IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-2796

AND IN THE MATTER OF	MERCURY GEOTHERM LIMITED (IN RECEIVERSHIP) and POIHIPI LAND LIMITED (IN RECEIVERSHIP)
BETWEEN	LG CHILCOTT AND PC CHATFIELD Applicants
AND	AS MCLACHLAN AND AM MCLACHLAN AS TRUSTEES OF THE WAITURUTURU TRUST First Respondents
AND	CONTACT ENERGY LIMITED Second Respondents
AND	MEL NETWORK LIMITED Third Respondents

CIV 2007-404-3263

AND BETWEEN	CONTACT ENERGY LIMITED Plaintiff
AND	AS MCLACHLAN AND AM MCLACHLAN AS TRUSTEES OF THE WAITURUTURU TRUST First Defendants
AND	MERCURY GEOTHERM LIMITED (IN RECEIVERSHIP) AND POIHIPI LAND LIMITED (IN RECEIVERSHIP) Second Defendants
AND	MEL NETWORK LIMITED Third Defendants
AND	VECTOR LIMITED Counterclaim Defendant

Hearing: 29-30 June and 1 July 2009

Appearances: T Allan and T Bowler for Chilcott and Chatfield
P Chemis and J Opie for Contact Energy Ltd
P David and K Morrison for Mel Network Ltd and Vector Ltd
A S McLachlan in person

Judgment: 22 December 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3 pm On Tuesday 22 December 2009

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INDEX

	Paragraph
Introduction	[1]
Standing	[9]
Factual background	[11]
The issues	[23]
Clause 10 of the Lease	[28]
The deed of settlement	[30]
Rectification of the deed of settlement	[49]
Mistake	[74]
Estoppel	[80]
Implied term	[85]
Relief against forfeiture	[90]
The deed of settlement: conclusion	[92]
Is the Lease valid?	[94]
Rectification of the Lease	[114]
Lots 1 and 2	[141]
Conclusions	[170]
Costs	[171]

Introduction

[1] These proceedings are the latest in a series of related cases concerning a failed joint venture. The objective of the parties to the venture was to construct and operate a geothermal power station near Taupo, with the intention of utilising natural geothermal resources for the large scale generation of electricity. Those participating in the venture were Mr and Mrs McLachlan, together with their interests, and Mercury Network Ltd, later MEL Network Ltd (Network), a subsidiary of Vector Ltd (Vector).

[2] The McLachlans contributed land and certain regulatory consents to the joint venture. As part of the arrangement between the parties, the McLachlans took a lease back of that portion of the land that was not immediately and directly required for the operation of the power station.

[3] The present proceedings seek rulings from the Court as to the status of the Lease to the McLachlans. They say that the provisions of the Lease remain undisturbed and they are entitled to continue their farming operations on the leased land. Other parties contend that:

a) The Lease has terminated by operation of the law, in that the sale by the McLachlans of their shares in the joint venture vehicle has triggered the operation of a clause in the Lease which provides for termination in that event;

b) In the alternative, the Lease is void as to part of the land because it fails to specify a term that is certain or capable of being rendered certain.

[4] There are two separate proceedings; the first is an application for directions by the receivers of the joint venture vehicle, made under s 34 of the Receiverships Act 1993. The second is an application made by Contact Energy Ltd (a purchaser of certain assets from the receivers) made under s 24C(4) of the Judicature Act 1908.

The two sets of proceedings are largely co-extensive and were subsequently consolidated.

[5] The case has been attended by certain procedural difficulties. Originally it was the subject of a five day fixture to commence on 20 October 2008. On 13 October 2008 Williams J granted the McLachlans an adjournment, on the ground that they could not obtain legal representation because they were not in a position to meet the costs involved. Further, Mr McLachlan was unable to represent himself because there were problems with his eyesight.

[6] The case was rescheduled for hearing in June of this year. Again, at a late stage. Mr McLachlan sought an adjournment on largely the same grounds as had resulted in the earlier adjournment. Keane J refused the adjournment in a judgment of 5 June 2009. The result was that Mr McLachlan represented the McLachlan interests at the trial before me. He did so with courtesy and dignity. He is plainly a man of considerable intelligence and experience. By reason of the fact that he is steeped in the history of the land, this litigation, and the joint venture, he was able to give a good account of himself. Of course he is not a lawyer, but to a very significant degree, I was able to rely upon submissions filed by his solicitors in anticipation of the hearing intended to take place in October 2008. Those written submissions deal in considerable detail with all aspects of the legal arguments addressed at trial. They run to some 33 pages and effectively place before the Court those aspects of Mr McLachlan's argument that he was not himself well qualified to address.

[7] Accordingly, although it was less than satisfactory that the McLachlans were not represented by counsel, I am satisfied that in this case they were not at a significant disadvantage.

[8] The evidence was given partly by affidavit, as was appropriate given the nature of the proceedings. Some witnesses were cross-examined. Certain parties wished to cross-examine Mr Towle, a solicitor who acted for the McLachlans. Unfortunately he was overseas and unavailable. At the conclusion of the hearing I adjourned the trial to enable arrangements to be made for Mr Towle to be cross-

examined at a time convenient to counsel and the Court. By memorandum dated 28 August 2009 counsel for Vector Ltd and Mel Network Ltd advised that they did not now wish to cross-examine Mr Towle.

Standing

[9] The pleadings for the McLachlans assert that Contact has no status to bring its proceedings under s 24C(4) of the Judicature Act 1908. However, standing issues were not referred to in the submissions filed on behalf of the McLachlans. Neither did Mr McLachlan address the question during the course of oral argument.

[10] Contact is the owner of certain of the land in dispute, known as lots 1 and 2. Its interest in those lots is subject to an equitable lease in favour of the McLachlans. There is a dispute between Contact and the McLachlans as to whether the equitable lease has terminated or is invalid. In my opinion there cannot be the slightest doubt that the Contact proceeding qualified for entry to the Commercial List and that Contact had standing to bring it.

Factual background

[11] On 1 October 1994, the McLachlan interests, together with Network, entered into a joint venture agreement to construct and operate a geothermal power station near Taupo. On any view the project represented a major commercial undertaking. The McLachlan interests brought to the joint venture farmland, together with certain regulatory consents which would be required to operate the proposed power station. In return they received some $21.5 million, of which $11 million was paid in cash and $10.5 million was represented by the allocation of shares in the joint venture company, Mercury Geotherm Ltd (MGL). The cash for the project came from Network which invested approximately $90 million in the joint venture. MGL was owned by Network as to 51.16% and the McLachlan interests as to 48.84%.

[12] Subsequently the joint venture purchased additional land, including the Landcorp land (part of what became known as Land B), the Bishop Land (Land C)

and two small parcels of land known as lots 1 and 2. The purchase money for these acquisitions came from Network.

[13] Of the land ultimately owned by the joint venture, the McLachlans provided some 32.4% and the joint venture the other 67.6%. Title to Land A, Land B and Land C, was taken either by MGL or by Poihipi Land Limited (Poihipi), both joint venture vehicles. Poihipi was a wholly owned subsidiary of MGL. Title to lots 1 and 2 is vested in Network. I will return to the situation of these separate lots presently.

[14] On 15 December 1995 the joint venture parties executed a number of documents, including an updated joint venture agreement and the Lease with which this proceeding is concerned. All of the joint venture land, less the power station site (around 8 hectares, which was needed for the power station and associated steam wells), was leased to the McLachlan interests for sheep or beef farming purposes.

[15] The Lease comprised, in effect, three separate leases of three separate parcels of land:

a) Land A, leased to the McLachlan interests by Poihipi for 19 years 363 days;

b) Land B, leased to the McLachlan interests by Poihipi for an indefinite term, namely " … until terminated pursuant to the provisions of this Lease …";

c) Land C, leased to the McLachlan interests by MGL, also for an indefinite term " … until terminated pursuant to the provisions of this Lease …"

[16] The Lease conferred upon the McLachlans a right of first refusal to purchase the leased land if MGL/Poihipi decided to sell it. Lots 1 and 2 were not included in the Lease.

[17] The power station was constructed and commenced operation in May 1997, but it was not financially successful. In December 1998, Network which had taken a debenture to secure its investment, appointed receivers to MGL and Poihipi.

[18] The McLachlan interests endeavoured to prevent the appointment of receivers by way of an application to this Court. They were ultimately unsuccessful, but the McLachlan proceeding continued as a claim for damages against Network and later Vector, until it finally settled in early 2006.

[19] On 24 December 1999 the receivers sold the power station to Contact Energy Limited (Contact). Contact also acquired a right to obtain access to the leased land for power station purposes (by requesting that the receivers exercise certain powers under the December 1995 lease). The land subject to the Lease was not sold to Contact, although under the sale and purchase agreement MGL and Poihipi are obliged to sell to Contact upon the termination of the lease.

[20] The failure of the joint venture and the subsequent sale to Contact has, in the words of the Privy Council " … led to some complex and hard-fought litigation raising a number of different issues". Two proceedings were brought by the McLachlans in 1998 against Network. Substantial damages were claimed. Separate proceedings regarding land issues were commenced by the receivers and Network to remove caveats registered against the land by the McLachlans. Among the questions determined by the Court were the extent and scope of Contact's right of first refusal, and the precise status of lots 1 and 2.

[21] In *Mercury Geotherm Ltd (in receivership) v McLachlan* [2006] 1 NZLR 258, Potter J held that these lots were subject to a constructive trust in favour of MGL and an equitable lease in favour of the McLachlans on the same terms as the Lease.

[22] I return to the McLachlans' damages proceeding, settled at the beginning of October 2006. That proceeding had been set down for a six week trial commencing on 2 October 2006. A settlement reached just prior to that was recorded in a formal settlement deed. The proper interpretation of that deed has given rise to these related

proceedings, but a second argument has now arisen. Counsel for Contact and for Network each argue that, except as to Land A, the Lease is void for uncertainty because it specifies an insufficiently certain term.

The issues

[23] There are two groups of issues for determination. The first concerns the proper construction of the deed of settlement. Pursuant to a provision in the Lease, it will come to an end if (as is provided for in the deed of settlement) the McLachlan interests cease to hold shares in MGL. It is argued on their behalf, however, that clause 5 of the deed of settlement negates the relevant provision of the Lease. The McLachlans seek also to argue that there is an implied term in the Lease to the effect that the Lease does not come to an end where the disposition by the McLachlan interests of their shares in MGL occurs at the direction of MGL and/or with its consent.

[24] If the Court rules against the McLachlans on the interpretation point, they raise arguments as to:

a) rectification of the settlement deed;

b) estoppel;

c) mistake;

d) relief against forfeiture under s 118 of the Property Law Act 1952 or the corresponding sections of the Property Law Act 2008.

[25] The second of the two principal arguments concerns the validity of the Lease in respect of Land B and Land C.

[26] The McLachlans argue that the provisions of the Lease defining the term for Land B and Land C are sufficiently precise and certain to save the Lease from invalidity for uncertainty of term. Other counsel say the Lease is simply void, save

in respect of Land A. If the Court should so hold, the McLachlans argue they are entitled to rectification of the Lease.

[27] Many of the foregoing issues require separate consideration in the context of lots 1 and 2.

Clause 10 of the Lease

[28] The termination provisions in the Lease bear upon each of the two principal arguments for determination. It is therefore convenient to set out at this point clause 10 of the Lease, which deals with the circumstances in which the Lease is to come to an end.

[29] Clause 10 provides:

> 10 **Termination**
>
> 10.1 If the Lessors require the Land for any purpose related to the construction and operation of MGL's proposed geothermal power station or the Lessors reasonably believe the use of the Land (or part of it) for the permitted use conflicts with, or limits, that purpose, the Lessors shall have the right to unilaterally vary this Lease to alter the area of the Land which it relates to, to suspend the Lease in respect to all or part of the Land, and/or vary the Term in respect of part or all of the Land, provided the Lessor gives the Lessee not less than 2 months' written notice of its intention to vary or suspend this Lease. If the Lease is materially varied or suspended in accordance with this clause and such variation or suspension occurs following the date of Commissioning, the annual rent shall be reduced on a procedure rata basis in respect of the area of the Land which the Lessee is not permitted to use following the variation, or the period during which any suspension remains in force.
>
> 10.2 In addition to the rights provided in section 11 and in clause s 10.1 and 10.3, this Lease shall terminate on the earliest to occur of:
>
> (a) the expiry of the Term: and
>
> (b) the date that the Lessee, or parties associated with the Lessee, cease to hold shares in the capital of MGL; and
>
> (c) the expiration of 12 months' written notice from the Lessee to the Lessors requiring the Lease to be terminated.
>
> 10.3 This Lease shall also terminate (in respect of Land or that part of the Land purchased) on the settlement date of any agreement for the sale

and purchase of the Land (or part of it) entered into in accordance with the provisions of section 16. Wehre part only of the Land is purchased, the Lessors shall unilaterally vary this Lease to alter the area of the Land which it relates to. If the Lease is materially varied or altered in accordance with this clause, the annual rent shall be reduced on a procedure rata basis in respect of that area of the Land which has been purchased by the Lessee in accordance with section 16.

10.4 Upon termination of the Lease pursuant to the provisions of this section 10, the Lessee shall yield up vacant possession of the Land, all Improvements, and (to the extent they are not removed under clause 6.5, all Lessee's Improvements) to the Lessors and all provisions of the Lease applicable to the expiry of the term shall apply.

10.5 Termination of the Lease pursuant to the terms of this section shall not release the Lessee from liability for rent then due or any antecedent breach of any of the provisions of the Lease.

10.6 The Lessee shall have no right or claim for compensation against the Lessors and shall not obtain any order, injunction or other remedy as a result of the Lessors terminating the Lease pursuant to the terms of this section.

10.7 If any alteration in the area of the Land to which this Lease relates (under clauses 10.1 or 10.3 above) results in this Lease then applying in respect of part only of the Land comprised in the relevant certificate of title, the Term of this Lease in respect of those parts of the Land shall automatically be varied, without payment of compensation to the Lessee and without otherwise affecting in any way the other provisions of this Lease, to a period equivalent to the Term of this Lease insofar as it relates to Land A.

The deed of settlement

[30] It is necessary to set out the terms of the deed of settlement in full:

PARTIES

ALISTAIR STUART McLACHLAN & AVA MARIE McLACHLAN ("Mr and Mrs McLachlan") of Taupo, trustees of the Waiturutu Trust ("Trust").

GEOTHERM ENERGY LIMITED, a company duly incorporated in New Zealand and having its registered office at Taupo.

GEOTHERM GROUP LIMITED, a company duly incorporated in New Zealand and having its registered office at Taupo.

GEOTHERM PRODUCE NEW ZEALAND LIMITED. a company duly incorporated in New Zealand and having its registered office at Taupo.

GEOTHERM TRANSMISSION LIMITED, a company duly incorporated in New Zealand and having its registered office at Taupo.

GEOTHERM INVESTMENTS LIMITED. a company duly incorporated in New Zealand and having its registered office at Taupo.

Together, referred to as ("**Plaintiffs**")

AND

MEL NETWORK LIMITED, a company duly incorporated in New Zealand and having its registered office at Auckland ("**Network**")

VECTOR LIMITED, a company duly incorporated in New Zealand and having its registered office at Auckland ("**Vector**")

MERCURY GEOTHERM LIMITED (in receivership), a company duly incorporated in New Zealand and having its registered office at Auckland ("**Mercury Geotherm**")

POIHIPI LAND LIMITED (in receivership), a company duly incorporated in New Zealand and having its registered office at Auckland ("**Poihipi**")

INTRODUCTION

A. Mr and Mrs McLachlan are directors of and own, either in their personal capacities or on behalf of the Trust, all or the majority of the shares in the remaining Plaintiffs.

B. In October 1994, the Plaintiffs and Network entered into a joint venture agreement for the purposes of establishing a joint venture company to build and operate a power station near Taupo ("**Joint Venture**").

C. Mercury Geotherm was incorporated as the corporate vehicle for the joint venture. Poihipi is a wholly owned subsidiary of Mercury Geotherm, which owns the joint venture land.

D. The Trust and Mercury Geotherm and Poihipi are parties to a deed of lease dated 15 December 1995 ("**Lease**").

E. Funding for the joint venture was provided by Network and secured by debenture over the assets of Mercury Geotherm and Poihipi. In August 1998, Network made demand for payment of $80,000,000 owed under its debenture.

F. In September 1998, the Plaintiffs issued proceedings, CIV-1998-404-253 and CIV-1998-404-510, against Network, Mercury Geotherm and Poihipi seeking an injunction to prevent the appointment of receivers together with damages. Subsequently, proceeding CIV-200-404-7053 was issued against Vector. (The proceedings are together referred to as the "**Damages Proceeding**").

G. In December 1998, Network appointed receivers to Mercury Geotherm and Poihipi.

H. There are separate proceedings, CIV-2000-404-2161, between the Plaintiffs (or some of them) and Poihipi and Mercury Geotherm, which are the subject of an appeal to the Court of Appeal ("**Power station site Proceeding**").

I. The parties have agreed to settle the Damages Proceeding and the Power station site Proceeding on a confidential, full and final basis.

AGREEMENT

1. Network or Vector will pay to Mr and Mrs McLachlan as trustees of the Waituruturu Trust the sum of $1,400,000.00 exclusive of GST (if any) ("**Payment**")

2. The Payment in clause 1 above is conditional upon performance of the following:

   (a) CIV-1998-404-253; CIV-1998-404-510; CIV-2004-404-7053: the Plaintiffs will discontinue each proceeding and Network shall discontinue its counterclaims within 7 days of the date of this deed. Costs will lie where they fall. The Plaintiffs shall be entitled to recover the security for costs which they have paid.

   (b) CIV-2000-404-2161: the Plaintiffs' appeal shall remain in place **only** to protect their position should the survey plan not comply with Potter J's judgment. In respect of the survey plan, the parties agree to the following timetable:

      (i) the survey plan will be provided to the Plaintiffs within three weeks of the execution of this deed;

      (ii) the Plaintiffs shall have one week to consider and agree to the survey plan;

      (iii) either party shall have liberty to approach the Court to have Potter J provide any necessary clarification in relation to the survey plan.

   The plaintiffs agree that they will not oppose the registration of the new certificate of title for the power station site nor will they oppose any remaining steps, including the subdivision application, which need to be taken to enable a certificate of title to be issued and registered. All costs to date are to lie where they fall.

(c) The Plaintiffs will withdraw all caveats, including caveats 6343798.1, 6343798.2 6343727.1, 6343727.2 registered over land owned by either Mercury Geotherm or Poihipi. The Plaintiffs agree that they will not lodge any further caveats on the basis of any term of the Lease.

(d) The Plaintiffs shall transfer their shares in Mercury Geotherm to Network free of any encumbrances within 7 days of the date of this deed.

3. Network or Vector will make the Payment to Mr and Mrs McLachlan as Trustees of the Waituruturu Trust forthwith following the performance of all matters set out in clause 2 above. In respect of clause 2(b) above:

(a) Payment is conditional only upon the Plaintiffs approving the survey plan in accordance with clause 2(b)(ii); or

(b) if the survey plan has not been produced to the Plaintiffs within three weeks of the date of execution of this deed, then Payment shall be made forthwith; but

(c) in that event, the Plaintiffs will nevertheless remain obliged to comply with the clause 2(b)(ii) except that the one week to consider and review the plan shall commence on the day following the provision of the plan; and

(d) In the event that the Plaintiffs do not comply with clause 3(c), they will be liable to refund any payment made to them under this deed forthwith.

4. Subject only to the matters set out in clause 2(b) hereof and the lots 1 and 2 appeal under proceeding CA117/05, the parties agree that this deed is in full and final settlement of any claim which any party may have against any other party or parties in respect of or arising out of the Joint Venture, the Lease, the Damages Proceeding, the Power station site Proceeding or the receivership of Mercury Geotherm and Poihipi.

5. For the avoidance of doubt, the rights and obligations under the Lease shall continue unaffected by this deed.

6. The agreement, this deed and its terms shall be confidential to the parties and their advisers except in so far as:

(e) they are required by law to disclose; and/or

(f) in the case of Vector, Vector provides disclosure to the market and/or to the New Zealand Stock Exchange.

7. This deed may be executed in two or more counterparts, each of which is deemed an original and all of which constitute one and the same deed. This deed will be effective upon the exchange by facsimile of executed signature pages.

[31] Clause 10.2(b) of the Lease provided that the Lease terminates when the McLachlans cease to hold shares in MGL. Clause 2(d) of the deed of settlement required the McLachlans to transfer their shares in MGL to Network, free of any encumbrances, within seven days of the date of the deed of settlement. The transfer occurred on 9 November 2006.

[32] Read in isolation, clause 10.2(b) of the Lease would suggest that the Lease came to an end, at the latest, from the date of registration of the transfer of shares. That is the position adopted by all of the parties save for the McLachlans. The latter argue that clause 5 of the deed of settlement on its proper construction operates to extend the term of the Lease beyond the termination date for which clause 10.2(b) provides.

[33] It is appropriate to touch briefly on some interpretation principles. It is common ground that the contemporary starting point is the discussion to be found in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, as later explained in *BCCI v Ali* [2002] 1 AC 251, along with the decision of our Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74.

[34] For present purposes the correct approach to interpretation is adequately summarised in the headnote to *Boat Park Ltd*:

> The principles by which contracts were to be interpreted were as follows:
>
> (i) the meaning to be ascertained was that which the document would have conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;
>
> (ii) subject to the requirement that it should reasonably have been available to the parties, the background included absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable person, except for the previous negotiations of the parties and their declarations of subjective intent; and
>
> (iii) the meaning of a document was not the same thing as the meaning of its words, but was what the parties using those words against the relevant background would reasonably have understood them to mean, even if this was to conclude that the parties must, for whatever reason, have used the wrong words or syntax. The law did not require that the parties have attributed to them an intention they plainly could not have had.

[35] In certain circumstances the subsequent conduct of the parties may be taken into account: *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277, but only shared conduct, or conduct by both or all parties suggesting a shared intention or understanding will be relevant. Nevertheless, the focus must still be on objective conduct rather than expressions of subjective intention or understanding: *Gibbons Holdings* at [60] per Tipping J.

[36] Because I received evidence from the parties' legal advisers in respect of the events surrounding the preparation and execution of the deed of settlement, it is appropriate to set out an extended passage from the judgment of the Court of Appeal on the question of extrinsic evidence in *Potter v Potter* [2003] 3 NZLR 145:

> **Extrinsic evidence as to negotiations and intentions**
>
> [31] For the interpretation of the contract Mr Carruthers relied upon a passage from the judgment of this Court in *Mount Joy Farms Ltd v Kiwi South Island Co-operative Dairies Ltd* (Court of Appeal, CA 297/00, 6 December 2001) at paras [38] and [39]:
>
> > "[38] The day has long since passed in our Courts where words are to be given a purely literal meaning. The words used are to be given their natural and ordinary meaning, and having regard to what those words as used in a document would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> >
> > [39] It is unnecessary to traverse the authorities for these now well established propositions. They include *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98; *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74; *Yoshimoto v Canterbury Golf International Limited* [2001] 1 NZLR 523; *WEL Energy Group Limited v ECNZ* [2001] 2 NZLR 1."
>
> [32] It seems necessary to observe that in *Mount Joy Farms* this Court was not setting out to provide any comprehensive survey of interpretation principles. In particular the phrase "all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" could be misconstrued if divorced from the context in which Lord Hoffmann first used it in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at p 913A. Lord Hoffmann's comprehensive survey of principle (912F – 913E) included, for example, the acknowledgment that "[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent" (p 913). The extent to which Lord Hoffmann's own gloss upon Lord Wilberforce's speeches in *Prenn v Simmonds* [1971] 1 WLR 1381 at pp 1384 – 1386 and *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 will endure is not yet finally resolved. Arguably such decisions as *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391 (PC) at p 395

represent a more conservative tendency although in the end the difference may be only one of emphasis.

[33] Wherever the emphasis is placed, the way in which commercial litigation is currently conducted in New Zealand suggests widespread misunderstanding of the limits of extrinsic evidence. It must not be overlooked that the "background knowledge" referred to by Lord Hoffmann can be relevant only where stringent requirements are satisfied. Four are of particular importance in the present case.

[34] The first is that although a contract is to be interpreted in its factual setting, there is no justification for invoking rules which exist solely to resolve ambiguities in order to create an ambiguity which, according to the ordinary meaning of the words used in the document, is not there: *Melanesian Mission* at p 395. The second is that extrinsic facts can be relevant only if within the mutual contemplation of the parties. Even an objective view of meaning is irrelevant if based on facts within the contemplation of one party alone. The third is that with the exception of known unilateral mistake, non est factum, and rectification, the subjective intentions of the parties are irrelevant. The fourth is that pre-contract negotiations are irrelevant except when used for the very limited purpose of ascertaining what objectively observable facts, as distinct from intentions, must have been within the contemplation of both parties: *Eastmond v Bowis* [1962] NZLR 954 (CA) at pp 959 and 960.

[35] It is true that in one of the decisions relied upon in *Mount Joy Farms*, Thomas J suggested that the parties' negotiations and draft agreements should be admissible if reliable extrinsic evidence were available to confirm their actual intentions (*Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (CA) at paras [59] – [95], pp 538 – 549). But it is important to note that when the decision in Yoshimoto was reversed in *Canterbury Golf International Ltd v Yoshimoto* [2002] UKPC 40) Lord Hoffmann took the opportunity to say this at paras [25] and [28]:

> 25. In a separate section of his judgment, Thomas J expressed the view that his construction was supported by two provisions in earlier drafts of the contract. He said that the normal rule which excludes evidence of pre-contractual negotiations, authoritatively stated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, should be relaxed or departed from. Their Lordships do not think that this is a suitable occasion for re-examining the law because they consider that in this case the evidence is, as Lord Wilberforce predicted, unhelpful.
>
> 28. Their Lordships do not think that it is helpful to try to construe the earlier version of clause 6.3 because it was dropped and the present clause 6.3 substituted. It seems to them pointless to try to speculate upon why the change was made. No doubt each party had their reasons for proposing it on the one hand and accepting it on the other. *All a court can do is to decide what the final contract means.*" (Emphasis added.)

[36] Accordingly Yoshimoto did not effect any change to established limits to the permissible use of extrinsic evidence for interpretation purposes. Considerable misdirected litigation time might be saved if more effect were given to those limits. In an area of Judge-made law no one could say that the limits are necessarily immutable. But that could scarcely be justification for

> adducing inadmissible evidence in the meantime. We do not admit inadmissible evidence against the possibility that one day a law change might make it admissible. As McGechan J tartly observed in *WEL Energy Group Ltd v Electricity Corporation of New Zealand* [2001] 2 NZLR 1 (general approach approved by this Court at p 18, para [31]) at p 9:
>
>> "[23] It may seem old-fashioned, but the first step in interpreting words in a document is to read the words concerned. They are the central focus, and the point of departure. *Boat Park* principles do not require anything different. The question is the meaning of the words used, in light of surrounding circumstances. Reference to surrounding circumstances is particularly appropriate where words used give rise to ambiguity or literal meaning gives rise to unreasonable outcomes. One does not start from surrounding circumstances and on that basis invent wording which might have made more sense but which does not exist. The task is interpretation, not reconstruction."
>
> [37] Once careful regard is paid to those principles, it becomes clear that in the present case none of the extrinsic evidence as to the intentions of the parties is admissible. Accordingly we do not propose to traverse the conflicting evidence on that topic.

[37] In the present case, evidence about the circumstances in which the deed of settlement came into being, and as to its negotiation, was plainly admissible because the McLachlans seek rectification if the Court does not accept their interpretation argument. But in its task of interpreting the deed of settlement, the Court is not to be informed by evidence of the course of negotiations between the parties or by declarations of subjective intent.

[38] I turn to the deed of settlement itself. Clause 2(d) provides that the McLachlans will, as part of the settlement, transfer their shares in MGL to Network free from any encumbrances within seven days of the date of the deed. In terms of clause 10.2(b) of the Lease, any such transfer would have the effect of terminating the Lease. The question is whether clause 5 of the deed of settlement operates to negate the effect of clause 10.2(b) of the Lease.

[39] The first observation is that the clause is expressed in declaratory terms: " … for the avoidance of doubt …" These opening words simply reflect the fact that, apart from clause 5 itself, the deed cannot possibly be regarded as affecting rights and obligations arising under the Lease. The only other reference to the Lease is to a covenant by the McLachlans not to lodge any further caveats " … on the basis of any term of the Lease". So apart from clause 5 the Lease is unaffected by the deed.

[40] Later observance by the McLachlans of the obligation created by the deed of settlement to transfer their shares in MGL to Network is consistent with clause 5 of the deed. The covenant to transfer their shares does not affect the terms of the Lease, which therefore remain "unaffected". The subsequent transfer and its registration have the effect of terminating the Lease, but termination arises from the related transfer and not from the provisions of the deed of settlement.

[41] The construction of clause 5 of the deed urged upon the Court by the McLachlans requires a finding that clause 5 effectively varies clause 10.2(b) of the Lease by providing that the transfer of shares undertaken pursuant to the deed of settlement is not to have the effect of terminating the Lease. In other words, it is argued that clause 5, which is intended to ensure that the provisions of the Lease remain unaffected, actually varies the Lease by negating the effect of clause 10.2(b).

[42] In the synopsis of submissions prepared by counsel for the McLachlans, it is contended that:

a) all parties were in possession of a copy of the Lease and aware of its existence. The terms of the Lease therefore constituted a fact that formed part of the available matrix;

b) given the value of the Lease to the McLachlans, and the potential for the transfer of shares to terminate the Lease, the McLachlans' interpretation of clause 5 must be the correct one;

c) the subsequent conduct of the parties in taking no immediate steps to terminate the Lease is consistent with an understanding shared with the McLachlans that clause 5 would prevent the Lease from terminating.

d) the McLachlans had transferred a significant portion of their farm land to the joint venture at the outset, and had taken back a lease of that land (excluding that portion required for the power station itself) along with further land acquired by the joint venture.

e) the land, the subject of the Lease, continues to be farmed by the McLachlans down to the present day;

f) the terms of the Lease include a right of first refusal granted to the McLachlans, should the lessor wish to sell;

g) accordingly the Lease remained extremely valuable to the McLachlans;

h) throughout the associated land proceedings, the McLachlans had tried to protect their position following the sale to Contact by arguing that the right of first refusal to purchase the leased land had been triggered.

[43] As to that, the existence of the Lease, and indeed its terms, must obviously form part of the available factual matrix. But the Court is not at liberty to consider the subjective intention of the parties, or any of them, where the interpretation of the agreement is plain.

[44] The deed of settlement was prepared by lawyers, negotiated by lawyers, and ultimately executed under the supervision of lawyers. Negotiations proceeded over some days, albeit in the context of the urgency created by the pending fixture in this Court.

[45] The parties and their legal advisers, had been engaged in a number of related disputes over a period of many years. They must be taken to have been familiar with the complex legal and commercial background.

[46] In my opinion, had the parties to the deed of settlement intended to modify the deed of Lease so as to save it from termination in the event of the transfer of the McLachlans' shares in MGL, there would have been at least an express reference in the deed of settlement to clause 10.2(b) of the Lease, and the parties would have spelt out their intention that the deed was not to have the effect of leading to the ultimate termination of the Lease.

[47] That did not occur. Clause 5 of the deed of settlement, as it stands, accurately sets out the legal position. The provisions of the deed itself do not affect the rights and obligations under the Lease. Rather, the Lease was terminated some days later when the McLachlans transferred their shares in MGL to Network. Until the shares were registered, they remained shareholders of MGL: clause 12.6 of MGL's constitution and ss 39(2) and 84(1) of the Companies Act 1993.

[48] I conclude therefore that, subject to my findings on the consequential arguments raised by the McLachlans, the transfer by the McLachlans of their shares in MGL to Network did have the effect of terminating the Lease, pursuant to the provisions of 10.2(b) thereof.

Rectification of the deed of settlement

[49] There is no dispute among counsel as to the legal principles governing the application of the equitable doctrine of rectification. In *Dundee Farms Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647 at 651, Richmond P, delivering the judgment of the Court of Appeal, said:

> … there is no dispute between counsel as to the legal principles which govern this case. They are to be found in the judgment of Simonds J in *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662. A passage from that judgment was adopted as a correct statement of the law by the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86, 95; [1970] 1 All ER 1213, 1220. The relevant portion is as follows:
>
>> ". . . in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify . . . [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties" ([1939] 1 All ER 662, 664).

[50] In *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 29-30 the following principles were identified by Tipping J:

> … I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the Court must be satisfied that the following points are established:
>
> (1) That, whether there is in antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
>
> (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

[51] The burden of proving a relevant common and continuing intention lies upon the party who claims that the written contract should be rectified: *Tucker v Bennett* (1887) 38 Ch.1 at 9. The nature of the onus resting on the party seeking rectification was discussed by the Court of Appeal in *South Island Deepwater Fisheries Ltd v Attorney-General* (1996) 5 NZBLC 104,073 at 104,076.

> We accept that to establish a case for rectification there must be convincing proof, but we do not regard this as importing some heavier onus than the normal civil onus of proof on the balance of probabilities. In every civil case the evidence must be such as to satisfy or convince the Judge, on the balance of probabilities, that the party on whom the onus lies has established the facts in issue. What degree of evidence will bring the Judge's mind to that position will vary according to the gravity of the allegation, as in the case of fraud: *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970. In a rectification case, one starts with the cogent evidence of the document itself, which purports to be the agreed record of the parties themselves as to the terms of their bargain. As Brightman LJ said, there is a high evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intentions. Mr Logan made the point that this must be all the more so where the document in question is a commercial contract between parties having access to legal advice.

[52] Where rectification is sought, evidence may be given of the negotiations of the parties and of their prior expressions of subjective intention: *Butler v Countrywide Finance Ltd* (1992) 5 PRNZ 447; *Attorney-General v Dreux Holdings Ltd* (1996) 7 TCLR 617.

[53] The rectification argument for the McLachlans emphasises the disastrous consequences for them of the loss of the Lease. They would lose their right to farm the land along with the right of first refusal contained in the Lease, a right which the McLachlans believed represented the only way, for practical purposes, by which the land earlier transferred to the joint venture might be recovered by them. The McLachlans argue also that the other parties must have been aware of their position, by reason of the stance adopted by the McLachlans over many years of litigation.

[54] Messrs Bryers and Towle, legal advisers to the McLachlans, each gave evidence. They considered clause 5 of the deed of settlement to have been sufficient to preserve and protect the McLachlans' interests in the land concerned.

[55] During the negotiations there appears to have been no explicit reference to the impact of the deed of settlement upon clause 10.2(b) of the Lease. Mr Bowler (a solicitor for the receivers) was involved in the negotiations but was unaware of the existence of clause 10.2(b). Likewise, Ms Nickels, a director of Network and legal services manager for Vector, says that neither Vector nor Network knew at the time of the execution of the deed, that the transfer of the shares in MGL would terminate the Lease. The evidence of Ms Ferguson, a partner in the firm of solicitors acting for Network and Vector, is to the same effect. Both say however that Network could not take any step that might detrimentally affect Contact's right to the land upon termination of the Lease. From the point of view of Network and Vector the purpose of the deed was to settle the damages proceedings and obtain possible taxation and other benefits for Network.

[56] Against that background I turn to the negotiations leading up to the execution of the deed. In the course of their arguments, the parties concentrated upon two letters from Wilson Harle (solicitors to Network/Vector) to Martelli McKegg (McLachlans' solicitors) on 26 and 28 September 2006 respectively, and a reply to the first of those letters from Martelli McKegg dated 27 September 2006.

[57] The McLachlans accept that oral negotiations were concerned primarily with the settlement figure and with timing of the settlement payment. Their case for rectification concentrates on the letters.

[58] The first letter, of 26 September 2006 from Wilson Harle, set out an offer of settlement to the McLachlans, which included a payment of $3 million to them on conditions which included the termination of the Lease and the transfer of the leased land to Contact, subject to Contact granting a lease back to the McLachlans over the land on identical terms. The reply of 27 September 2006 from Martelli McKegg declined the offer, indicating that: "Our client considers that Contact will never sell the land and that the right of first refusal will become worthless".

[59] The third letter dated 28 September 2006, from Wilson Harle, outlined an offer of settlement which became the basis for the deed of settlement. Paragraph 3(c) of that letter reads:

> Your clients will withdraw all caveats, including caveats 6343798.1, 6343798.2, 6343727.1, and 6343727.2, and agree not to lodge any further caveats on the basis of any clause of the deed of Lease dated 15 December 1995 ("**Lease**"). The suggestion that the interests be incorporated into easements or otherwise into the survey plans is not acceptable. The rights will, of course, continue in the Lease which is remaining on foot.

[60] This letter also explained that the settlement offer was reduced from the former $3 million to $1 million, by reason of the fact the McLachlans were not prepared to compromise on land ownership issues (by agreeing to terminate the Lease), and so the land could not be sold to Contact and the proceeds of sale were no longer available to Network to meet any settlement payment.

[61] The letter of 28 September was written by Ms Ferguson. Her reference to the Lease remaining on foot must therefore be considered in the light of her evidence that she was at the time unaware of the provisions of clause 10.2(b) of the Lease.

[62] Although Ms Ferguson and Mr Bowler have no recollection of it, Mr Bryers contended in evidence that he had discussed the continuation of the McLachlans' lease with them during the course of negotiations leading up to the deed of settlement.

[63] The original draft of the deed of settlement appears to have been prepared by Ms Ferguson who circulated it on the evening of 28 September 2006. That first draft

did not contain clause 5. On the following morning at about 9 am she circulated a revised version which did include clause 5.

[64] Ms Ferguson believes that clause 5 was inserted at the suggestion of another solicitor involved in the negotiations, but she is unable to say who. Mr Bryers says it was not him and that he does not believe he spoke to Ms Ferguson between the first and second drafts. The suggestion may have come from Mr Towle, whose evidence is silent on the point; but he did speak to Ms Ferguson about that time in relation to the caveats.

[65] The second draft of the deed contained a version of clause 5 that was later modified. In its initial form it read:

> For the avoidance of doubt the rights under the Lease shall continue unaffected by this deed.

[66] Network says that the clause might have been intended to refer to rights which supported earlier disputed caveats lodged by the McLachlans (a right of first refusal and the right to extract minerals). Those caveats were the subject of paragraph 3(c) of the letter dated 28 September 2006 from Wilson Harle. In its initial form the clause simply records the fact that the deed was not intended to affect those rights. However, following receipt of the second version of the deed of settlement, Mr Bryers, in consultation with Mr Towle, went through the amended version of the deed and made certain handwritten changes. One of those changes was to insert the phrase "and obligations" in clause 5 after the words "the rights". As is argued for the McLachlans, it is unlikely that Mr Bryers would have done that if he had been the author of the clause in its original form. The amendments made by Mr Bryers were acceptable to Ms Ferguson, who provided a further version of the deed later that morning.

[67] I turn to consider the position of the individual participants in negotiations. Ms Nickels of Network/Vector says that she believed the clause to have been simply a "boilerplate clause", the function of which she understood was to declare that the provisions of the deed of settlement did not, of themselves, vary the Lease. Ms Ferguson, while uncertain who initially provided the proposed clause 5, says that

if she was indeed the author, she would not have inserted the clause for the purpose of dealing with clause 10.2(b) of the Lease, since she was unaware of the existence of that clause. She also says that, had she known about clause 10.2(b), then she would not have included clause 5 of the deed of settlement in that form, because there was a risk that it might have given rise to a claim by Contact against her clients. Ms Ferguson's position is that she considered clause 5 to simply state the obvious: that the settlement did not involve dealing with the Lease, the terms of which were unmodified by the settlement.

[68] Mr Bryers and Mr Towle each say that they believe clause 5 was included to ensure that the transfer of shares in MGL would not result in the termination of the Lease under clause 10.2(b). Mr McLachlan, unsurprisingly in the light of the advice he would have received from Messrs Bryers and Towle, believes that under the deed of settlement the Lease was to continue. He says he would never have signed the deed of settlement otherwise.

[69] While it might be thought remarkable that Messrs Bryers and Towle had a detailed familiarity with the terms of the Lease, but Ms Ferguson and Ms Nickels did not, the difference is readily explicable. Messrs Bryers and Towle had acted for the McLachlans for some time in a range of litigation which included the land disputes, so they were well aware of the details of the Lease. On the other hand, neither Ms Ferguson nor Ms Nickels had been involved in the land disputes to any significant degree.

[70] Three principal factors suggest that there may be substance in the argument advanced by the McLachlans:

a) the explicit reference in Wilson Harle's letter of 28 September 2006 to the Lease continuing on foot;

b) having turned down $3 million in return for agreeing to the termination of the current Lease, the sale of the land to Contact and the taking of a lease back from Contact on identical terms, the McLachlans would hardly agree to settle for $1 million, on the basis

that by transferring their shares in MGL to Network they would bring the existing Lease to an end in any event;

c) there would be no need for clause 5 at all if the common intention of the parties was that the Lease would be rapidly brought to an end upon completion of the formalities attending the transfer of the McLachlans' shares in MGL.

[71] Against that, there is this powerful consideration – if the continuation of the Lease was a fundamental requirement for the McLachlans, then why was a clause unambiguously preserving the Lease not included in the deed of settlement, and why does clause 5 omit any reference to the crucial clause 10.2(b) of which Messrs Bryers and Towle say they were well aware?

[72] In my view, the McLachlans have not discharged the burden of proof resting upon them. At most, the evidence discloses that Network/Vector and the receivers, together with their advisers, simply did not turn their minds to the provisions of clause 10.2(b) of the Lease. Although the McLachlans and their advisers were cognisant of the clause, the steps they took to preserve the McLachlans' position were insufficiently clear to give rise to an inference that a common intention had arisen. It is not possible to identify "a single corresponding intention" to use the words of Tipping J in *Westland Savings Bank*.

[73] The McLachlans' counterclaim for rectification of the deed of settlement accordingly fails.

Mistake

[74] The McLachlans further plead and argue the provisions of the Contractual Mistakes Act 1977. They rely upon each of the three categories of mistake for which that Act provides, namely:

a) a unilateral mistake known to one or more other parties (s 6(1)(a)(i));

b) a common mistake made by all parties (s 6(1)(a)(ii)); and

c) two or more parties (not having substantially the same interest under the deed of settlement) making different mistakes about the same matter of fact or law (s 6(1)(a)(iii)).

[75] There is no evidence to support the proposition that Network/Vector and the receivers entered into the deed of settlement knowing that the McLachlans believed that the Lease would be preserved by the deed of settlement. The evidence is that Network/Vector (and for that matter the receivers), simply did not turn their minds to the provisions of clause 10.2(b) at the time at which the deed of settlement was negotiated. Neither is there any evidence to support the argument that s 6(1)(a)(iii) applies.

[76] The argument for the McLachlans with respect to common mistake (s 6(1)(a)(ii)) is that the parties entered into the deed of settlement on the shared mistaken understanding that the transfer of their shares in MGL would not result in the termination of the Lease. There are several difficulties with this argument. The first is that the mistake relied upon is, in effect, as to the proper interpretation of clause 5 of the deed of settlement. The McLachlans and their legal advisers considered clause 5 to have been sufficient to protect and preserve their interests under the Lease. I have held that it was not. The qualifying mistake is therefore as to the interpretation of the relevant contract. Relief in respect of such a mistake is barred by s 6(2) of the Contractual Mistakes Act.

[77] Neither can it be shown that Network/Vector or the receivers entered into the deed under a mistake as to the effect of clause 5. The evidence is that they were unaware of the provisions of clause 10.2(b). That being so, it cannot be said that they shared a common mistake with the McLachlans. There can be no common mistake as to a matter to which one party did not turn its mind: *New Zealand Refining Co Ltd v Attorney-General* (1993) 15 NZTC 10,038; *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211. Those were cases in which both parties had failed to turn their minds to the issue giving rise to the alleged mistake.

[78] The position is slightly different here, in that the McLachlans and their advisers were alive to the provisions of clause 10.2(b), but thought they were protected by clause 5 of the deed of settlement. Other parties were unaware of clause 10.2(b) and thought that clause 5 of the deed of settlement was simply declaratory. Those parties cannot be said to have been influenced in their decision to enter into the deed of settlement by the same mistake as asserted by the McLachlans. Those other parties did not turn their minds to the impact of clause 5 upon clause 10.2(b) of the Lease and so cannot be said to have misconceived it or formed any belief or conception about it. They are neither correct nor mistaken.

[79] For these reasons the McLachlans are unable to rely upon the provisions of the Contractual Mistakes Act.

Estoppel

[80] The McLachlans plead also that MGL is estopped from asserting that as at either 6 October 2006 (the date of execution of the deed of settlement), or 9 November 2006 (the date upon which the shares were transferred), the Lease terminated. They rely upon:

a) the negotiations leading up to the execution of the deed of settlement;

b) their continued and uninterrupted occupation of the land subject to the Lease over a period of many years;

c) the failure of any party to the present proceedings to take any step until now to determine the rights and obligations of the parties under the Lease; and

d) the acceptance of annual rental from the McLachlans.

[81] This aspect of the case received only very limited attention and argument. The elements of estoppel by representation are not in dispute. There must be a clear, unambiguous representation or promise by one party to the other. The party to

whom the representation or promise was made must have relied on it by altering his or her position to such an extent that it would be inequitable to allow the promisor to go back on his or her word: *Gillies v Keogh* [1989] 2 NZLR 327.

[82] While silence or inaction may constitute a representation as much as positive language, no estoppel will arise unless the representor was under a legal duty, as opposed to a moral or social duty, to the representee to make the disclosure which was not made, or to take steps which were not taken, and which were relied upon as creating the estoppel: *W & R Jack Ltd v Fifield* [1996] 2 NZLR 105. An alteration in position may consist merely of a failure to take some course of action which the representee would possibly have taken but for the representation: *Hutton v Royal Exchange Assurance Corp* [1971] NZLR 1045.

[83] I am satisfied that the McLachlans cannot set up an estoppel in this case. The subject matter of the asserted estoppel is the deed of settlement, read in the context of the Lease. The deed of settlement was negotiated over a period of days, after extensive detailed negotiations. It is not possible to identify a representation on the part of the other parties which the law ought to regard as actionable. In particular, statements made after the execution of the deed of settlement cannot possibly have influenced the decision of the McLachlans to execute the deed, and statements made by other parties or their legal advisers prior to the date of execution of the deed cannot have operated as an estoppel either. Throughout, the McLachlans were in receipt of competent and experienced legal advice from advisers who had acted for them for some considerable time.

[84] Ultimately, they must have acted on the advice they received from their lawyers, and not on the basis of observations by other parties as to the legal effect of either the Lease or the deed of settlement.

Implied term

[85] The McLachlans further plead that a term must be implied into the Lease (not the deed of settlement), to the effect that the termination event specified in clause

10.2(b) would not apply to the disposition by the McLachlans of their shares in MGL, at the direction of MGL and/or with its consent.

[86] Again, this aspect of the argument received little attention at the hearing. There is a presumption against implying terms into written contracts: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137. Where a contract is in writing, and has been carefully constructed, detailing the parties' respective rights and obligations, there will be little room for the implication of terms on business efficacy grounds: *Duke of Westminster v Guild* [1985] QB 688 at 698 and *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169 at [17].

[87] Among the leading authorities on implied terms is *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363, where the Privy Council set out five conditions (which may overlap) that must be satisfied before a term will be implied. The term must be:

a) reasonable and equitable;

b) necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

c) so obvious that it "goes without saying";

d) capable of clear expression; and

e) not contradict any express term of the contract.

[88] The proposed implied term fails most of the *BP Refinery* tests. For example it is not necessary to give business efficacy to the contract. In most circumstances (other than the insolvency of the McLachlans) a transfer of their shareholding in MGL would be undertaken by consent. To imply the term for which the McLachlans contend would be to rob the clause of virtually all efficacy. Indeed, it would seem the implied term would render clause 10.2(b) of the Lease entirely redundant, in that MGL's consent is required for every share transfer because the

Board of MGL is empowered in its absolute discretion to refuse to register a transfer of shares. In effect therefore, the proposed implied term contradicts the term itself. Moreover, the term sought to be implied is by no means obvious.

[89] The McLachlans' argument for an implied term cannot therefore be sustained.

Relief against forfeiture

[90] In the alternative the McLachlans seek relief against forfeiture pursuant to s 118 of the Property Law Act 1952, or alternatively s 253 of the Property Law Act 2007.

[91] Again, this argument received no significant attention at the hearing. Section 253 of the Property Law Act 2007 applies in the case of cancellation of a lease on the ground of a breach of a covenant or condition of a lease. There has been no breach in the present case. The McLachlans were not bound to hold shares, nor were they bound to retain them. The Lease simply terminates by operation of law when the McLachlans cease to hold shares in MGL. Sale of their shares in that company cannot be construed as a breach of a covenant or condition of the Lease. The provisions of s 253 of the Property Law Act simply have no application.

The deed of settlement: conclusion

[92] In my opinion clause 5 of the deed of settlement leaves the terms of the Lease undisturbed. The subsequent transfer by the McLachlans of their shares in MGL pursuant to the provisions of the deed of settlement triggered the operation of clause 10.2(b) of the Lease, with the result that it thereby terminated, bringing to an end their interests as lessees in respect of the lands covered by the Lease: Land A, Land B and Land C.

[93] I will deal with the question of lots 1 and 2 separately in this judgment.

Is the Lease valid?

[94] As a matter of law the Lease is comprised of three separate leases, combined in one document. Clause 2.1 of the Lease provides:

> **TERM AND RENT**
>
> 2.1 This Lease shall commence on the Commencement Date specified in the Reference Schedule and shall expire at midnight on the last day of the Term unless previously terminated pursuant to the provisions of this Lease. The parties acknowledge that the Lease may terminate in respect of part of the Land prior to the expiry or termination of the Lease in respect of any other part of the Land. In the event of such termination, this Lease shall continue and shall be of full force and effect in respect of the remaining Land, subject to the relevant provisions of this Lease.

[95] The term of the Lease is stipulated in item 2 of the Reference Schedule which is annexed to and forms part of the Lease. Item 2 reads:

> **TERM**
>
> In respect of Land A, 19 years 363 days or until terminated pursuant to the provisions of this Lease, whichever is the earlier.
>
> In respect of Land B and Land C, until terminated pursuant to the provisions of this Lease.

[96] The Lease makes provision for termination in clause 10 (reproduced earlier) upon the occurrence of certain defined events:

a) The expiry of the Term (clause 10.2(a));

b) The date upon which the McLachlans or parties associated with them cease to hold shares in MGL (clause 10.2(b));

c) The expiry of a 12 months notice in writing from the McLachlans (clause 10.2(c));

d) Where the right of first refusal is exercised (clause 10.3).

[97] In addition, clause 11.1(a) contains the usual provision, pursuant to which the lessors may terminate in the event of default by the McLachlans.

[98] Certainty of term is an essential element of a valid lease: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, and the term of the lease must be certain or capable of being made certain at the time at which it takes effect: *Lace v Chantler* [1944] KB 368 at 370.

[99] In *Prudential Assurance* a lease which purported to inure "until the said land is required by the landlord for the purposes of widening Walworth Road" was held to be void. Lord Templeman delivered the leading speech in *Prudential* and said at 394:

> My Lords, I consider that the principle in *Lace v Chantler* [1944] 1 All ER 305, [1944] KB 368 reaffirming 500 years of judicial acceptance of the requirement that a term must be certain applies to all leases and tenancy agreements. A tenancy from year to year is saved from being uncertain because each party has power by notice to determine at the end of any year. The term continues until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine or for one party only to be able to determine is inconsistent with the concept of a term from year to year: see *Doe d Warner v Browne* (1807) 8 East 165, 103 ER 305 and *Cheshire Lines Committee v Lewis & Co* (1880) 50 LJQB 121. In *In re Midland Railway Co's Agreement* [1971] Ch 725 there was no 'clearly expressed bargain' that the term should continue until the crack of doom if the demised land was not required for the landlord's undertaking or if the undertaking ceased to exist. In the present case there was no 'clearly expressed bargain' that the tenant shall be entitled to enjoy his 'temporary structures' in perpetuity if Walworth Road is never widened. In any event principle and precedent dictate that it is beyond the power of the landlord and the tenant to create a term which is uncertain.

[100] So in *Doe d Roberton v Gardiner* (1852) 12 CB 319, a purported lease "for ever" was held to be void. Similarly in *Lace v Chantler* a lease for the duration of the war was held to be invalid. But in *Mrs Levin Ltd v Wellington Co-operative Book Society* [1947] NZLR 83, a lease for the duration of the war, or a term of five years, whichever date should be the earlier, was held to be valid because the maximum date was certain. The term of the lease could be no longer than five years.

[101] In *Sinclair v Connell* [1968] NZLR 1186, it was held that a lease for the life of a tenant will be valid because the ultimate death of the tenant is inevitable.

[102] The principle discussed in *Prudential Assurance* and in *Lace v Chantler* was approved and applied by Cartwright J in *Canon NZ Ltd v Herpa Properties Ltd* HC

AK CP183/94 27 April 1995, and is accepted as applicable in this country in Hinde McMorland & Sim *Land Law in New Zealand* (online looseleaf ed, LesisNexis) 11.006.

[103] Interestingly, s 212 of the Property Law Act 2007, ameliorates something of the rigour of the common law principle. It provides:

> **212 Lease terminating on occurrence of future event**
>
> (1) A lease is not invalid only because it provides for its termination, or permits notice of its termination to be given, on the occurrence of a future event so long as the event is sufficiently defined in the lease that it can be identified when it occurs.
>
> (2) However, the lease terminates on the tenth anniversary of the date on which the term of the lease began (the **tenth anniversary date**) if that future event has not occurred before that date.
>
> (3) Subsection (2) does not apply to a lease that provides for its termination on, or for notice of its termination to be given on or before, a date that—
>
> > (a) is fixed in the lease; and
> >
> > (b) is later than the tenth anniversary date.
>
> (4) A lease that is valid only because of the application of this section cannot be registered under the Land Transfer Act 1952 but is to be treated for all purposes as creating an equitable estate in the land.

[104] By virtue of s 212, a lease will not be invalid by reason only of the fact that it provides for termination on the occurrence of a future event, so long as the event is sufficiently defined in the lease that it can be identified when it occurs. So, in terms of s 212, a lease which provides for termination on the occurrence of an event which may never occur, will not be invalid. But s 212(2) provides that in such circumstances the lease terminates on the 10th anniversary of the date on which the term of the lease began, if that future event has not occurred before that date.

[105] The existence of the section constitutes legislative recognition of the underlying common law principle, but s 212 applies only to leases or sub-leases that come into operation on or after 1 January 2008 (s 206(2)), and so is of no application here.

[106] I turn to the facts of this case. It is immediately apparent that there can be no challenge on the ground of uncertainty of term to the lease, insofar as it concerns Land A. The lease of Land A specifies a term certain of 19 years 363 days, and so cannot be void for uncertainty.

[107] But the leases of Land B and Land C are different. Clause 10.2(a) is not applicable because the lease does not specify a term in respect of Land B and Land C. Clause 10.2(b) confers no certainty because the McLachlans or parties associated with them may never cease to hold shares in MGL.

[108] Clause 10.2(c) is likewise uncertain because the written notice for which that sub-clause provides may never be given. Clause 10.3 confers no greater certainty because the lessors may never wish to sell the land, with the result that the right of first refusal may never be exercised, and clause 11.1(a) is uncertain because the McLachlans might never default under the Lease.

[109] The right of the McLachlans to give 12 months notice under clause 10.2(c) requires particular attention. In *Prudential Assurance* Lord Templeman (at 395), referred specifically to in the case where one party only has the right to terminate at will. He said:

> A term must either be certain or uncertain. It cannot be partly certain because the tenant can determine it at any time and partly uncertain because the landlord cannot determine it for an uncertain period. If the landlord does not grant and the tenant does not take a certain term the grant does not create a lease.

[110] Mr McLachlan submits that the proper construction of the term of the Lease can only be as set out under clause 10.7, and against the background that the joint venture partners proceeded on the basis that whatever land was not utilised for the power station's requirements would be leased back to the McLachlan interests.

[111] Clause 10.7 makes provision for an amendment to the term of the Lease in respect of Land B and/or Land C, where additional land is required for the power station. In those circumstances, clause 10.7 provides that the term of the Lease shall be automatically varied in respect of the remainder of the land in the relevant certificate of title, so that the term of the Lease is equivalent to that specified in

respect of Land A, namely 19 years 363 days. The difficulty about that lies in the principle that the validity of the Lease must be judged as at the date upon which the Lease comes into effect. As at that date, there can be no certainty that the provisions of 10.7 would ever operate to bring the term of the Lease for Land B and/or Land C into line with the term certain that applies in respect of Land A.

[112] The result is that in respect of Lands B and C, the Lease is void. Section 105 of the Property Law Act 1952 deems the interest of the McLachlans in the Lease to be limited to a tenancy determinable at the will of either of the parties by one month's notice in writing.

[113] Section 105 of the former Act applies to the exclusion of the equivalent s 210 of the Property Law Act 2007: see s 367(3) and (4) of the 2007 Act.

Rectification of the Lease

[114] In the event that the Lease was found to be void in respect of Lands B and C, the McLachlans seek rectification to provide for a perpetually renewable term, subject to the termination provisions in clauses 10 and 11.

[115] I have earlier set out the legal principles applicable to a claim for rectification. In order to succeed the McLachlans must show on the balance of probabilities that, prior to execution of the Lease, the parties to it had reached a common understanding not reflected in the document recording their bargain.

[116] Two preliminary matters require brief discussion. First, the Lease was one of a number of documents, all executed on 15 December 1995. The documents concerned recorded the agreement of the parties in respect of a complicated commercial joint venture project of some considerable scale. Each party was advised by lawyers throughout negotiations which occupied many weeks. The terms of the Lease (and the other joint venture documents) were the subject of detailed discussion by the parties and their legal advisers. These considerations of themselves tend to tell against rectification.

[117] The second question relates to the somewhat unusual drafting technique employed in the Lease in order to distinguish between Land A on the one hand and Lands B and C on the other.

[118] When the Lease was executed the parties did not know how long the joint venture would last. Section 218(a)(iii) of the Resource Management Act 1991 provided that a lease of part (but not the whole) of an allotment for more than 20 years was deemed to amount to a subdivision. Land A comprised part titles and would be caught by s 218, but Lands B and C comprised whole titles, and so not subject to that section. For that reason, the parties agreed that the lease of Land A would be for 19 years 363 days, a term just short of the 20 year trigger period provided for in s 218.

[119] Clause 10.7, discussed earlier, was likewise aimed at ensuring that the deeming provisions of s 218 did not catch the Lease where, by reason of later power station requirements, the area leased was reduced to less than the whole of a certificate of title.

[120] I turn to a review of events preceding the execution of the Lease. On 19 August 1994, Mr McLachlan sent a facsimile to a Mr McBurney at Vector. It dealt with a number of matters to be included in the heads of agreement document. In the course of his facsimile Mr McLachlan said:

> The residue of the farm land (including Bishops and the Taupo District Council land) will be leased to WT [Waituruturu Trust] at a peppercorn rental per annum for the life of the project on otherwise usual farming lease terms.

The reference to the Taupo District Council land is a reference to lots 1 and 2.

[121] At that point Mr McLachlan envisaged that the Lease would inure for the life of the project.

[122] A draft heads of agreement document, dated 8 September 1994, was subsequently prepared. It was never signed, but Mr McLachlan says in an affidavit sworn by him on 18 August 2008, that:

> Although this document was never signed, it records the state of the negotiations between me and Vector at that time.

Part E5 of the Heads of Agreement provides that the term of the Lease was to be for the term of the joint venture.

[123] The first joint venture agreement was signed by the parties, including the McLachlans, on 1 October 1994. Clause 14.4 of that document confirms that:

> (a) The Lease shall be for the term of this agreement in respect of any part of the Land comprised in a separate certificate of title, and for a term commencing on the Acquisition Date and expiring on the day falling nineteen years and 363 days after that date, or longer (but not exceeding the term of this agreement) if such longer period would not be deemed to be a subdivision or be subject to any external restriction or approval, and would not be unlawful, in respect of any other part of the Land to be covered by the Lease.

[124] Clause 18.1 of the 1 October 1994 joint venture agreement provided that the term of that agreement was for the period during which Network and the McLachlans held shares in the joint venture company (MGL).

[125] The Lease itself went through several drafts. An early version provided in clause 10.2(c) that the Lease would terminate on 12 months written notice by either party. Had the Lease been executed in that form, then it would undoubtedly have been valid. A lease for indefinite duration but terminable by either party on notice is valid.

[126] Mr McLachlan sought and obtained a variation of clause 10.2(c). On 10 December 1995 he sent a further facsimile to Vector's lawyers, suggesting that 10.2(c) be varied. He explained that:

> The right to terminate on 12 months notice is the Lessees right because of the long term nature of the lease. While it is the Trusts intention to farm the land for the long term, we cannot predict future generations wishes. The Trust must be accorded the sole right to terminate. Similar considerations do not apply to the Lessor.

[127] On 12 December 1995 Vector's solicitors circulated a revised version of the Lease, which incorporated Mr McLachlan's suggested amendment to clause 10.2(c).

The Lease finally signed on 15 December 1995 likewise carried into effect Mr McLachlan's amendment.

[128] The result is that the provision in the draft lease which conferred upon the lessor the right to give notice of termination (a provision which would have ensured the validity of the Lease) was removed at Mr McLachlan's suggestion. In those circumstances it cannot be said that the intention of the parties was not to execute a lease containing clause 10.2(c) as it appeared in the Lease itself. In other words, the Lease reflects the intention of the parties.

[129] I accept that the parties did not intend to enter into an invalid agreement, but there can be no doubt that they intended to enter into the agreement in the form in which it was executed.

[130] The McLachlans say that the Lease does not reflect the common intention of the parties that a valid long term lease would be granted, and argue that the Court has jurisdiction to rectify the Lease in order to create a valid lease. On their behalf it is suggested that this be achieved by providing for:

> … a particular fixed term lease with a right of renewal for a further term, on terms which include the covenant for a right of renewal. This would allow the McLachlans to continue to renew the lease until such time as the joint venture parties agree to terminate the joint venture, or the McLachlans did not wish to continue.

[131] In other words, the McLachlans ask the Court to convert the Lease into a perpetually renewable lease, known as a "Glasgow lease", a type of lease that is valid because each renewal of the lease is a surrender and re-grant; there is in effect a succession of leases with valid, certain terms: *In re Savile Settled Estates* [1931] 2 Ch 210.

[132] The Court could consider adopting such a course only where it had been established that the rectification sought reflected the common intention of the parties. But the common intention here was not to create a lease which provided for perpetually renewable terms; rather the parties intended to create a lease which would continue for the term of the joint venture, but not beyond it.

[133] In an affidavit sworn on 18 August 2008, Mr McLachlan says:

> The lease was intended to run for the same length of time as the joint venture, or until the McLachlans either did not want to continue with the lease or got into default.

[134] Mr McLachlan further says in that affidavit that his expectation was that the joint venture would continue until the geothermal resource was exhausted, and so was expected to last for a long time.

[135] I accept without difficulty the proposition that the parties to this joint venture contemplated that it would continue for a considerable period, and that all being well, it was likely to last until the resource ran out. On the evidence that might well have been a period in excess of 50 years.

[136] But there was always the risk that the joint venture would not be economically successful, and it was necessary that the documents governing the relationship of the parties provide for an appropriate outcome if the joint venture foundered. The McLachlans contributed significant assets to the joint venture, for which they received both cash and shares. On the other hand, Vector, through Network, made a major investment, much of which it never recovered. When it sold the majority of the assets to Contact in December 1999 pursuant to its debenture it received less than half of the joint venture's indebtedness to Vector. The substratum of the joint venture was accordingly lost at the time of the sale to Contact. In November 2006, when the McLachlans transferred their shares in MGL to Network, their last link with the joint venture was severed. Yet the McLachlans say that the Lease must continue.

[137] Of course the parties did not intend to create a lease that was invalid. But they plainly intended to effect the amendment to the draft lease that renders the Lease void for uncertainty. Rectification of the Lease, in order to render it valid, would simply create an agreement that the parties did not intend. The evidence is that the parties did not envisage the Lease extending beyond the life of the joint venture. That life is now over.

[138] Moreover, even if a case could be made for rectification as a matter of principle, it is impossible in my opinion to rectify this lease in a manner that reflects the common intention of the parties. There is no evidence that they intended to create a Glasgow lease, let alone what the term of that lease should be. Glasgow leases are often for terms of 21 years, but that is simply the convention. The term selected for Land A was dictated by reference to the deemed subdivision provisions of the Resource Management Act which have no impact on Land B or Land C.

[139] I accept also Mr Chemis's submission to the effect that rectification, even if otherwise available, is precluded here by reason of the position of Contact which is a bona fide purchaser without notice. A claim to rectification is a mere equity which is not binding on a bona fide purchaser without notice (actual or constructive): *AMP Society v Bridgemans Art Deco Ltd* [1996] 2 NZLR 263 (CA).

[140] The plaintiffs are unable to bring themselves within the principles governing the rectification of documents and their argument for rectification of the Lease is accordingly rejected.

Lots 1 and 2

[141] Lots 1 and 2 are adjacent to other land formerly owned by the McLachlan interests. In 1993 a McLachlan company, Geotherm Energy Ltd, acquired these lots from the Taupo District Council. Payment of the purchase price was deferred and was overtaken by the negotiations which led to the joint venture. It was agreed that the joint venture would acquire the rights of Geotherm Energy Ltd to purchase lots 1 and 2, and that Network, as interim financier for the joint venture company MGL, would hold the land titles until a defined stage in the power station project was reached. At that point title would be transferred to MGL and there would be a lease to the McLachlan interests on the same terms and conditions as appear in the Lease. But no such lease was executed at the time.

[142] In *Mercury Geotherm Ltd (in receivership) v McLachlan* HC AK M129/00 14 June 2002, at [157] (b), Potter J granted a declaration that:

> Network held lots 1 and 2 DPS 69822, Certificates of Title 56A/137 and 56A/138 as a constructive trustee for Geotherm and the McLachlans are entitled to an equitable lease from Geotherm of lots 1 and 2 in like terms to the lease of the leased land dated 12 December 1995, subject however to any prior equity in favour of Contact which may be established.

[143] Subsequently a transfer and a deed of lease were prepared in order to give effect to the declaration granted by Potter J.

[144] Her Honour also found that a right of first refusal in favour of the McLachlan interests under the equitable lease had not been triggered, and that the question whether the McLachlans were entitled to sustain their interest as lessee under the equitable lease would require subsequent determination of the competing equitable interests.

[145] On appeal, the Court of Appeal held that Potter J's conclusion that the McLachlans' right of first refusal under the equitable lease had not been triggered was premature, in the absence of a full investigation into the relationship between Network/Vector and the receivers in respect of the sale of the lots. That issue was directed back to the High Court to be resolved together with the issue of the competing equities of Contact and the McLachlans.

[146] In a subsequent judgment delivered on 23 May 2005 (*Mercury Geotherm Ltd (in receivership) v McLachlan* [2006] 1 NZLR 258), Potter J held that:

a) The McLachlans' right of first refusal under the equitable lease had not been triggered;

b) The McLachlan interests had a prior equity to that of Contact, and that Contact would accordingly take title to lots 1 and 2 subject to the McLachlans' equitable lease.

[147] An appeal from that judgment was dismissed by the Court of Appeal: *McLachlan v Mercury Geotherm Ltd (in receivership)* CA117/05 4 December 2006. The Court of Appeal ruled that the McLachlans:

> … continue to have a leasehold interest in Lots 1 and 2 with a right of refusal should the Lessor, now Contact, wish to sell.

[148] A transfer and deed of lease, intended to give effect to Potter J's judgment of 14 June 2002, were prepared but have never been executed.

[149] Against the background of that brief summary of the part played by lots 1 and 2 in the present dispute, I turn to the competing contentions of the parties. Network/Vector and Contact argue that:

a) The equitable lease was declared by Potter J to be on the same terms as the 15 December 1995 lease;

b) That lease includes clause 10.2(b). Accordingly, the equitable lease must also be taken to include an identical clause 10.2(b).

c) Clause 10.2(b) provides that the lease terminates on the date that the McLachlans, or parties associated with the McLachlans, cease to hold shares in MGL;

d) The McLachlans have transferred the shares they held in MGL;

e) Accordingly clause 10.2(b) of the equitable lease has been triggered and the equitable lease has terminated.

[150] For the McLachlan interests only limited attention was paid to this issue in the detailed submissions lodged by their solicitors. In their second amended statement of defence and counterclaim, the McLachlans plead and rely upon [157] of Potter J's judgment. They do not assert that the equitable lease in favour of the McLachlans is to be otherwise than on the same terms as the existing lease.

[151] At paragraph 21 of their amended pleading they say:

> 21. If Contact is the lessor under the Equitable Lease above, there is an express or necessarily implied term of the Equitable Lease that the termination event specified in clause 10.2(b):
>
> 21.1 Applies only if and for as long as MGL is the lessor; and/or

> 21.2 Does not apply following transfer of the land by MGL to any third party nor run with the land.
>
> 21.3 Will not apply to a disposition by the first defendants of their shares in MGL at the direction of MGL and/or with its consent.

[152] The allegation that the provisions of 10.2(b) do not apply following transfer of the land by MGL to any third party is not supported by further argument by counsel for the McLachlans. I am unable to accept that argument, or the related point appearing in clause 21.2 of the amended pleading, to the effect that clause 10.2(b) does not run with the land. I have already rejected the point raised in paragraph 21.3 of the pleading.

[153] Mr Chemis for Contact argues that in any event the McLachlans are bound by Potter J's declaration regarding the terms of the equitable lease. There was no appeal from that finding. I agree that the McLachlans are estopped per rem judicatum. The principle is of course not in dispute. A party to litigation is estopped against any other party to a decision from disputing or questioning that decision on the merits in any subsequent litigation. The rule is founded upon considerations of public policy and the general desirability of finality in litigation. The principles are extensively discussed in cases such as *Thoday v Thoday* [1964] 1 All ER 341 and *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28.

[154] To the extent that paragraph 21 of the McLachlans' amended pleading seeks to raise an issue as to the terms of the equitable lease, it cannot be supported. As found by Potter J, the terms of that lease are the same as the terms of the Lease.

[155] I should perhaps note that the parties to the 14 June 2002 judgment of Potter J were MGL, Poihipi, Network and the McLachlans, all of whom are parties to this present proceeding. Contact was not a party, but is a privy, in that it derives its interest through Network.

[156] I turn to the question of the term of the equitable lease. Earlier in this judgment I held that the Lease was void in respect of Land B and Land C, in that the lease for those properties was for an undefined period. But the Lease in respect of Land A was valid, because it was for a term certain.

[157] Lots 1 and 2 do not form part of Lands A, B or C. No preceding judgment deals expressly with the term of the equitable lease insofar as it concerns lots 1 and 2. I accept Mr Chemis's submission that the term of the equitable lease must be co-extensive with that for either Land A or for Land B and Land C, given Potter J's ruling that there is no third option.

[158] There is a measure of agreement between the McLachlans and other parties to the effect that the unexecuted deed of lease prepared for lots 1 and 2 evidences the common intention of the parties to the proposed deed at that time. But in written submissions advanced by the solicitors for the McLachlans, it is argued that it does not follow from the presumed common intention of the parties to the unexecuted deed, that such presumed intention should be reflected in the Court's decision in respect of the term of the equitable lease. That is because the deed is unexecuted, and allowance must be made for the parties to have changed their minds prior to execution.

[159] For example, Mr Shackleton argues for the McLachlans, it may be that issues regarding certainty of term would have been raised and dealt with in the lead up to execution. Moreover, he argues, it would be repugnant to the interests of justice and the principles of equity, for the Court to declare the equitable lease to exist on terms which render it void for uncertainty of term. A Court must presume that the intentions of the parties to the unexecuted deed of lease would have been to grant and take a valid lease.

[160] While there is some superficial attraction in that approach, Mr Shackleton does not explain how the Court can properly reach a conclusion that departs from Potter J's findings, save by way of a grant of rectification, a remedy I have earlier held is not available to the McLachlans.

[161] I accept Mr Chemis's argument that the starting point for definition of the term of the equitable lease must be the presumed intention of the parties. I accept also that the provisions of the unexecuted deed of lease must be taken to evidence the intention of the parties at the time of preparation of that document. Indeed, that

much was accepted in a letter dated 17 September 2008 from the McLachlans' solicitors to Contact's solicitors.

[162] As did the Lease in respect of Land B and Land C, the unexecuted lease provided that the term was to be " … until terminated pursuant to the provisions of this Lease" (item 2 of the Reference Schedule). Clause 1.1 of the unexecuted lease defined the expression "Term" as meaning the term specified in the Reference Schedule. Clause 2.1 of the unexecuted lease provided that " …this Lease shall commence on the Commencement Date specified in the Reference Schedule and shall expire when terminated pursuant to the provisions of this Lease".

[163] Although, like the Lease itself, the unexecuted document provided in clause 10 and 11 for events of termination and default, it does not fix a finite termination date. Clause 10 of the unexecuted document follows the scheme of clause 10 of the Lease.

[164] Is there anything to displace the presumption arising from the provisions of the unexecuted lease? In my opinion the answer to that question must be "No".

[165] The unexecuted lease simply replicated the relevant provisions of the Lease with respect to the term or length of the lease. No party became aware that the Lease itself was invalid in respect of Lands B and C until after the deed of settlement and the sale of the McLachlans' shares in MGL. There is nothing to suggest that, had the unexecuted deed of lease been executed by the parties, they would not have completed it in the form in which it remains. In other words, there was simply no reason for them to amend the provisions of the unexecuted lease with respect to the term or length of the lease.

[166] The selection of a term certain for Land A was in some respects a fortuitous accident in that, by taking steps to avoid a deemed subdivision, the parties cured a source of invalidity of which they were unaware. But no such fortuitous circumstance can rescue the equitable lease.

[167] The deed of settlement does not relevantly touch upon the equitable lease; even if it did, my earlier finding to the effect that the deed of settlement left clause 10.2(b) unaffected would apply also to the terms of the equitable lease. The result is that the equitable lease, like the Lease itself, came to an end when the McLachlans ceased to be shareholders in MGL.

[168] The outcome in respect of lots 1 and 2 is therefore effectively the same as for the Lease itself, in that:

a) because clause 10.2(b) has been triggered the equitable lease has terminated;

b) the equitable lease was, in any event, invalid for uncertainty of term, with the result that it was terminable by either party on one month's notice.

[169] For the reasons earlier discussed, rectification is unavailable to the McLachlans.

Conclusions

[170] My findings may be summarised as follows:

a) Clause 5 of the deed of settlement does not amend the Lease;

b) In respect of Land B and Land C the Lease is void, in that it fails to specify a term which is certain or capable of being rendered certain at the outset;

c) The equitable lease in respect of lots 1 and 2 is likewise void for the same reason;

d) Upon completion of the transfer by the McLachlans of their shares in MGL both the Lease (in respect of Land A, Land B and Land C) and the equitable lease, terminated pursuant to clause 10.2(b) of the Lease;

e) The McLachlans are not entitled to rectification of either the Lease or the deed of Settlement;

f) Accordingly, the McLachlans are in possession of the Lands with which this proceeding is concerned, on a tenancy determinable by any party on giving one month's notice.

Costs

[171] Costs are reserved. The parties may file memoranda if they are unable to agree. Leave is reserved to all parties to make such further application as may be appropriate in the light of this judgment.

C J Allan J