1 of 4 DOCUMENTS: New Zealand Company and Commercial Law Reports/2012/Concrete Structures (NZ) Ltd v Waiotahi Contractors Ltd - [2012] NZCCLR 21 - 26 April 2012

Pages: 1

Concrete Structures (NZ) Ltd v Waiotahi Contractors Ltd - [2012] NZCCLR 21

High Court Rotorua
CIV-2011-463-501; [2012] NZHC 787

9 March; 26 April 2012
Andrews J

Implied term -- Whether necessary to imply liquidated damages clause into the subcontract to give business efficacy -- Whether implying liquidated damages clause so obvious that it goes without saying -- Whether clause to perform obligations under subcontract in timely and complete manner should be implied.

Waiotahi Contractors Ltd submitted a tender to the Whakatane District Council for the construction of the Awatapu Lagoon Flood Pump Station. Concrete Structures (NZ) Ltd submitted a quotation to Waiotahi for the supply of precast concrete panels on a delivered to site basis.

Under the head contract between Waiotahi and the Council, the construction project was to be completed within 14 weeks after the start of the physical works - 21 July 2007. The project was due for completion on 15 October 2007. Practical completion was given on 20 December 2007. The Council imposed liquidated damages for late completion at $5,000.00 per week.

Waiotahi issued proceedings in the District Court against Concrete Structures for liquidated damages. The District Court gave judgment in favour of Waiotahi. Waiotahi appealed against that judgment.

The judgment of the District Court was not clear on which term or terms were implied into the subcontract and Andrews J proceeds on the basis that the District Court Judge held that two terms should be implied into the subcontract. One for liquidated damages and the other providing the requirement that Concrete Structures provide its labour in a timely and complete fashion.

Mr Blanchard submitted that neither of the terms referred to by the Judge could be implied into the subcontract. The liquidated damages term of the head contract could not be implied because it did not satisfy the business efficacy test. He also submitted that without a liquidated damages clause, Waiotahi would still be entitled to make a claim for general damages in the ordinary way.

Mr Blanchard also submitted that as Concrete Structures refused to sign the standard form contract, in order to limit its obligations to Waiotahi, the Judge erred in concluding that such a term could be implied. He further submitted that this was because, in the light of Concrete Structures having rejected the term, it could not be said that it was "so obvious that it goes without saying", or that it represented the obvious, but unexpressed, intention of the parties.

Mr Franklin submitted that adherence to the terms of the head contract could be implied, and was necessary to give business efficacy to the subcontract. He also submitted that a contract allowing Concrete Structures to complete its work whenever it felt like it could not work.

Held: (appeal allowed)

(1) A term for liquidated damages in a headcontract may not be implied into a subcontract where there is no lack of business efficacy caused by the absence of the liquidated damages term (see [47]).

(2) Implying a liquidated damages clause into a subcontract may not be so obvious that it goes without saying where failure to sign standard form contract divorces the subcontractor from the obligations of the head contract (see [48]).

(3) Where term to perform obligations under subcontract in a timely and complete manner is not pleaded the term cannot be implied into the subcontract (see [53]).

Cases mentioned in judgment

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10, [2009] 1 WLR 1988.

Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103, [2008] 2 NZLR 141.

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, (1976) 16 ALR 363 (PC).

Harrison v Wright (1811) 13 East 343, 104 ER 202.

Mayor of Sydenham v Poore (1900) 19 NZLR 146 (SC).

Wall v Rederiaktiebolaget Luggude [1915] 3 KB 66.

Winter v Trimmer (1746-1779) 1 Black W 395, 96 ER 225.

Application

This was an appeal brought by Concrete Structures (NZ) Ltd, the appellant, against a decision of the District Court which gave judgment to Waiotahi Contractors Ltd, the respondent, in the sum of $47,500 plus interest.

G Blanchard and *K Badcock* for the appellant.

S Franklin and *E Gray* for the respondent.

ANDREWS J.

Introduction

[1] The appellant, Concrete Structures (NZ) Ltd (CSL), has appealed against the judgment of Judge Wolff in favour of the respondent, Waiotahi Contractors Ltd (Waiotahi) in the sum of $47,500 plus interest (the District Court judgment).[1]

[2] The principal issue on appeal is whether the Judge erred in holding that a term was to be implied into a subcontract between Waiotahi and CSL, that CSL would be liable for liquidated damages payable by Waiotahi under its head contract with the Whakatane District Council (the Council). A secondary issue is whether, if the term was properly implied, the Judge erred in holding that CSL was in breach of the term.

Background

[3] Waiotahi and CSL both carry on business as civil engineering contractors. In early 2007 the Council invited Waiotahi to tender for the construction of the Awatapu Lagoon Flood Pump Station. On 13 February 2007 Waiotahi wrote to CSL and invited it to submit a quotation for the supply of precast concrete panels. Waiotahi's letter read:

> Please find enclosed drawing and spec for Whakatane District Council Awatapu Pump Station. Please quote for the supply of Precast Concrete Panel on a delivered to site basis.

> Tender closes on Friday the 16th Feb at 4pm, in the full compliance to contract to be in our hand if possible Thursday if not latest 10 am Friday.

Enclosed with the letter were construction drawings, the technical specifications, and a schedule of quantities.

[4] On 19 February 2007, Waiotahi faxed a letter to CSL, annexing copies of "Notices to Tenderers", numbered 1 to 5, and asked if CSL's costs could be placed against the appropriate item numbers.

[5] CSL submitted a quotation to Waiotahi on 19 February 2007, subject to the terms and conditions set out in the letter, for $234,024.00 (GST exclusive) for "pump station concrete work". Waiotahi submitted a tender to the Council for the contract for the "Awatapu Lagoon Flood Pump Station Civil Works" on 20 February 2007, in the sum of $1,135,929.07 (GST exclusive). Waiotahi's covering letter noted that their "nominated subcontractor Concrete Structures Ltd will be carrying out the concrete construction work as well as the temporary Sheetpiling".

[6] Waiotahi's tender was not accepted by the Council. There were discussions and correspondence between Waiotahi, CSL, the Council, and the Council's engineers regarding the design and changes to the project. On 13 March 2007 the Council accepted a revised tender from Waiotahi, for $792,001.38 (GST exclusive). The Council's letter of acceptance to Waiotahi recorded that the cost for the Pump Station Concrete work (to be done by CSL) was $137,203.60.

[7] On 15 March 2007 CSL wrote to Waiotahi, wetting out details as to the scope of work, design, work programme, and traffic management, and attaching a "measure of quantities for the various options". On 11 April 2007 Waiotahi sent CSL a purchase order, worded as follows:

> O/N. herewith for Work as Quoted for Whakatane District Court Awatapu Lagoon Pump Station Contract No 06/77.
>
> Please proceed with Precast Concrete Slab Pump Station design soonest & supply Construction drawing via ourselves for Principle (sic) signoff.
>
> Advise rough timescale for driving of sheetpiling & Pump Station construction. Our covering letter and Subcontract Agreement follows today.
>
> Your invoices to Quote our Job No 17731.

There was no evidence that a subcontract agreement was sent to CSL that day.

[8] The revised quotation and tender required changes to the design of the pump station. That design work was to be undertaken by CSL and its designers. Between April and July 2007 there were communications between Waiotahi, CSL, and the Council's engineers concerning design drawings. On 18 June 2007 CSL's design drawings, calculations, and Producer Statement for the design were forwarded to Waiotahi and the Council's engineers for approval. After requested amendments were completed, the Council's engineers issued a Producer Statement for their design review on 6 July 2007.

[9] On 15 June 2007 Waiotahi asked CSL to supply its construction programme, as follows:

> ...
>
> Can you please supply me with your construction programme for these works including timing of the driving of the sheetpile. Your time line for the construction programme should be based on the time from date of acceptance of your drawings/issue of Building Consent. The programme should come direct to myself and not be forwarded to [the Council's engineers] at this stage as Waiotahi will want to review it first. ...

[10] On 18 June 2007 CSL responded by way of a handwritten note on Waiotahi's letter:

> As previously advised (10/5/07) we expect to start on site 1/8/07. Subject to other commitments, we may have resources available earlier & will let you know once this is confirmed. ...

[11] On 13 July 2007 Waiotahi sent CSL a letter, as follows:

> **Whakatane District Council 06/77**
>
> **Awatapu Lagoon Flood Pump Station Civil Works**
>
> Re Subcontract Agreement
>
> Documents I propose to append to our Subcontract Agreement. Please review and advise. Value is $301,276.00 G.S.T. exclusive.

[12] Annexed to Waiotahi's letter were copies of CSL's letter of 15 March 2007 (referred to at [7] above), CSL's Sheet Pile Tender design, dated 14 March 2007, an email from CSL to Waiotahi dated 21 March 2007 concerning design amendments and a cost variation, and a cost schedule.

[13] CSL responded to Waiotahi's letter the same day, again by way of a handwritten note on Waiotahi's letter:

(1) The documents are OK.
(2) The price is OK.
(3) The subcontract agreement will probably end up in the bin.

[14] The reference to the "subcontract agreement" is in response to another letter Waiotahi had also sent CSL on 13 July 2007, in which it stated that it "[wished] to accept your tender for subcontract work/services as set out in your quotation (Date 15.03.07 and email 21.03.07) $301,276.00 GST exclusive". Waiotahi went on to say that the acceptance was subject to the New Zealand Contractors' Federation Standard Form of Contract for Small Contracts (the standard form contract) and additional conditions set out in the letter. Waiotahi had signed the standard form contract and asked that CSL sign it and return it to Waiotahi. CSL returned the contract to Waiotahi, unsigned, on 18 July 2007.

[15] A building consent was issued on 20 July 2007. The start date for CSL's work was 1 August 2007. CSL completed its work by about 26 November 2007.

[16] Under the head contract between Waiotahi and the Council, the construction project was to be completed within 14 weeks after the start of the physical works. Physical works were to commence upon the issuing of a building consent; that is, on 21 July 2007. The project was due for completion on 15 October 2007. Practical completion was given on 20 December 2007 and the Council imposed liquidated damages on Waiotahi for late completion, at $5,000 per week, pursuant to a provision in the head contract. Liquidated damages totalled $47,500.

The District Court judgment

[17] Waiotahi issued proceedings in August 2009, claiming the liquidated damages it had been required to pay the Council. Waiotahi alleged it had entered into a "verbal [Sub-Contract] with [CSL] evidenced in writing", and that "it was an implied term of the Sub-Contract that [CSL] would adhere to the terms of [the head contract between Waiotahi and the Council]". Waiotahi alleged that it was prevented from completing its contractual obligations to the Council on time by CSL's poor performance, namely slow work and removal of materials from the site.

[18] The Judge's factual findings may be summarised as follows:

(a) He accepted evidence given for Waiotahi that CSL was made aware of the times required under Waiotahi's head contract with the Council. In making this finding the Judge observed that the director of CSL, Mr Romanes, "must have been aware that in a public works such as the Awatapu project his head contractor was subject to a penalty clause for delay".[2]

(b) The delays in the project, which resulted in Waiotahi being penalised for late completion, were substantially attributable to CSL's delays in performing its work.[3]
(c) As at 13 July 2007 (when CSL returned the standard form contract to Waiotahi unsigned) CSL knew the terms of the head contract, and was aware of the timeline to which Waiotahi was committed. The Judge also found that CSL's refusal to sign the standard form contract was a device to divorce CSL from the obligations of the head contract.[4]
(d) CSL was aware of the liquidated damages clause in the head contract so that Waiotahi's loss was not only foreseeable, but actually foreseen by CSL.[5]

[19] The Judge went on to apply the test set out in the judgment of the Privy Council in its judgment in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[6] and found that there had been at least one implied term that CSL had breached, and that accordingly CSL was liable for the liquidated damages for which Waitahi was liable to the Council under the head contract.

[20] There was a dispute between the parties as to the precise term or terms implied by the Judge

The terms implied by the Judge

[21] Mr Blanchard for CSL first submitted that it is not clear what term the Judge implied into the subcontract. He referred, first, to the Judge's finding that:[7]

> ... any reasonable bystander would say that ... on this occasion, the parties had obviously intended that the subcontract be bound to the same liquidated damages clause that bound the head contractor and principal.

Mr Blanchard submitted that this suggested that the Judge was implying a liquidated damages clause.

[22] He then referred to the Judge's findings that:[8]

> Even if the reasonable bystander were not prepared [to imply the term set out at [21], above] then at the very least there would be a term implied into this contract that [CSL] would provide its labour in a timely and complete fashion so as to ensure that Waiotahi was able to complete the head contract in a timely way.

[23] I proceed on the basis that the Judge held that two terms should be implied into the subcontract. I refer to the first as a term that CSL was bound by the liquidated damages provisions of the head contract (the liquidated damages implied term), and to the second as a term that CSL was required to provide its labour in a timely and complete fashion (the general implied term).

[24] When discussing the second, general, implied term, the Judge added "so as to ensure that Waiotahi was able to complete the head contract in a timely way". My reading is that while those words inform the content of what "timely and complete fashion" meant, it was not part of the general term implied by the Judge. It merely meant, as Mr Franklin submitted, that the Judge thought the end result would be the same, however the implied term was formulated. This is evident from the Judge's conclusion:[9]

> ... Whether [CSL's breach] was a breach of a detailed and precise penalty clause or whether the breach was a more general failure to diligently and tenuously [sic] provide its expertise to the contract, the end result is the same. Damages from that breach were foreseeable and actually within the knowledge of [CSL] at the time of the breach.

I note that the Judge did not add here any qualification to the "more general" implied term such as "so as to ensure that Waiotahi was able to complete the head contract in a timely way".

[25] Mr Blanchard noted also that Waiotahi had pleaded an implied term different from those found by the Judge. In its statement of claim, Waiotahi had pleaded that CSL would "adhere to the terms of the Head Contract". For Waiotahi, Mr Franklin submitted that the terms implied by the Judge were "fairly close" to Waiotahi's pleaded term.

[26] My view is that the implied term pleaded by Waiotahi is similar enough to the liquidated damages implied term found by the Judge that it was open to the Judge to imply the liquidated damages term without that resulting in a breach of natural justice. In any event, CSL's submissions did not focus on any difference between the pleaded term and the liquidated damages implied term, so I intend to treat those two terms as being identical for the purposes of this appeal.

[27] I am satisfied that a term that CSL would adhere to the terms of the head contract between Waiotahi and the Council could not be implied into the subcontract, for the same reasons that the liquidated damages term could not be implied. Those reasons will be explained later in this judgment.

Alternative or complementary terms

[28] Pointing to [67] of the District Court judgment (quoted at [24], above), Mr Blanchard submitted that the Judge had appeared to consider that the liquidated damages implied term and the general implied term were alternatives leading to the same result. On behalf of Waiotahi, Mr Franklin submitted that the Judge did not intend the implied terms as alternatives; he implied both terms into the subcontract. He submitted that they were not contradictory terms. In any event, he submitted, however the implied term was formulated, the end result was the same, as the Judge found.[10]

[29] Whether the two terms are alternatives or complementary is not material for the purposes of the appeal, as I decide that neither term should have been implied.

Approach on appeal

[30] CSL is exercising a general right of appeal under s 72 of the District Courts Act 1947. The appeal is by way of rehearing. The approach to be followed by this Court on an appeal from a decision of the District Court is that set out in the judgment of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[11] The Supreme Court said:[12]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

Regarding findings of fact which are dependent on an assessment of the credibility of witnesses, the Court said:[13]

> ... The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important. ...

[31] With those statements of principle in mind, I turn to consider CSL's submissions that the Judge erred in finding the implied terms that he did, and in finding that CSL had breached those implied terms, causing Waiotahi loss.

The contract between Waiotahi and CSL

[32] Before considering counsel's submissions on the Judge's finding that terms could be implied, it is helpful to identify the contract between CSL and Waiotahi. On behalf of CSL, Mr Blanchard submitted that the contract between CSL and Waiotahi was evidenced in the exchange of letters culminating in Waiotahi's acceptance by way of the purchase order sent by Waiotahi to CSL on 11 April 2007. On behalf of Waiotahi, Mr Franklin submitted that the contract was "verbal, evidenced in writing".

[33] The Judge appears to have found that the contract between Waiotahi and CSL was partly in writing and partly oral and by conduct. This is evident from the Judge's observation that:[14]

> On the face of it, the note from [CSL refusing to sign the standard form contract] is a rejection of the terms of the "Standard Form of Contract for Small Contracts", but plainly the behaviour of the parties up to that point and from that point on reveals that the parties were involved in a contract of some sort at that time.

[34] In any event, it was common ground that there was no express term in the contract between CSL and Waiotahi that CSL was bound to the same terms of contract (including the liquidated damages term) as Waiotahi was bound in its contract with the Council, nor is there any express provision as to the time within which CSL was required to complete its work. The only issue therefore is whether the Judge was correct in finding that such terms could be implied.

Whether the terms could be implied

Legal principles

[35] The conditions which must be satisfied before a term can be implied into a contract were set out in the judgment of the majority of the Privy Council in *BP Refinery*:[15]

(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
(3) it must be so obvious that "it goes without saying";
(4) it must be capable of clear expression; and
(5) it must not contradict any express term of the contract.

[36] In its later judgment in *Attorney General of Belize v Belize Telecom Ltd*,[16] the Privy Council held that the five criteria were best regarded, not as a series of independent tests each of which must be surmounted, but "as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means or in which they have explained why they did not think that it did so".[17]

[37] Earlier in its judgment, the Privy Council made some general observations about the process of implying terms. The Privy Council noted that the question of implication arises when a contract does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen; that if the parties had intended something to happen, the contract would have said so. If the contract does not provide for an event, then if the event causes loss to one side or the other, the loss lies where it falls.[18] The Privy Council also observed that the use of the word "necessary" in the "business efficacy" test means that it is not enough for a Court to consider that the implied term expresses what it would have been reasonable for the parties to agree to, but that the Court must be satisfied that is what the contract actually means.[19]

The parties' submissions

[38] Mr Blanchard submitted that neither of the terms referred to by the Judge could be implied into the subcontract. A term that CSL was bound to the liquidated damages term of the head contract could not be implied because it did not satisfy the business efficacy test. He submitted that without a liquidated damages clause, Waiotahi would still be enti-

tled to make a claim for general damages in the ordinary way. Further, there was no authority for implying a liquidated damages clause.

[39] Regarding the general term, Mr Blanchard submitted that it could not be implied because, as the Judge found:[20]

> ... as at the 13 July Mr Romanes knew the terms of the head contract, that he was aware of the timeline that Waiotahi was committed to, and that his failure to sign the proffered [standard form] contract that was tendered to him was a device to divorce [CSL] from the obligations of the head contract.

[40] Mr Blanchard submitted that in the face of the finding that CSL refused to sign the standard form contract, in order to limit CSL's obligations to Waiotahi, including in particular performing in accordance with the head contract, the Judge erred in concluding that such a term could be implied. He submitted that this was because, in the light of CSL having rejected the term, it could not be said that it was "so obvious that it goes without saying", or that it represented the obvious, but unexpressed, intention of the parties.

[41] For Waiotahi, Mr Franklin submitted that adherence to the terms of the head contract could be implied, and was necessary to give business efficacy to the subcontract. Mr Franklin submitted that a contract allowing CSL to complete its work whenever it felt like it could not work.

[42] In response to Mr Blanchard's submission that there was no authority supporting implying a liquidated damages clause, Mr Franklin submitted that the proper question to ask was whether there was any authority to the effect that a liquidated damages clause could *not* be implied. In the absence of any such authority, Mr Franklin submitted, there was no impediment to the Judge implying such a term.

[43] Mr Franklin further submitted that the Judge had found as a matter of fact that the issue of timing had never been raised, and then rejected by CSL. He submitted that there was no reason to reverse the Judge's factual finding.

Discussion

(i) Liquidated damages implied term

[44] As the Judge noted,[21] liquidated damages clauses are generally construed strongly against the party seeking to rely on them. The Judge acknowledged that the Court should be slow to imply a liquidated damages term into a subcontract.[22]

[45] Mr Blanchard referred me to the following statement implying a term for liquidated damages, from the English text *Liquidated Damages and Extensions of Time: In Construction Contracts*:[23]

> The rules of construction are rarely used by the courts to imply terms which would permit extensions of time to be granted to keep alive provisions for liquidated damages. Nor are they used to imply terms to introduce or clarify liquidated damages provisions. In matters concerning extensions of time and liquidated damages, the courts stick firmly to the rule that implied terms are introduced only to give a contract business efficacy and since general damages can be sought when liquidated damages provisions fail there is no lack of business efficacy.

[46] It is well-settled that general damages can be sought as a substitute for liquidated damages.[24]

[47] In this case, I am satisfied that it was not necessary, in order to give the subcontract between CSL and Waiotahi business efficacy, to imply a term that CSL would be liable for the liquidated damages for which Waiotahi would be liable to the Council under the head contract. There was no lack of business efficacy caused by the absence of a liquidated damages clause.

[48] Further, I accept CSL's submission that a liquidated damages clause was not so obviously a term of the subcontract that it "goes without saying", or that it represented the obvious, but unexpressed, intention of the parties. As the Judge

found, CSL clearly had no intention to be bound to any of the terms of the head contract, including the liquidated damages term.[25]

[49] Accordingly, I conclude that the Judge erred in finding that a term that CSL was bound by the liquidated damages provisions of Waiotahi's head contract could be implied into the subcontract.

(ii) General damages implied term

[50] I turn now to the second, general, implied term: that CSL was required to perform its obligations under the subcontract in a timely and complete fashion.

[51] The arguments against implying the liquidated damages term into the subcontract between CSL and Waiotahi are not equally applicable to the implication of a general term. They do not mean that a general term along the lines that CSL was required to perform its obligations under the subcontract in a timely and complete fashion could not have been implied. A term that the contract works be performed in a timely and complete fashion could be said to be "so obvious that it goes without saying", and that it "represents the obvious, but unexpressed, intentions of the parties". Indeed, such a term would need to be a term of the subcontract (whether express or implied) in order for Waiotahi to have a claim for general damages, such as Mr Blanchard contended was available.

[52] However, Waiotahi did not plead that such a term should be implied into the subcontract. Waiotahi's claim proceeded in the District Court on the basis that there should be an implied term that CSL was bound by Waiotahi's liquidated damages clause, so it was not open for the Judge to determine the case on a term that had not been pleaded. Furthermore, in determining whether CSL had breached an implied term, the Judge did not address matters that would be relevant to a claim for general damages. Such matters may have included determining what was "timely and complete" performance and any issue as to contributory fault on the part of Waiotahi.

[53] Accordingly, I conclude that the Judge erred in finding that a term that CSL was to perform its obligations under the subcontract in a timely and complete manner was to be implied into the subcontract, because such a term had not been pleaded. For the same reason, the Judge also erred in finding that CSL had breached that term.

Alternative ground of appeal: delays caused by Waiotahi

[54] As I have found that the Judge erred in implying terms into the subcontract, it is not necessary to consider CSL's alternative ground of appeal, under which it submitted that Waiotahi had caused delay to CSL, thus rendering any liquidated damages implied term void.

Result

[55] The appeal is allowed. Judgment is entered in favour of CSL, and the orders made in the District Court are set aside.

[56] The judgment sum, which has been paid by CSL to Waiotahi, is to be returned to CSL, together with interest at the rate ordered in the District Court.

[57] CSL is entitled to costs on a 2B basis.

FOOTNOTES

1 *Waiotahi Contractors Ltd v Concrete Structures (NZ) Ltd* DC Tauranga CIV-2009-087-238, 21 July 2011.

2 At [22].

3 At [39].

4 At [54].

5 At [66] and [67].

6 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

7 District Court judgment at [64].

8 At [65].

9 At [67].

10 At [67].

11 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

12 At [16].

13 At [13].

14 District Court judgment at [47].

15 *BP Refinery*, above, n 6 at 283, per Lord Simon of Glaisdale, Viscount Dilhorne, and Lord Keith of Kinkel. The minority (Lord Wilberforce and Lord Morris of Borth-y-Gest) did not express any different opinion as to the conditions.

16 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

17 At [27], per Lord Hoffmann.

18 At [17].

19 At [22].

20 District Court judgment at [54].

21 At [45].

22 Ibid.

23 Brian Eggleston *Liquidated Damages and Extensions of Time: In Construction Contracts* (3rd ed, Wiley-Blackwell, London, 2008) at [6.3].

24 See *Winter v Trimmer* (1746-1779) 1 Black W 395, 96 ER 225; *Harrison v Wright* (1811) 13 East 343, 104 ER 202; *Mayor of Sydenham v Poore* (1900) 19 NZLR 146 (SC); *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 72-73. See also Harvey McGregor *McGregor on Damages* (18th ed, Thomson Reuters, London, 2009) at [13-026].

25 Judgment at [54].

Reported by: Cherie Gum