27 October, Mr Patterson needed an immediate fall-back position : if he was going to have a long drawn out negotiation (his description) he needed something to bargain with; otherwise, in the vernacular, the Bank had him over a barrel. I have no doubt therefore that at some time shortly after the 27 October meeting he asked IHL to redesign the fourth floor on a basis that would give Brickell Moss the same floor space but would remove the Bank's ground of objection. On 4 November

CRL sent IHL a copy of the 1970 deed. Mr Smith checked the meaning of Clause 15 with IHL's lawyers who confirmed that the permitted encroachment applied to the existing structure only. IHL must have set to work very quickly to produce a new design of the fourth floor that would not require the Bank's consent. The result, as hinted in a letter to CRL dated 20 November, was of somewhat peculiar appearance, owing to the problem caused by the extent to which the existing building already encroached on the Bank's property. The east wall of the fourth storey had to stop at a point short of the end wall of the rest of the building on that side whereas on the other three sides the new floor overhung the existing walls. The building was in a position where it was overlooked by a number of high rise office blocks, and the 20 November letter made it apparent that IHL's architect was understandably concerned about the appearance. The letter stated that amended plans had been sent to the WCC, and sought permission to proceed with the detailed redesign work, which was considerable. IHL also stipulated for a number of conditions before it would start on the new design. In particular, IHL stated that the price would have to be renegotiated. Mr Patterson had to agree that he found it confusing to receive a letter from Mr Smith couched in terms that did not seem to recognise the "strategy" of which he claimed Mr Smith was aware. A similar situation had arisen in respect of the letter written by Mr Worthington on behalf of IHL on 30 October; Mr Patterson said he assumed that Mr Smith must have failed to pass on his knowledge of Mr Patterson's intentions, yet it emerged that the letter had been written on Mr Smith's instructions. Mr Patterson said he had told Mr Smith he required

the redesign as a means of expediting the building permit. Mr Smith on the other hand said that Mr Patterson, while preferring to be able to proceed with the original design, needed the revision as a possible solution to the problem he was now facing. I prefer Mr Smith's account of events on this point. Mr Patterson now had a further problem in that IHL were reluctant to go ahead with the new design except on terms to which Mr Patterson would not wish to commit himself. As had been the case with Mr Worthington's letter, on receipt of the second letter, he did not respond formally. Instead, at a meeting on 24 November, he raised another possibility, namely to proceed with a two part project : first the renovation of the bottom three floors, then the fourth; obviously in a desire to obtain time in which to conclude the negotiations concerning the fourth floor encroachment, or any alternatives, to best advantage. Mr Patterson said that IHL would be indemnified in respect of any extra costs. Within a few days, as a result of various practical difficulties, this proposal was dropped. Then Mr Patterson requested that IHL should get under way with the original proposal. He said that he believed the Bank's consent was imminent. This ties in with the letter that PPL wrote to the Bank on 26 November, of which Mr Smith of course was unaware at the time. It will be noted that that letter concluded with the proposition that if PPL's proposals were not acceptable then the encroachment would be deleted. The proposal made by PPL which it will be recalled did not include an arbitration clause was no more than an agreement to enter into negotiations. I think it was hopeful of Mr Patterson to assume, if he did, that the Bank's

approval was imminent. Mr Smith, possibly taking a charitable view, said that he would accept that Mr Patterson so believed; he himself, having appreciated the strength of the Bank's bargaining position, on the one hand, and the advantageous terms achieved by Whitcoulls in 1970 on the other, did not think it likely that there would be an early rapprochement. Mr Smith's doubts are clearly demonstrated by the fact that on 26 November, at his request, his partner Mr Page telephoned Mr Egan with whom he was acquainted from past dealings. Mr Egan told him that it would be a long time before the Bank's problem was resolved. There is independent evidence that supports the view that Mr Smith's perception of the position was the more correct, and indeed that Mr Patterson at the time was not optimistic that matters would quickly be concluded. In December Brickell Moss & Co, who by reason of talk they had heard of some difficulty (the rumours strengthened by the lack of any activity on the site) sought a meeting with Mr Patterson. This took place on 18 December when Mr Patterson's explanation was that he was being held to ransom by the Bank; no other reason for the delay was proffered nor any promise of a ready solution as Mr Wyatt, whose evidence I prefer where Mr Patterson's is in conflict, departed with his worst fears confirmed and the thought in his mind that the firm would have to look at alternative arrangements for its accommodation. So if, as the plaintiff contended, Mr Smith took it on himself to form an unnecessarily gloomy view of the situation, here was another participant altogether, uninfluenced by Mr Smith, reaching the same conclusion entirely on the basis of Mr Patterson's own explanations. As an

incidental matter it emerged from Mr Wyatt's evidence that Brickell Moss were at no stage approached about the possibility of a redesign to their proposed fourth floor space. That gives some insight as to how Mr Patterson worked, and I do not make that comment in a sense wholly unfavourable to him. Clearly he left no stone unturned in his efforts to find the least onerous solution to the unexpected obstacle that the Bank had placed in his way. However, doubtless for sound commercial reasons, from time to time he pursued alternative courses simultaneously, without taking those with whom he was dealing fully into his confidence.

When, around the end of November, Mr Patterson asked IHL to get the original proposal under way, Mr Smith responded that it was not practicable to let subcontracts and make preparations to put men on the site when there was no certainty that the Bank's consent would be forthcoming. It was of the essence of Mr Smith's intentions as to the carrying out of the work that he would plan and organise the subcontracts and the contractor's own portion of the work so as to have a maximum number of trades working at once and, as he put it, getting in and out quickly. Further, to proceed in the absence of a permit would leave IHL at risk that, for example, structural steel would be fabricated and delivered and would have to be paid for when it might turn out not to be wanted for some time or at all. He said that IHL would be prepared to do this if it was indemnified for costs. Mr Patterson's response was not to worry about it, he would indemnify IHL. Mr Smith however took the view that his Company would

require a formal indemnity. Mr Patterson said in evidence that Mr Smith might well have made such a request. I find that he did. Mr Patterson, following I believe a policy of keeping as many balls in the air as possible, made no response.

In the meantime of course the Bank had replied that PPL's proposal of 26 November was unacceptable. As already noted, it was quite some time before CRL responded. I really cannot accept the proposition, implicit in Mr Patterson's evidence, that at this stage he was proceeding on the basis that the Bank's consent would be obtained simply by PPL agreeing to relinquish the retail extension, and that the building permit was held up for reasons attributable to IHL. No evidence was called from PPL and obviously I have been left in the dark as to the exchanges between PPL and CRL on the issue, and in regard to internal consideration given to the problem by PPL. However, the events that occurred after receipt of the Bank's letter of 3 December clearly showed that PPL was not yet ready to surrender. On 14 December CRL sought an opinion from its solicitors on the legal implications of the proposal for adding a floor. In the confirming letter Mr Patterson said that "as you are aware" the Bank had already caused substantial delay. The aspect on which advice was sought has, I believe, considerable significance. It was whether Whitcoulls could add a floor to the building if the addition did not encroach over the right of way. In other words Mr Patterson was still keeping alive the alternative design. This was either just for bargaining purposes with the Bank, or as a real alternative that might be capable of being made accept-

able to Brickell Moss. The point is that whichever it was, the fact that such an enquiry was still being pursued is simply irreconcilable with the proposition that resolution of the problem was an impending formality. I note too that on 17 December IHL forwarded to the WCC revised structural calculations referring to the new proposal for the fourth floor. Clearly CRL had not yet instructed IHL to abandon that scheme.

## Cause of delay to date

Conscious as I am that this has become a very lengthy account, it may be convenient if I summarise my conclusions to this point.

In the period September-November inclusive, the basic cause of the delay was the Bank's objection. This led to IHL not exerting any pressure on the WCC to expedite the building permit. As to the latter, there were no matters of real difficulty, other than the absence of consent by the Bank, which would have impeded its progress. If during this period, or indeed subsequently, there had ever been a realistic prospect that work could shortly commence, the permit could have been ob tained readily and promptly, by IHL either conceding points outstanding, such as the urinals, or procuring its issue on the basis that it was "tagged" in a way that preserved the rights of the parties to pursue such points while permitting the project to get under way.

In December the same position continued but with a variation. Mr Patterson now wished IHL to start, on the basis that he was confident that the Bank's consent would be obtained shortly. Mr Smith was not prepared to take the risk that Mr Patterson's confidence was misplaced, leaving IHL to carry costs that had been incurred prematurely. Mr Patterson would not give a written undertaking to bear such expenses.

Period late December - 4 March 1982

The narrative resumes just prior to Christmas, at which time CRL's solicitors gave their advice on the 1970 deed. There followed, as mentioned earlier, a meeting between PPL and the Bank, on 24 December.

Immediately after the vacation there was progress in that by 13 January Mr Patterson was able to write to the Bank to concede both the arbitration clause and the request for a formal deed. Although it was not until 4 February that PPL gave the confirmation then required by the Bank, it was clear to Mr Smith from the time discussions resumed in January that now the Bank's consent was indeed imminent.

On 22 January Mr Smith and Mr Patterson met in Christchurch. By now the building industry was no longer in the depressed state of the previous July. Mr Smith informed Mr Patterson that his earlier scheme of bringing Christchurch subcontractors to Wellington was no longer practicable. I think the

conflict of evidence regarding events at this meeting is more apparent than real. I noted that Mr Patterson was careful and consistent in the words he ascribed to Mr Smith, and as to his attitude at this time, and that these do not really differ from the impression that Mr Smith gave himself. The expression that Mr Patterson used several times to describe Mr Smith's attitude was that he would be unable to complete the contract at the original price. When asked whether he put it to Mr Smith that he should proceed on the original basis, his reply was "I probably suggested that", while on another occasion he avoided a direct answer by saying "I don't think I ever gave Mr Smith the impression that I would be releasing him from his fixed price contract". Mr Smith on the other hand said Mr Patterson constantly did just that : he appreciated conditions had changed drastically since July, and said he did not expect IHL to lose money on the deal. I will need to examine events at this time and their legal significance, in detail when considering the defences to the action. For the moment it is sufficient to say that Mr Patterson did not commit himself to any course of action, except to agree that IHL should proceed to see what prices it could obtain for the necessary subcontracts. Since Mr Smith maintained that it would no longer be practicable to use Christchurch subcontractors as originally envisaged, Mr Patterson offered to assist IHL to get in touch with Wellington firms who might be suitable.

On 2 February, having obtained subcontractors' names from CRL, IHL wrote to them seeking quotations. The letter requested a reply within 10 days but some of the subcontractors sought further time which was granted. Little evidence was given as to the

response, but such as there was showed that one reply was obtained by telephone as late as 1 March, while another, in writing, was dated 27 February. The latter was in respect of a major item, the windows, involving some $125,000.

There was no dispute that meetings took place between Mr Smith and Mr Patterson on 22 January, in Christchurch, and in Wellington on 1 March. There was no clear evidence of any intervening meeting. In the pleadings the defendant referred to one in early February, but the events said to have happened on that occasion clearly occurred on 22 January. Mr Patterson referred to a "February meeting" in his evidence, but in the context of an occasion when Mr Smith put up a price of $906,000; this was an obvious reference to the meeting of 1 March. In this passage of his evidence Mr Patterson referred to two meetings, the list of subcontractors being supplied between the two. However, after carefully re-reading the evidence, I am satisfied that about mid-February, there was either a further meeting, or at least a telephone conversation, in which Mr Smith discussed with Mr Patterson the results of such of the subcontractors' responses as were then to hand. Otherwise, the apparent gap in events between the meetings of 22 January and 1 March becomes inexplicably long. I am sure that sufficient quotations or estimates came in to confirm Mr Smith's opinion that he could not go ahead on the basis of the original price, and that he told Mr Patterson as much. That information led Mr Patterson to commence to explore alternatives, and is consistent also with the contents of his letter to PPL of 26 February, in which he said that IHL had "recently" told him that they would be

unable to complete at the contract price.

There is an absence of any signs of pressure on IHL in this period. Part of the time, Mr Patterson was preoccupied with an investigation by the Securities Commission following a take-over. However, my assessment is that following the 22 January meeting, Mr Patterson realised there would be problems in having the work carried out on terms that were reconcilable with the figure of $890,000 in the CRL-PPL contract. One possibility was to seek an increase from PPL which would enable him to negotiate a new deal with IHL. From Mr Worthington's evidence I accept that at the 22 January meeting Mr Patterson had it in mind to do that, or at least to feel out PPL's reaction. I think there are hints of this in several contemporary documents : Mr Patterson's report to his Board made on or about 26 January (which would have been seen by his Chairman who was also the Chairman of PPL), the Board minutes of 1 February, and the letter Mr Patterson wrote to Mr Crimp, PPL's secretary, dated 8 February. Evidently Mr Crimp interpreted the signs the same way as he replied immediately to say that PPL would expect CRL to hold to their fixed price. At this point, as I see it Mr Patterson was left with little option but to endeavour to have the project completed at the original price, or to proceed on some other course that would allow CRL to show a profit.

Mr Smith said that at the 1 March meeting, Mr Patterson told him he had tried to get PPL to agree to an increase, but had been rejected. When asked about the topic Mr Patterson made a somewhat obscure reference to Mr Cushing, the person who was chairman of both companies. He may have meant that his subsequent course

was influenced or dictated by the latter. At any rate, soon after receiving Mr Crimp's discouraging response, and confirmation from Mr Smith that he could not hold to the original price, Mr Patterson turned his thoughts in other directions. He realised that he would have to be ready with an alternative, either as a means of bargaining with IHL, or as a fall-back position. He had a meeting with the principal of another construction company on 15 February. On 23 February he consulted Mr Cardiff, a partner in a firm of Wellington quantity surveyors. I should state now that I accept Mr Cardiff's evidence as to the events regarding which he deposed. Basically, at that stage Mr Patterson was seeking advice whether to persevere with IHL or get in another contractor, and if so, how. About a week later Mr Patterson enquired from Mr Cardiff as to the adequacy of IHL's plans and specifications.

To round off the topic of events during January-February, I add that there may well have been little or no communication between the parties in the second half of February, while Mr Patterson explored alternatives. Mr Smith spoke of an uneasy silence; he thought that this followed the meeting of 1 March, but the interval between that meeting and the 4 March letter was so short that I am more inclined to think that the silence preceded the meeting. It would also serve to explain why, when Mr Patterson called for that meeting, IHL were not prepared for it, and had to hurriedly complete their work of putting a new price together.

Probably because Mr Cardiff had pointed out that there were advantages in persevering with IHL, Mr Patterson sought a further meeting with Mr

Smith. This took place in Wellington on 1 March. As just mentioned it seemed to catch Mr Smith unprepared as he had to ask his quantity surveying department to put together an up to date estimate of cost urgently. They rang various figures through to Mr Smith while the meeting was in progress. Mr Smith was at pains to say that this was a rough "guestimate", not a proposal. I think it was the best that his firm could prepare in the time available. Be that as it may, the price he mentioned at that meeting was $906,000 or a figure very close to it. Mr Patterson reserved his position. On 4 March solicitors wrote to IHL on plaintiff's behalf with reference to IHL's "recent attempt to alter the price" stipulated in the development contract. They said this amounted to a repudiation of the contract, and that CRL elected to accept it. The letter continued that if, alternatively, there had not been a repudiation, then there had at least been a breach going to the root of the contract, giving rise to an election to rescind, and that CRL rescinded the contract accordingly.

Even after that there were some discussions which showed that Mr Patterson had not completely discounted the idea of having IHL carry out the work. It seems a fair inference that any objection to IHL related to their attitude to the contract price rather than their ability to perform in other respects. In the end however CRL had the project carried out by another builder, to a somewhat altered design, and at a higher cost than the original contract. In these proceedings, CRL claimed damages for loss of bargain, upon the bases set out in the 4 March letter.

## IHL's attitude

To deal with the various defences raised it is necessary to form some overview of IHL's position, and the frame of mind of its principal Mr Smith, as the project ran into the unanticipated problem of the Bank's objection. First, on any view the contract price of $679,500 was a very competitive one. I am not satisfied that, as the plaintiff contended, the defendant had made some mistake in the calculation of its price, but I am sure that IHL expected the margin of profit to be modest at best, and that this was rather secondary to the opportunity of obtaining a connection with a client who held promising potential. Further, to carry out the contract on a satisfactory financial basis it was of the essence of IHL's intentions that it should be able to perform an efficient Christchurch-based exercise within a minimum of time.

Assuming that a minimum of eight weeks was needed to obtain local authority approval, it appears that at the time of submitting the plans to the WCC, IHL could reasonably have aimed to start before the end of November. In the meantime of course it became known that there was a difficulty about the Bank's consent.

By the end of October it was obvious that the Bank's attitude raised complex issues. That was not the view expressed by Mr Patterson in his evidence, but I have already detailed the reasons why I disagree with him. By this time Mr Smith realised that the contract could not be performed profitably. When modes

of performances that differed from the original were mooted he was quick to insist that cost escalations should be taken into account. As to performance according to the original scheme, I think there was a period when he seriously doubted it would ever proceed, because of the Bank's attitude. On the other hand, I believe Mr Patterson was always sanguine that some way around the difficulty would be found, although I consider that in evidence he exaggerated the degree of progress that he thought had been achieved by the end of October. But I must say in Mr Patterson's favour that I do not think he ever relinquished hope that the project would eventually proceed as originally planned, and that being so, I do not think he ever gave Mr Smith cause to believe that the original project had been abandoned.

Bearing in mind that a prime object of the exercise was the expectation of cementing a relationship with CRL, one can sympathetically appreciate the dilemma that enveloped Mr Smith in November-December. There were signs that the mode of performance might have to be re-negotiated and if so, IHL would have the opportunity of putting the price on a more favourable footing. On the other hand the possibility remained that the Bank's consent would be obtained, enabling the work to proceed on the original footing in which case IHL was at risk of incurring a loss which would escalate in amount as time went by. IHL could not very well hope to get quit of that risk yet be retained to carry out the work on some new basis. So in the result, as I see it, IHL stood by and hoped for the best. I think that Mr Smith's own evidence of the message that he left for Mr Patterson just on Christmas is ample confirmation. When in due course the worst happened (that is, from

IHL's standpoint) namely that CRL first was able to obtain the Bank's consent, then declined IHL's overtures for a price increase, IHL decided that rather than carry out the contract at the original price, it would take its chances on such legal defences as could be mustered.

## Completion date

Before turning to the legal aspects it is desirable to clear away an incidental issue. The plaintiff contended that the parties orally agreed that the works would be completed by the end of February. There was no direct evidence to that effect, nor am I prepared to infer that any such agreement was reached. The parties certainly hoped that completion would be around that time, having regard to the desired commencement date of the Brickell Moss tenancy; although I observe that the agreement with the tenant did not stipulate a firm date. However, in dealing with time IHL's preliminary letter of 8 June 1981 specifically excluded the period taken in obtaining a building permit, and this is reflected by Clause 5.06 of the development contract, which fixed a time only for the construction period itself. The oral term contended for by the plaintiff would be inconsistent with that clause. So on both evidential and legal grounds this contention fails.

## The defendant's case

In its pleadings the defendant raised eight separate defences. By the stage of final addresses, to an extent some of these had been re-arranged or amalgamated. In dealing with the legal aspects, I will follow, in a broad way, the outline of the defendant's final submissions.

The first issue must concern the terms of the contract. Here, the only matters that require discussion are implied terms, and the status of the letter written by the plaintiff dated 29 July 1981. Both issues revolve around the question of the encroachment to the Bank's land.

The written contract incorporated a New Zealand Standard specification setting out conditions of contract for building and civil engineering construction, NZSS 623 : 1964. Clause 11.2.1 contained provisions regulating the manner in which the owner was to give the contractor possession of the site. In the event the provisions were ineffective as they were dependent upon the appointment of an engineer and the establishment of a programme of work. By common consent no engineer was ever appointed.

In my view the contract must be regarded as subject to an implied term that the owner would give possession of the site within a reasonable time : Hudson's Building and Engineering Contracts 10th Edn pp 317-319. Such implication fulfils all the conditions in the majority judgment in BP Refinery

(Westernport) Pty Ltd v Shire of Hastings 1977 16 ALR 363, 376. In my opinion the implied term is not contradictory of clause 4.00 of the development contract under which IHL undertook to obtain all necessary permits and approval. It has been convenient to refer throughout to the question of "consent" of the Bank, and in light of that terminology, for the plaintiff to say that that consent was but an instance of the "approvals" contemplated by clause 4.00; but the availability of the owner's site is a fundamental matter entirely distinct from the building, town planning and other relatively technical and mechanical types of permission that in my opinion are envisaged by clause 4.00. It would be unexpected and illogical that the contractor, a stranger to the site, should be left to make some bargain with the owner's neighbours which might well require negotiations on aspects of their relationship quite separate from the building project.

The existence of the 29 July letter fits readily with my conclusion. The circumstances in which it came to be written did not emerge with certainty but the existence of the encroachment was known to both parties at an early stage, possibly prior to execution of the development agreement. As Mr Patterson made plain in his evidence, there was no dispute but that both parties regarded it as CRL's obligation to obtain the necessary permission from the Bank. The letter simply recorded the position, thus removing any possible argument about the effect of clause 4.00. I think that Mr Mathieson was right in saying that on grounds of absence of consideration, the letter would have been ineffective as a variation; but for the reasons already given, in my view no question of variation arose. If necessary however, by virtue of

the letter I would regard CRL as estopped from denying the existence of the obligation to which it refers.

Since I view the letter simply as confirmatory of an existing obligation I do not think too much should be made of its language. However, in case I am wrong in this I should refer to Mr Mathieson's argument that all the plaintiff undertook was to seek approval. The critical words are :

> " I will approach both parties for their consent to overhang this right of way by 1.2 metres. I will undertake to do this prior to the commencement of construction. "

Taken literally, the undertaking is (a) to approach the owners (b) before commencement of construction. If that was all, it would not be very meaningful. I think I am entitled to have regard to the fact this was an informal letter confirming an existing understanding, not a contract prepared in a legal office. What was required, obviously, was not merely an approach, but the consent of the owners. It could not be contended that a letter written to them the day before construction was to commence would discharge the plaintiff's obligations. Consent was needed before work commenced because if it was not forthcoming, a different mode of construction might be required. If

it was necessary to construe the letter, I would regard it as an undertaking to obtain consent a reasonable time before construction commenced; the last phrase meaning that what was envisaged was consent obtained in sufficient time not to hold up the contractor, he having performed his own obligations up to that stage with all reasonable speed.

The next submission for the defence was that in breach of the implied term the plaintiff failed to obtain the Bank's consent within the required time. This undoubtedly is correct. The development contract having been signed on 17 July 1981, formal withdrawal of the Bank's objection was not obtained until 8 February 1982, a longer interval than the entire construction period allowed in the contract. It is clear that Mr Patterson did not rush matters. He said that this was purposely so, in order not to give the Bank the impression that he was desperate to obtain its consent. Whether for this reason or on account of difficulties within his own organisation it is apparent that there were substantial lapses of time for which the Bank was not responsible.

It is convenient to take the defendant's next three submissions together. In summary they were :

(a) The plaintiff's breach of the implied term entitled the defendant to cancel the contract by virtue of ss 7(3)(b) and s 7(4) of the Contractual Remedies Act 1979 and to claim damages, or both.

(b) By way of compromise and in consideration of defendant agreeing to carry out the contract works the plaintiff agreed that a fresh price for the contract works would be negotiated.

(c) The plaintiff's letter of 4 March 1982, in which it purported to cancel the original contract on the basis of the defendant's alleged repudiation or breach of it, constituted a breach of the compromise agreement.

By way of initial answer Mr Mathieson objected that none of these matters had been distinctly pleaded. Insofar as this contention related to an additional plea (by way of alternative to (a) above) that the obtaining of the Bank's consent was a condition precedent to the defendant's obligation to commence construction work, I think this is well founded. The other contentions were not all pleaded in the precise form advanced in final argument but in my view were sufficiently within the scope of the pleadings and the course of the trial.

I have some problem with the legal thrust of these submissions. Even if they were all made out on the facts (in my opinion they are not) an agreement to negotiate a new price would not, by itself, discharge the existing agreement (see Courtney & Fairbairn Ltd v Toleini Bros 1975 1 All ER 716) nor did Mr Barton so submit. In its pleadings the defendant maintained that the plaintiff's failure to obtain the consent of the Bank constituted a fundamental breach of the contract. Indeed the defendant's principal response to the letter from the plaintiff's solicitors dated 4 March 1982 was that the contract had come to an end

late in 1981 because of the plaintiff's failure to obtain the consent. One obvious difficulty of that approach - there are probably others, such as waiver - is that the defendant at no stage communicated to the plaintiff any decision to cancel the contract, see Schmidt v Holland 1982 2 NZLR 406.

In any event, this group of submissions breaks down at (b) on the facts. I am quite unable to spell out of the evidence any agreement that a new price would be negotiated, on some basis sufficient to satisfy the criteria present in Sudbrook Trading Estate Ltd v Eggleton 1983 1 AC 444. In January 1982 the parties certainly commenced to take steps to establish a new price, in the sense that with the plaintiff's co-operation, the defendant obtained sub-contractors' prices, while Mr Patterson proceeded to obtain information that would have enabled him to judge whether whatever figure IHL came up with was a fair one, and assist him to bargain with IHL if he wished. But neither side was committed to the establishment of a new price; and no formula or machinery had been agreed, expressly or by implication, whereby a reasonable price might be fixed in the event that the parties did not reach accord (see Hunt v Wilson 1978 2 NZLR 261, per Richardson J at p 281). Mr Smith thought any price would have to be approved by the plaintiff's quantity surveyor, but there was no proof of any agreement to that effect. In my opinion the steps taken by the parties in the period commencing after the vacation and concluding with the meeting of 1 March were devoid of contractual intent or effect.

I come then to the defendant's final and critical group of submissions, where under four separate alternative headings it contended that the defendant's unwillingness to perform the contract works at the original price did not constitute a breach or repudiation of its contractual obligations. The first was based on the proposition that the obligation to perform the contract works at the original price was terminated by the alleged compromise agreement, and with this I have already dealt sufficiently.

## Repudiation

It is convenient to refer next to the fourth, to the effect that if the original contract was held to be subsisting, the defendant did nothing that constituted a distinct and unqualified refusal to be bound. Although coming to this topic in the course of working through the defence submissions, I appreciate that the onus lies on the plaintiff. Section 7(2) of the Contractual Remedies Act 1979 provides that a party may cancel if, by words or conduct, the other repudiates the contract by making it clear that he does not intend to perform his obligations. The argument proceeded on the assumption that notwithstanding the terms of s 7(1), previous decisions at common law were relevant to deciding whether conduct was to be regarded as repudiatory. As Lord Wilberforce said in Federal Commerce and Navigation Co Ltd v Molena Alpha Inc 1979 AC 757 (see p 778) the form of the critical legal question

may differ slightly as it is put in relation to varying situations. The approach particularly appropriate to the present case is that of Lord Wright in Ross T Smythe & Co Ltd v T D Bailey & Co 1940 3 All ER 60, 72;

> " I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way. "

In Universal Cargo Carriers Corporation v Citati 1957 2 QB 401, in a passage not affected by the subsequent appeal (see 1957 3 All ER 234) Devlin J said :

> " A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must 'evince an intention' not to go on with the contract. The intention

> can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract. "
>
> (p 436)

It is I think clear that in January - February 1982 IHL was still prepared to carry out the contract works. Was the position that Mr Smith was determined to do so only in the manner substantially inconsistent with IHL's obligations, and not in any other way? Or, more precisely, did he so conduct himself as to lead a reasonable person to that conclusion?

To answer that it is necessary to repeat and to some extent elaborate on the evidence of the relevant events. As already noted Mr Patterson described Mr Smith's attitude and words as being that he was "unable" to complete at the original price. Mr Smith's response, in evidence, was that the matter was not put to the test; he was never asked to proceed on the original basis; Mr Patterson consistently told him that he did not "expect" IHL to lose money on the deal.

I do not know that in the end there was a great conflict of evidence between Mr Patterson and Mr Smith on the point. Any difference lay more in the interpretation each placed on the other's attitude, or professed to. I find that both by words and by conduct Mr Smith made it clear that he did not intend to proceed at the original price. After the vacation, despite the knowledge that the Bank's consent would be forthcoming, IHL did not get the contract moving. Instead, the matter proceeded on the basis that IHL would work out a new price although, as I have held, the plaintiff did not commit itself to accept any new price or renegotiate the contract. In Mr Patterson's usual style it was simply one option that he decided to explore and keep open. However, matters could not have reached this point unless Mr Smith had made it clear that his company was looking for a new price. If it be suggested that he too was simply retaining his options the answer is that in Mr Smith's mind, the question of proceeding at the original price was no longer a real possibility because he was sure it would involve an unacceptable loss. Mr Smith proceeded to obtain prices from Wellington sub-contractors. I have already found that the results confirmed Mr Smith's opinion that he would not be able to adhere to the original price, and that he informed Mr Patterson accordingly. That conversation, coupled with the signal received from PPL that there was no likelihood of agreement to any increase in the price contained in the PPL-CRL contract, caused Mr Patterson to see Mr Curren, and also to engage Mr Cardiff's assistance.

Mr Barton relied on Starlight Enterprises Ltd v Lapco Enterprises Ltd 1979 2 NZLR 744 but that decision is readily distinguishable, as is the case with Woodar Investment Development Ltd v Wimpey Construction UK Ltd 1980 1 All ER 571. Here, the defendant was not relying on a provision in the contract in the bona fide albeit mistaken belief that it was entitled to an increase in the price. Nor, if the principle in those cases extends so far, was it bona fide taking the stance that it was no longer bound, although willing to carry out the contract on the original conditions if mistaken in that view. If any confirmation be required it can be found in the response of the defendant to the 4 March letter from the plaintiff's solicitors, which maintained that the defendant's recent attempt "to alter the price stipulated in the development agreement" amounted to a repudiation of the contract. The defendant, in the considered reply sent by its solicitors more than a fortnight later, did not deny the allegations of fact, but simply raised the contention that the contract had come to an end some months previously. Nor was it suggested that if that view was wrong the defendant would be prepared to carry out the contract at the original price. I think it is obvious that being convinced by reason of its investigations that to proceed on the original basis would result in a substantial loss, IHL was not prepared even to contemplate that course. Its attitude precludes any recourse to the approach in Instone v A. Schroeder Music Publishing Co Ltd 1974 1 All ER 171 where the view was open (see p 181) that had the plaintiff probed further into what he regarded as repudiatory conduct he would have found it to be otherwise. Here, the defendant's stance, in my opinion, fell squarely within the terms

of Lord Wright's words already quoted. It is pertinent to recall some remarks of Devlin J in the Citati case at p 437 : in this context "I cannot" will often amount to much the same as "I will not".

## Promissory estoppel

The basis for this defence was that on a number of occasions the plaintiff had intimated to the defendant that because of the delay, it would not hold the defendant to the original contract price. On the strength of those representations, so it was contended, the defendant continued its efforts to perform the contract, and did not exercise the right to cancel, as it would have been entitled to do as a result of the plaintiff's failure to perform its obligation to obtain the Bank's consent. Again it is necessary to commence by further examining the facts.

In the course of his evidence Mr Smith said, on a rough count at 15 separate places, that Mr Patterson had made statements to the effect that CRL did not expect IHL to lose money on the project. These were generalised remarks but Mr Smith spoke of three identifiable occasions when IHL sought a specific indemnity against particular expenses : first when Mr Patterson requested the alternative design on or about 30 October 1981; secondly at the end of November when he raised the idea of splitting the project into two parts, and thirdly shortly before Christmas, when he wished IHL to commence work on the original scheme,

notwithstanding that the Bank's consent had not yet been obtained. In respect of the first Mr Patterson accepted that he agreed to meet the additional costs that would be involved in preparing the alternative design. He would not admit as much in relation to the other two occasions. On the third, when asked to give an assurance in writing, he did not respond. However, even assuming that he indicated some willingness to meet additional expense each time, it has to be remembered that in these instances CRL was requesting performance outside the scope of the development contract and was therefore not in a position to resist such a stipulation. It does not follow that Mr Patterson would feel bound to agree to a request for an increase in the contract price based simply on cost escalation. My assessment of Mr Patterson is that he would not have given any assurance to meet extra expense except where he felt this was inescapable if he was to keep the project viable. Apart from anything else, he would not have made such a decision except with the authority of CRL's Board. What Mr Smith deposed to, if taken literally, was an entirely open-ended undertaking to protect IHL against unspecified cost increases accruing over an undefined period. In my view such an act would have been out of character on Mr Patterson's part. Further, the question of performance simply in terms of the development contract did not arise until the Bank's consent was to hand. That did not occur until after Christmas. The uncertainty of the position before Christmas is indicated by incidents immediately beforehand : the meeting between PPL and the Bank, and Mr Smith's message to Mr Patterson about the ever-increasing costs. Had Mr Patterson already given any firm assurance about the

latter, such a message would have been superfluous. I am satisfied that prior to Christmas, Mr Patterson did not give any generalised assurance of meeting increased costs.

Turning to the period after the vacation, at that stage, I think somewhat contrary to his expectations, Mr Smith found that CRL had indeed succeeded in obtaining the Bank's consent, and that his company was now in the position of being asked for performance in terms of the original contract. His response to that was that he could not do it at the original price. Again, I think that Mr Patterson's reaction was in keeping with what one would expect of him. In the first instance he did not take up any antagonistic or legalistic stance, but allowed and indeed assisted IHL to endeavour to establish a price based on up to date costs. This left several possibilities open : the new price might conceivably be sufficiently close to the original to allow IHL to go ahead at the previous figure, or alternatively CRL might be prepared to absorb a modest increase; it might be possible to persuade PPL to increase the price payable under their own contract; and the new figure would be useful in the eventuality that CRL had to look for another contractor to carry out the work. Again, with this range of options open, I cannot believe that Mr Patterson would have taken it upon himself to give assurances of additional payments to IHL. And my views in this respect are strengthened by the terms in which Mr Smith deposed to the remarks made by Mr Patterson. The recurring theme was that Mr Patterson did not expect IHL to lose money on the project. At best this was an ambiguous remark; estoppels cannot be founded on ambiguity. In regard to the post-vacation period, I am equally satisfied that Mr Patterson did not make any

unequivocal statement that CRL would compensate for cost escalations. I have no doubt that he made various remarks of a reassuring nature that led Mr Smith to believe that he appreciated IHL's position and would do his best to alleviate it in some way, such as endeavour to obtain an increase from PPL that could be passed on to IHL.

Similar reasoning is applicable to the defendant's contentions relating to an agreement for a "new deal". As pleaded, it would appear that the defendant was alleging that Mr Patterson had spoken of a "new deal", but according to Mr Smith's evidence it was in fact he who had used the term, supposedly at the 22 January meeting. I accept that Mr Smith used some such expression, but for reasons already indicated I do not believe that Mr Patterson ever assented to it.

There is another difficulty in the way of accepting that Mr Patterson gave assurances of the kind suggested by the defence, or assented to a "new deal". On other occasions Mr Smith was cautious in relying on oral propositions. He was anxious, commendably so, to have obligations recorded. There was no letter recording or seeking confirmation of abandonment of the original contract, an arrangement to proceed at a new price to be fixed, or the "new deal".

I conclude that the plea of promissory estoppel fails on the facts.

## Lawful Repudiation

The defendant's final argument in the group of four under consideration was that even if (as in the event I have found) the defendant in February 1982 had purported to repudiate an extant obligation to perform the contract, a lawful justification existed at the time of the apparent repudiation, in that the plaintiff had failed to obtain the Bank's consent within the required time. I accept that a party who in repudiating gives a bad reason or none is entitled to justify by pointing to a good ground provided it existed at the time of the refusal to perform : British and Beningtons Ltd v N.W. Cachar Tea Co Ltd 1923 AC 48, 71-72. Relating the issue to the Contractual Remedies Act 1979, the question is whether the plaintiff was in breach of an essential stipulation - subpara (a) of s 7(4). Mr Barton did not found any argument on subpara (b). In the ordinary use of language "stipulation" is not appropriate to describe an implied term, but like Dawson & McLaughlan in their treatise on the Act (p 4, fn 25) I would find it astonishing if the effect of the legislation was to preclude reliance on breach of such a term as a ground for cancellation.

I said earlier that if I had to construe the letter of 29 July 1981 I would regard it as an undertaking to obtain the Bank's consent a reasonable time before construction commenced, that is to say in sufficient time not to hinder the contractor. From the defendant's point of view this I think is the highest at which the onus on the plaintiff could be pitched. Attainment of course required the co-operation of a third party and it is arguable that the plaintiff's

obligation was no more than to use reasonable diligence, see Hunt v Wilson (above) per Cooke J at p 272. However, the obtaining of consent was regarded as a formality; neither party contemplated the possibility of refusal and I am inclined to accept the formulation of the term in the words set out at the commencement of this paragraph, which in effect is how it was proposed on behalf of the defendant.

The next issue, namely whether in respect of a term so framed, time was of the essence, was the subject of extensive argument. Mr Barton, relying particularly on Bunge Corporation v Tradax Export SA 1981 1 WLR 711 (House of Lords) and also on Etablissements Chainbaux SARL v Harbormaster Ltd 1955 1 Lloyd's Rep 303 (Devlin J) argued that it was. Mr Mathieson contra referred to Hudson (above) p 608, Emden's Building Contracts and Practice 8th Ed Vol. 1 p 179 and Keating's Building Contracts 4th Ed 1st Supplement p 11 where in referring to Bunge Corporation v Tradax Export SA the learned authors observe that the contract in question was a mercantile contract "which is not a term applied to building contracts".

In principle of course the issue is not to be determined on the basis of generalised perceptions relating to particular categories of contracts. In Bentsen v Taylor Sons & Co 1893 2 QB 274 Bowen LJ said :

> " There is no way of deciding that question (sc whether a particular term is a condition) except by looking at the contract in the light of the surrounding circumstances, and then making up one's

> 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. "
>
> (p 281)

Similarly, in Hunt v Wilson (above) which related to the fixing of the price for a sale of land by valuation, Richmond P said :

> " Can one say with sufficient certainty that both parties must have intended that if a price was not fixed within a reasonable time after the making of the agreement then their bargain should come to an end? "
>
> (p 287)

In the present instance some evidence can be mustered to show that prompt completion was of importance to both parties. In particular IHL intended, and CRL understood, that performance would

be achieved by a quick well-organised Christchurch based operation. There is the fact that a tenant was ready to move in, although not, it must be said, on a date that was absolutely fixed. But the indicia to the contrary are powerful. The contract contained neither a commencement nor a completion date. The only time period stipulated was for the actual contract works. Then despite my earlier caveat one has to give some weight to the general considerations that have led the textbooks to classify building contracts in the category where time is rarely of the essence unless expressly made so. The whole undertaking usually involves both parties in arrangements and commitments on such a scale that it would be quite unreasonable to suppose that either was prepared to contemplate the situation that if some time stipulation was exceeded - which, as one knows from experience, it so easily can be, without real fault by anyone - the opposite party should immediately be entitled to cancel. The ordinary remedies available to the other party, that is to say of bringing matters to a head by a notice if necessary, or seeking damages, are generally sufficient to meet the case. So, in my opinion, here I bear in mind too this dictum of Cooke J in Hunt v Wilson :

> " There is something unattractive in an approach involving a retrospective determination by the Court that the contract ended at a date which could not have been identified by the parties at the time. "

( p 270)

In that case, although the appeal was dismissed all members of the Court were of the view that the trial Judge had been mistaken in treating the contract at an end at a certain date.

Here of course we are concerned not with time for completion, but whether in relation to an intermediate step, time is to be regarded as essential. It would be a strange result if in a contract where time for completion was not of the essence, the intermediate requirement which the parties did not contemplate would cause any difficulty, should assume such importance in regard to time that failure to comply would justify immediate cancellation. The fact is that neither party gave the point consideration because it was taken for granted that the matter was a formality. Had they been required to put their minds to it, I do not feel at all confident that either would have replied "of course time is of the essence". I find that it was not.

The defendant, faced as it was with a continuing delay caused, on my findings, by CRL's failure or inability to obtain the Bank's consent, had the choice of bringing matters to a head by giving notice to the plaintiff, or letting them drift. It chose the latter : I have discussed the reasons, as I see them, in the section headed "IHL's attitude". Mr Smith's evidence showed that he was not unmindful of the possibility of giving notice making time of the essence. On the latter subject, counsel took me fully through the authorities, including United Scientific Holdings Ltd v Burnley Borough Council, 1978 AC 904, Hunt v Wilson, already cited (in which incidentally no reference is made to the former) Baker v McLaughlin 1967 NZLR 405 and a number of Australian cases, the most recent being

the decision of the High Court in Louinder v Leis 1982, 56 ALJR 433. In light of the conclusions I have reached however no issue of law remains to be discussed under this heading. It is clear that in the circumstances that developed, IHL would have been justified in putting CRL on notice that it required access to the site by a nominated date, and equally certain that it did not do so.

In case, contrary to my view, CRL was in breach of an essential term, I go on to deal with the next step in the argument, concerning affirmation and waiver. For this purpose one must postulate that at some stage IHL obtained an election to cancel the contract. The difficulty in identifying any such point is a reflection of the problems facing this portion of IHL's case. Starting with the hypothesis of an essential term to the effect that CRL would obtain the Bank's consent in sufficient time not to delay the contractor, the fact is that when it became apparent that that term was not being fulfilled, IHL instead of taking steps to insist that it was, allowed the process of obtaining a building permit to drift along. In accordance with my findings under a previous heading ("Dealings with local Authority") IHL would have been in a position to obtain a permit in early December. In November and December a number of opportunities occurred when, if minded to make a stand against the continuing delay, IHL could have done so, but nothing of the kind occurred. It responded to CRL's requests in which alternative modes of performance of the contract were suggested. The appeal regarding the urinals was lodged. New calculations were forwarded to the WCC on 17 December. Mr Smith and Mr Patterson kept in touch : in particular, there was the message left by Mr Smith just before Christmas. I find it diffi-

cult to isolate anything of a decisive nature in the evidence, and perhaps that makes the real point : things just continued on the same course as before.

I do not overlook that in such circumstances the innocent party may hold his hand, and await developments : Clough v London & NW Railway Co 1871, LR 7 Exch 26, 34; and see e.g. Buckland v Farmer & Moody 1978 3 All ER 929. As Kitto J said in Tropical Traders Ltd v Goonan 1964, 111 CLR 41, 55 : "It (sc. the innocent party) might keep the question open, so long as it did nothing to affirm the contract and so long as the respondents' position was not prejudiced in consequence of the delay"; that is, delay in making the election. I do not think however that it is possible to take that view of IHL's continued involvement here.

Mr Mathieson was inclined to pin his argument on affirmation. I think that the various actions of the defendant, none in itself spectacular, cumulatively were sufficient to be so regarded. If not, I have little difficulty in concluding that they amounted to an indefinite extension of the time allowed to CRL to fulfil the condition, indefinite in the sense that time was at large, making it necessary for notice to be given to restore time to its previous essentiality (see Charles Rickards Ltd v Oppenheim 1950 1 KB 616). CRL meantime continued on its own course, committing PPL to concessions in respect of the retail extension in order to obtain the Bank's consent. IHL I am satisfied acted in full knowledge of the relevant facts. Thus the ingredients of waiver are also satisfied and, very likely, promissory estoppel as well (see Strada Estates

Pty Ltd v Harcla Hotels Pty Ltd 1980, 25 SASR 284) but since the last mentioned ground was not argued I do not decide the matter on that basis.

Accordingly, in regard to the implied term, even if the view is taken that originally, time was essential, in my opinion IHL was not entitled, without more, to repudiate in reliance on breach of that term in February/March 1982.

The defences therefore all fail.

## Damages

The principle applicable to the computation of damages for loss of bargain was not in dispute. The measure is what it cost the plaintiff to have the work done, less the contract price : McGregor on Damages, 14th Ed pp 22-23. The plaintiff eventually contracted to have the work carried out by another builder, McMillan & Lockwood Ltd, for a contract price of $855,637. Argument centered on the question to what extent the finished product thus obtained differed from what IHL had undertaken to furnish. In evidence, the subject was not explored in any depth. Mr Patterson said that the final product was not the same building. It was different, he claimed, in a number of fundamental respects; but when he elaborated, the differences seemed to me to be matters of detail rather than substance and indeed Mr Patterson qualified the statements quoted earlier by adding that "it was essentially the same concept". The view I had of the premises tended to confirm that conclusion, at

any rate to the extent that one could tell from an external examination. I appreciate that the northern façade presented an entirely different appearance from that contemplated in the IHL plans. The essential matter, in my opinion, is that CRL obtained from McMillan & Lockwood Ltd an end result that, so far as the evidence went, satisfied the requirements of the PPL-CRL contract. Vis a vis PPL, it was not suggested that CRL suffered any detriment or had to pay any compensation through substitution of the McMillan & Lockwood Ltd design.

The plaintiff relied on other evidence as indicating that the true value of the work that IHL had contracted to perform, as at February 1982, was in the vicinity of $900,000. To the forefront of course was IHL's own estimate,proffered at the 1 March meeting. I have already commented on the manner in which that figure was put together. I do not think that it was any more than an indicative price. The Mainzeal quotation of $903,962, reached after detailed discussion between that company and Mr Cardiff, merits greater weight. However, I accept Mr Fogarty's analysis that several items, totalling some $45,000, might well have been trimmed off the Mainzeal price, had negotiations with that company been pursued. Mr Cardiff himself put forward an estimate of $900,000 but the figure was produced under pressure of time and he did not maintain that it was finely tuned. Although these three items of evidence gain strength from their collective consistency, I regard them as out-weighed by the effect of the established price at which McMillan & Lockwood Ltd proceeded to bind themselves to do the work.

It needs to be added that there was evidence that the cost of having the work carried out by McMillan & Lockwood Ltd escalated to somewhere in the vicinity of $900,000, the precise total not having been established as yet. No detail was given as to the items involved. Mr Cardiff, in a contemporary report on his negotiations with McMillan & Lockwood Ltd., stated that the only variable was a surcharge for possible delay in the issue of the building permit; there was no evidence that any such delay occurred. I interpolate that the same document (Exhibit AD) strengthens my view that the McMillan & Lockwood Ltd scheme was fairly comparable with the defendant's. The information as to the causes of the escalation, and whether they were of a kind to which the IHL contract might likewise have been subjected, must be in the hands of or accessible to the plaintiff. I do not see why I should speculate in the plaintiff's favour. On the evidence, I conclude that McMillan & Lockwood Ltd contracted to supply for $855,637 substantially the same end product, from CRL's point of view, as IHL had earlier undertaken to furnish for $679,500, and that the plaintiff is entitled to recover the difference, viz $176,137.

A second heading under which the plaintiff sought damages related to three items of expenditure incurred, it was alleged, prematurely : carpet purchased for the building in November 1981, drawings relating to the original contract, for which the plaintiff paid the defendant in October 1981, and the expense of demolishing the old portion of the building, discharged by two payments made in October 1981 and February 1982. On the basis that it had lost the use of the sums of money concerned, the plaintiff claimed interest on the amounts expended from the dates of the respective payments until

30 April 1982. The onus is on the plaintiff to establish that by reason of the defendant's failure to proceed with the building work, the plaintiff suffered financial loss in the respects alleged. In my opinion, the evidence has failed to do so. In relation to the carpet, the plaintiff admitted that had it delayed the purchase, in all probability the price would have increased substantially. Apart from a brief assertion by Mr Patterson couched in general terms, no evidence was given enabling me to make any comparison between the saving in cost by virtue of the early purchase, and the use to which the plaintiff could have put the money in the meantime. In respect of the demolition expenses, there was abundant evidence that the relevant events occurred in a period of rapid escalation of costs in the building industry. Without more, I am not prepared to assume that the plaintiff was worse off through having the work carried out early. Similar considerations apply to the drawings. Accordingly, I dismiss this part of the plaintiff's claim.

Subject then to the matter next discussed, I find that the plaintiff is entitled to damages of $176,137.

The defendant's second counterclaim raised explicitly the issue of the damage sustained by the defendant by reason of the plaintiff's delay in obtaining the Bank's consent. There is no conceptual difficulty about a claim for damages for delay notwithstanding that the latter did not give rise to a right to cancel (Raineri v Miles 1981 AC 1050) but the defendant may have a problem in raising a counterclaim for losses which, because of his own non-performance, were not incurred. However, the plaintiff also relied

on the same matter in mitigation of damages, see McGregor on Damages 14th Ed p 152. For the moment nothing hinges on whether the issues are considered under one heading or the other, although that will require further discussion before any formal judgment can be entered.

The basis of the defendant's argument is as follows. The plaintiff was in breach of the implied term as to the obtaining of consent. By reason of the delay so caused, the actual cost to the defendant of carrying out the contract would have been greater than if the plaintiff had fulfilled its obligation, because of the escalation of costs in the meantime. Thus if the defendant had proceeded with the building, as I have found it was obliged to do, IHL would have had a good claim in damages against the plaintiff, for the difference between the cost to IHL of performing the contract on the basis on which it was entered into, on the one hand, and what it would have cost IHL to perform it, on the basis of ruling rates at a delayed date, on the other.

In the light of the various findings of fact and law in this judgment, that argument, in my opinion, is entitled to succeed. The only matter requiring amplification, as I see it, relates to the finding already made in regard to waiver. While, for the reasons discussed earlier, I take the view that IHL affirmed the contract, notwithstanding CRL's delay in fulfilling the term relating to the Bank's consent, I see nothing in the evidence to indicate that IHL waived its right to damages. The one does not follow from the other, and different and more specific conduct would be needed to satisfy the proposition that the right to

damages had been waived as well, see Hudson (above) at p 608.

It is apparent that detailed evidence would be required to deal with the assessment of loss under this head. I accept that it would not have been practicable to lead such evidence at the trial, in advance of the findings of fact now made. I therefore consider it proper, as requested by the defendant, that there should be an enquiry into damages on this aspect.

For purposes of the enquiry it is desirable that I should make a more precise finding as to the date by which IHL would have been able to obtain a building permit if not delayed by CRL's inability to achieve the Bank's consent. I fix this date as 4 December 1981.

## Counterclaim

In light of my findings in this judgment, the first counterclaim cannot succeed. Further, the evidence did not satisfy me that the defendant would have made any profit out of the contract, even if it had proceeded on schedule. Thus at best the defendant would have been entitled to nominal damages.

I have already dealt with the second counterclaim, under the heading of damages. As to the third, it was common ground that the defendant was entitled to recover the sum claimed. Since this counterclaim does not arise out of the same subject matter as the action, R 300 does not apply. Accordingly there is no reason to delay the entry of judgment on the third counterclaim.

## Conclusion

My formal judgment is as follows :

1. The plaintiff is entitled to judgment on its claim;

2. Subject to (3), the plaintiff is entitled to recover the sum of $176,137 for damages;

3. There will be an inquiry as to loss caused to the defendant by the plaintiff's delay, as indicated in the judgment. Leave is reserved to apply as to all procedural aspects, and in order to define the issues for the enquiry more specifically;

4. Pending completion of the enquiry, entry of judgment for the plaintiff is deferred; likewise entry of judgment in respect of the defendant's second counterclaim;

5. There will be judgment for the plaintiff on the first counterclaim;

6. On the third counterclaim, there will be judgment for the defendant in the sum of $13,303.41 with interest at 11% from 20 April 1982. I allow costs as on judgment by confession without motion (item 6 of Table C). Execution is stayed until further Order;

7. Except as stated, all questions of interest and costs are reserved.

Solicitors :
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Weston Ward & Lascelles (Christchurch) for Defendant