IN THE COURT OF APPEAL OF NEW ZEALAND

CA145/04

BETWEEN	GULF CORPORATION LIMITED First Appellant
AND	AUCKLAND PROPERTY GROUP LIMITED Second Appellant
AND	GULF HARBOUR INVESTMENTS LIMITED Respondent

Hearing: 2 December 2004

Court: McGrath, Hammond and O'Regan JJ

Counsel: A H J Commons for First and Second Appellants
L H M Lim and E E Harding for Respondent

Judgment: 25 May 2005

JUDGMENT OF THE COURT

A The appeal is allowed. The order for specific performance made in the High Court is quashed.

B Each appellant is entitled to $3,000 costs, plus usual disbursements.

REASONS

McGrath J (dissenting) [1]

Hammond J [12]

O'Regan J [19]

McGRATH J

Introduction

[1] The central question in this appeal is whether the respondent, Gulf Harbour Investments Limited, gave its unqualified and absolute assent as offeree to the exact terms of an option to purchase a carpark site when it purported to exercise the option. New Zealand courts have rarely been receptive to arguments that a document expressing an intention to exercise an option has effectively done so if the document includes a statement as to the resulting contractual terms which is wrong. In such circumstances the purported exercise of the option is generally found to be ineffective: there is no consensus between the parties and no contract. That is how the majority of this court construe the respondent's notice of 21 August 2003 with the consequence that the judgment of the Court, by a majority, is that the appeal is allowed.

[2] I agree with the statements of principle concerning the requirements of assent to the terms for an option to be validly exercised, as discussed in the reasons for judgment of O'Regan J. This Court took a strict approach to these requirements in *Reporoa Stores Limited v Treloar* [1958] NZLR 177 which it has since affirmed in *Buckland v Bay of Islands Electric Power Board* (1980) 1 NZCPR 217. I conclude, however, that the application of the principle to the circumstances of this highly unusual case leaves the exercise of the option intact. In my view, when it is read as a whole, in the context of the factual background and the terms of the option there is nothing in the letter of 21 August 2003 that is in conflict with the absolute and unqualified expression of intent to exercise it appearing in the second paragraph.

The option

[3] The option concerned was part of a wider transaction involving the sale of land for $50m, by the respondent to the first appellant as nominee of the second appellant, Auckland Property Group Limited. Originally the parties had intended that the carpark site would not be part of the land that was transferred, but in its final form the agreement for sale and purchase did include it. It also provided that the carpark land would be subject to rights of access and use by the respondent, which was given an option to purchase it for the sum of one dollar ($1), exercisable at any time during a period of 10 years from 3 April 2001. Accordingly, although title to the carpark was transferred to the appellant in substance the economic rights to that land never left the respondent, and the intention of the parties effected through the form of a conveyancing device was that following a subdivision, that would separate the carpark land from the balance of the land transferred, legal ownership would revert to the respondent.

Exercise of the option?

[4] The terms of the respondent's letter of 21 August 2003 were:

> **GULF HARBOUR MARINA – OPTION TO PURCHASE EASTERN BOAT HARBOUR CARPARK ("CARPARK")**
>
> 1. You are the registered proprietor of the land comprised in Certificate of Title NA134D/136, North Auckland Registry ("Land"). The Land is subject to a right of way and parking right easement granted to Gulf Harbour Investments Limited and created by Transfer D603614.1 ("Easement"). The Easement includes (amongst other things) an option to purchase the area of land referred to as the Eastern Marina Car Park ("Option").
>
> 2. Gulf Harbour Investments Limited hereby gives notice of its intention to exercise the Option and complete the purchase. Please consider this correspondence as notice required by clause 5.1(b) of the Easement.
>
> 3. We note that the terms of the Easement require the parties to enter into an agreement for sale and purchase in the form of the Auckland District Law Society and Real Estate Institute of New Zealand 7th Edition (2) July 1999 form, and further that the subdivision necessary to effect the separation of title to the Eastern Marina Car Park is to be completed at our cost.

> 4. We now enclose for execution duplicate copies of the agreement for sale and purchase. On receipt of the signed agreement for sale and purchase we will sign the agreement and return one copy to you. Subsequently we will commence such steps as are necessary to effect the subdivision. Naturally, we will be in further communication with you when your assistance is required in that regard. In the meantime please urgently return the signed agreement for sale and purchase to our solicitors, Kensington Swan, Private Bag 92101, Auckland.

The letter was signed by the respondent's Group Legal Counsel.

[5] Paragraph 2 of the letter expresses an unqualified exercise of the option. Paragraph 3 states that the terms of an easement provided for in the agreement which creates the option require that the parties enter into a further agreement for sale and purchase, in a stipulated standard form, at the offeree's expense. A form of agreement was enclosed by the respondent with its letter. Its general effect is discussed by O'Regan J and I need not elaborate on that discussion.

[6] If the effect of the letter is that the option was exercised, the resulting contract binds the appellant to sell the carpark land to the offeree, with the offeree accepting all costs associated with separating off of title to the land concerned. It did not create an obligation on the parties to enter into a further agreement.

[7] The question then is whether in the context of a contract giving effect to these arrangements, in the form that it does, the true construction of the letter of 21 August 2003 is that the apparently unqualified and absolute exercise of the option in paragraph 2 is contradicted and displaced, and prevented from taking effect because, by virtue of clause 3, the letter as a whole is not an assent to the terms and indicates there is no consensus between the parties.

[8] The approach I take to that question of construction is one reflected in an observation of this Court in *Rainbow Corporation Ltd v Westland* (1992) 6 NZCLC 67908:

> …the authorities do not suggest that in a construction of the terms upon which the option is to be exercised the Court is not to apply the usual canons. Here the nature and purpose of the option, the realities of business life and practice, form part of the factual background against which the terms of the option are to be understood.

[9] In the context of a transaction for the sale of land, under which legal ownership of the carpark was to pass from the respondent to the first appellant, the purpose of the option was to secure its return to the respondent's ownership, at a time of its choosing, for a nominal consideration. In the meantime under an easement the respondent was to have full rights of use at no cost to it.

[10] The economic reality is that the respondent at all times in substance retained economic ownership of the land. The context is not one which suggests that a mis-statement of the contractual terms in exercising the option is likely to be a "try-on", by which the offeree seeks to obtain the benefit of the exercise of the option on other terms. Objectively, the error is rather a simple misconception that is not a proposal of different contract terms. As well, the appellant's position was such that there could not realistically be any doubt that it was accepting the stipulated terms of the option rather than what it thought those terms required. In each respect the position is to be distinguished from that addressed by this Court in *Reporoa Stores Limited v Treloar* [1958] NZLR 177 (cf per K M Gresson J at p 193).

[11] In those circumstances I am satisfied that the letter of 21 August 2003 was an unqualified and absolute assent to the exact terms of the option. I would accordingly dismiss the appeal.

HAMMOND J

Introduction

[12] I have to confess that I have found this a troublesome case. "Troublesome" because on the one hand the overall merits, in a commercial sense, of the appellant's case entirely escape me; but on the other hand, the appellants appear to me to be entitled to the benefit of a property rule of long standing which, at least in the way the matter has come before us, I do not think we can properly disturb.

[13] I therefore agree with the disposition of this appeal, and the consequential orders as formulated, by O'Regan J. I propose to add only some brief comments of my own.

[14] One principle of property law which I had understood to be long settled is that an acceptance must be exactly in terms of the offer. A purported acceptance which varies that offer in any particular is not an acceptance. This is true of the law of contract generally (see *Smith v Taylor* (1988) ANZConvR 110 (CA)); and the principle also applies to the exercise of options (*Reporoa Stores Ltd v Treloar* [1958] NZLR 177 (CA) and *Buckland v Bay of Islands Electric Power Board* (1980) 1 NZCPR 217 (CA)).

[15] In this instance, the respondent has fallen foul of that principle by reason of the circumstances set out in the judgment of O'Regan J.

[16] McGrath J, for reasons which I can entirely empathise with, endeavours to avoid the full weight of the *Reporoa* principle by saying that, ultimately, and in this case in particular, it must be a matter of construction of the particular letter. I have real difficulty in avoiding the conclusion that there was in clause 2 an unequivocal acceptance, followed by the tags (and consequential difficulties) which O'Regan J has carefully traversed. This is just what the *Reporoa* line of authority says cannot be done. Moreover it strikes me that to admit of this approach is to create the very difficulties for the law of contract and for conveyancers that *Reporoa* has sought to avoid: these cases will become cases about construction of documents, itself a somewhat problematic endeavour with far from certain outcomes.

[17] Finally, I am troubled by endeavouring to "outflank" the *Reporoa* rule on the kind of argument - or rather lack of it - that was addressed to us. Whether a property rule of that antiquity and standing should be disturbed requires a different kind of legal methodology and argument than what was before us.

[18] I think the appropriate course is therefore, at least in this Court, to maintain the strict *Reporoa* approach.

O'REGAN J

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Introduction

[19] This is an appeal from a decision of Associate Judge Lang recorded in an interim judgment dated 11 March 2004 and a final judgment dated 20 June 2004.

[20] The case concerns an option to purchase a large parcel of land at Gulf Harbour known as the Eastern Boat Harbour Carpark (the carpark site). Associate Judge Lang found that the respondent, Gulf Harbour Investments Limited (GHIL) had exercised the option and ordered the first appellant, Gulf Corporation Limited

(Gulf Corporation) to specifically perform its obligation to sell the carpark site to GHIL. Gulf Corporation argues that no valid exercise of the option has occurred and that, accordingly, there is no agreement on its part to sell the carpark site to GHIL.

Facts

Head Agreement

[21] In December 2000, Gulf Harbour Developments Limited (Gulf Developments), entered into an Agreement for Sale and Purchase of Real Estate with the second appellant, Auckland Property Group Limited (Auckland Property). This agreement, known as the Head Agreement, was a complex document which provided for the transfer of a large parcel of land at Gulf Harbour from Gulf Developments to Auckland Property for a purchase price of almost $50 million plus GST. Gulf Developments and GHIL were sister companies: both were wholly owned by the same holding company.

[22] The Head Agreement followed on from an earlier Heads of Agreement dated 3 November 2000, which dealt with the same subject matter but which was expressed to be subject to final documentation. Schedule 8 to the earlier Heads of Agreement made it clear that the carpark site was "not part of the contract" i.e. it was not to be transferred to Auckland Property. However, when the Head Agreement itself was signed, the land to be conveyed by Gulf Developments to Auckland Property under the Head Agreement (which I will call the global site) included the carpark site. However, the Head Agreement contained a specific provision assuring GHIL's position in relation to the carpark site. This was cl 18, which said that the carpark site would be the subject of a deed in the form set out in Schedule 10.

Easement Deed

[23] The document contemplated by cl 18 was called an Access Carparking and Marina Facilities Easement Deed (the Easement Deed). The parties were Auckland Property and GHIL, even though it had been noted in the Recitals to the Head

Agreement that Auckland Property nominated Gulf Corporation as purchaser under the Head Agreement, so that it would be Gulf Corporation which would take title to the global site, including the carpark site. The Easement Deed gave very broad rights to GHIL to have access over, and to use, the carpark site. The term "use" was defined extremely broadly, so that GHIL had rights in respect of the carpark site which, in practical terms, had many of the characteristics of ownership. In addition, cl 9 of the Easement Deed provided that Auckland Property Group granted to GHIL an option to purchase the carpark site for one dollar, such option being exercisable at any time between 3 April 2001 and 3 April 2011.

[24] It was contemplated by the parties that the carpark site would need to be subdivided from the larger area of land conveyed pursuant to the Head Agreement, but cl 9 of the Easement Deed provided that this would take place after the exercise of the option.

[25] Gulf Corporation became the proprietor of the global site on 7 May 2001. Auckland Property did not at any stage become the proprietor of the global site, as it had exercised the power of nomination which it had under the Heads of Agreement. However, Auckland Property remained liable for the obligations of the party it had nominated (Gulf Corporation in this case).

Easement Transfer

[26] Just prior to the transfer of the global site by Gulf Developments to Gulf Corporation, Gulf Developments executed a transfer creating an easement in gross over the carpark site in favour of GHIL, and this was registered on the title of the global site. I will call this document the Easement Transfer. The terms of the Easement Transfer were, in all material aspects, the same as the terms of the Easement Deed. In particular, cl 5 of the Easement Transfer provided that GHIL had an option to purchase the carpark site. The terms of cl 5 were the same as the terms of cl 9 of the Easement Deed. Clause 5 provides:

5. OPTION

5.1 In consideration of the sum of $1 paid by the Transferee to the Transferor (the receipt of which sum is hereby acknowledged), the Transferor grants to the Transferee an unconditional and irrevocable option to require the Transferor to sell that part of the Land [the global site] constituting the Eastern Marina Car Park to the Transferee (**"Option"**) on the following terms and conditions:

(a) The Transferee may exercise the Option at any time during the period commencing on 3rd April 2001 and expiring on 3rd April 2011;

(b) The Option shall be exercisable by the Transferee by serving notice of the Transferee's intention to exercise the Option and upon receipt of such notice the Transferor shall be bound to sell the Eastern Boat Harbour Car Park to the Transferee on the terms of the Auckland District Law Society and Real Estate Institution *[sic]* of New Zealand's Agreement for Sale and Purchase of Real Estate Seventh Edition (2) July 1999 but otherwise with the following terms:

(i) Purchase price: $1.00;

(ii) Settlement Date: 10 working days following the issue of a separate title for the Eastern Marina Car Park;

(iii) Resource consent: The Transferee shall apply for and endeavour to obtain a resource consent for the subdivision of the Land and the Transferor shall assist in all respects for *[sic]* such application including the production of the Transferor's title to the Land and signing any necessary consent. All costs associated with obtaining Resource Consent to subdivide the Land and all costs associated with the subdivision of the Land shall be borne by the Transferee including the reasonable cost of the Transferor and its professional advisors.

(iv) As a condition of taking title, the Transferor may at its discretion elect to register a restrictive covenant, to give effect to the use provisions of this instrument to run with the land. Such covenant shall be registered at the Transferee cost *[sic]* and recorded on the Certificate of Title.

[27] The operative words of the option are unusual, in that the option is not expressed to be an option to purchase but rather an option to require the transferor to sell. However, neither party attributed any significance to that wording, and I am

satisfied that the legal effect of the document is to create an option in favour of GHIL to purchase the carpark site.

18 August 2003 letter

[28] In August 2003 GHIL decided to exercise the option. On 18 August 2003 it wrote to Auckland Property in the following terms (with the reference to the Agreement being to the Easement Deed):

> 1. You will recall that by Agreement dated 1 December 2000 ("Agreement"), Auckland Property Group Limited granted to Gulf Harbour Investments Limited an option to purchase the Carpark ("Option").
>
> 2. Gulf Harbour Investments Limited hereby gives notice of its intention to exercise the Option and complete the purchase. Please consider this correspondence as notice required by clause 9.0(b) of the Agreement.
>
> 3. We note that the terms of the Agreement require the parties to enter into an agreement for sale and purchase in the form of the Auckland District Law Society and Real Estate Institute of New Zealand 7th Edition (2) July 1999 form, and further that the subdivision necessary to effect the separation of title to the Carpark is to be completed at our cost.
>
> 4. We will shortly prepare and forward to you for execution the necessary agreement for sale and purchase, and will now take steps to effect the subdivision. Naturally, we will be in further communication with you when your assistance is required in that regard. In the meantime please confirm receipt of this notice of exercise.

21 August 2003 letter

[29] Of course, Auckland Property was not the registered proprietor of the global site, which was the land to which the easement in gross created by the Easement Transfer related. Perhaps because GHIL realised this, it sent another letter on 21 August 2004 to the registered proprietor of the land, Gulf Corporation. That letter referred to the Easement Transfer. It provided as follows:

> 1. You are the registered proprietor of the land comprised in Certificate of Title NA 134D/136, North Auckland Registry ("Land"). The Land is subject to a right of way and parking right easement granted

to Gulf Harbour Investments Limited and created by Transfer D603614.1 ("Easement"). The Easement includes (amongst other things) an option to purchase the area of land referred to as the Eastern Marina Car Park ("Option").

2. Gulf Harbour Investments Limited hereby gives notice of its intention to exercise the Option and complete the purchase. Please consider this correspondence as notice required by clause 5.1(b) of the Easement.

3. We note that the terms of the Easement require the parties to enter into an agreement for sale and purchase in the form of the Auckland District Law Society and Real Estate Institute of New Zealand 7th Edition (2) July 1999 form, and further that the subdivision necessary to effect the separation of title to the Eastern Marina Car Park is to be completed at our cost.

4. We now enclose for execution duplicate copies of the agreement for sale and purchase. On receipt of the signed agreement for sale and purchase we will sign the agreement and return one copy to you. Subsequently we will commence such steps as are necessary to effect the subdivision. Naturally, we will be in further communication with you when your assistance is required in that regard. In the meantime please urgently return the signed agreement for sale and purchase to our solicitors, Kensington Swan, Private Bag 92101, Auckland.

[30] Both of these letters were signed on behalf of GHIL by the Group Legal Counsel for the Gulf Harbour group of companies.

[31] The Agreement for Sale and Purchase which was enclosed with the 21 August 2003 letter was the Auckland District Law Society and Real Estate Institute of New Zealand 7th Edition (2) July 1999 form (the ADLS form).

[32] The ADLS form had been completed to allow for execution, so that details of the vendor, purchaser, legal description of the land, purchase price and similar matters had been set out on the ADLS form.

[33] In addition, the "Conditions" section on the front page had been crossed out. This meant that the provision relating to consent under the Overseas Investment Act 1973 ("OIA Consent required: Yes/No") had been deleted in its entirety. It was accepted that the effect of the deletion of the provision in its entirety was to make cl 8.3(1) of the document inapplicable. This provided:

> 8.3 (1) If the purchaser has either deleted "Yes" or made no deletion on the front page of this agreement under the heading "OIA Consent required" then the purchaser warrants that the purchaser does not require consent under the Overseas Investment Act 1973 (OIA Consent) to purchase the property.

[34] Some additional terms were included in the space provided in the ADLS form for "Further Terms of Sale". The most relevant for present purposes is cl 14.3 which says:

> The vendor undertakes to take all steps reasonably required of it by the purchaser to assist with completion of the subdivision in a timely fashion, including but without being limited to execution of all documentation requiring execution by it as the existing registered proprietor and the obtaining from its mortgagee (if applicable) of partial releases of all charges affecting the property.

[35] This provision can be contrasted with cl 5.1(b)(iii) of the Easement Transfer (reproduced in [26] above) which deals with the same subject matter but in different terms.

OIC Consent

[36] GHIL was an "overseas person" as defined in the Overseas Investment Act 1973 and the Overseas Investment Regulations 1995 at the time it entered into the Easement Deed and at the time the Easement Transfer was executed in its favour. It was still an overseas person at the time of the sending of the 18 August 2003 and 21 August 2003 letters. However it ceased to be an overseas person in December 2003 when SOB Holdings Limited, a company owned by Mr James Speedy, who is a New Zealand resident, purchased the shares in Gulf Harbour Holdings Limited which is the sole shareholder of both Gulf Developments and GHIL.

[37] One of the grounds on which Gulf Corporation refused to accept that the option had been effectively exercised by GHIL was the fact that GHIL did not have consent under the Overseas Investment Regulations to the acquisition of the interest in the carpark site acquired pursuant to the Easement Deed and also did not have consent to the acquisition of the fee simple estate in the carpark site in pursuance of the exercise of the option. This led the Associate Judge to adjourn the High Court

proceedings part heard to give GHIL the opportunity to seek retrospective consent from the Overseas Investment Commission (OIC). GHIL did so, and retrospective consent was granted on 12 May 2004 to the acquisition by GHIL of an estate in the carpark site. That authorised GHIL's acquisition of the interests created under the Easement Deed, the Easement Transfer and, if effectively exercised, the agreement resulting from the exercise of the option.

[38] It is not clear whether the option contained in cl 5 of the Easement Transfer was an offer that was capable of being effectively accepted before the OIC consent was given, and the illegality of the Easement Transfer was thereby removed. The point was not argued in the High Court or in this Court and our conclusions on the issues before the Court make it unnecessary to decide it.

29 January 2004 letter

[39] After GHIL ceased to be an overseas person it made another attempt to exercise the option on 29 January 2004. This letter was in essentially the same terms as the letter of 21 August 2003, except for the addition of the following sentence at the end of para 2:

> The exercise of this Option is without prejudice to the previous exercise of the Option by Gulf Harbour Investments Limited, which is the subject of court proceedings CIV-6443/03 involving Gulf Harbour Investments Limited, Auckland Property Group Limited and yourself.

[40] A copy of the ADLS form was again enclosed. This document had the same notations and markings as the document which had been sent with the 21 August 2003 letter. Accordingly, to the extent that the enclosing of the ADLS form with those notations and marking affected the validity of the purported exercise of the option on 21 August 2003, the same problems existed with the purported exercise on 29 January 2004. The difference was, of course, that the deletion of the box relating to consent under the Overseas Investment Act was of less practical significance in January 2004 because, by then, GHIL was not an overseas person.

High Court judgments

Judgment of 11 March 2004

[41] In his first judgment of 11 March 2004, the Associate Judge stated the principles for the granting of summary judgment in terms with which neither party took issue and allowed the amendment of the pleadings to incorporate a claim based on the purported exercise of the option on 29 January 2004.

[42] The Judge identified four issues to be determined. These were:

(a) Was the Option validly exercised?

(b) If it was, was the arrangement nevertheless entered into in breach of the Overseas Investment Act 1973?

(c) If it was, could the Court validate the contract?

(d) If it declines to do so, what should be done?

[43] The Judge concluded that the exercise of the Option was effected in the second paragraph of the letter sent by GHIL to Auckland Property on 18 August 2003, which referred to the exercise of the option created by cl 9 of the Easement Deed (to which Auckland Property was a party) rather than cl 5 of the Easement Transfer (which was registered against the title of the land held by Gulf Corporation). The Judge said when Auckland Property received the letter, the option was validly exercised.

[44] However, in case he was wrong on that point he went on to consider the letter sent by GHIL to Gulf Corporation on 21 August 2003. He found that para 2 of this letter (which was in essentially the same terms as para 2 of the 18 August 2003 letter) was also an effective exercise of the option. He accepted that GHIL was wrong to say that the parties were required to enter into a further agreement for sale and purchase but said a binding agreement in the terms specified in the option itself

had been concluded when GHIL exercised its option in the letter and that any errors in the ADLS form sent with the letter were therefore of no consequence.

[45] The Judge found that GHIL did not need to re-exercise the option in January 2004 and that this purported re-exercise of the option was of no effect.

[46] On the second issue the Judge found that it was arguable that the rights granted to GHIL under the Easement Deed amounted to more than an easement and that it was also arguable that consent under the Overseas Investment Regulations was required for GHIL to acquire rights under that document. Similarly he found that it was arguable that consent was required for the granting of the option to purchase the carpark site, and that consent was also required for the exercise of the option. Accordingly he found that the exercise of the option was unlawful because it contravened the Overseas Investment Regulations. Accordingly he found the contract which had been formed by the exercise of the option was an illegal contract and that, under the Illegal Contracts Act 1970, it was of no effect.

[47] The Judge then turned to the question of validation of the contract. He determined that it was not appropriate to validate the contract in circumstances where power existed for the body responsible for the administration of the Overseas Investment Act and the Overseas Investment Regulations to provide retrospective consent. The Judge determined that the appropriate course was therefore to adjourn the proceedings to allow GHIL to seek retrospective consent from the OIC. This was sought and obtained in May 2004.

Judgment of 20 June 2004

[48] After the OIC consent was obtained, there was a further hearing, after which the Judge issued his second judgment dated 20 June 2004. In that judgment, the Judge noted that counsel had agreed that any exercise of the option would no longer be an illegal transaction because retrospective consent had been granted. He therefore concluded that, as a result of his earlier judgment, GHIL had a valid and binding contract for sale and purchase of the carpark site. He therefore ordered Gulf Corporation to specifically perform its obligations to sell the carpark site on the

terms set out in cl 9 of the Easement Deed. In this Court, counsel were agreed that this was an error and that the reference should have been to cl 5 of the Easement Transfer because that is the document which is binding on Gulf Corporation.

[49] The Judge was also asked to make an order that Auckland Property should procure Gulf Corporation to specifically perform its obligation to sell the carpark site. He said this was unnecessary because there was no reason to suppose that Gulf Corporation would decline to comply with the order. However he reserved leave for GHIL to apply further if necessary.

Issue on appeal

[50] As the issues relating to the Overseas Investment Act have now been resolved, the only issue on the appeal is the effectiveness of the purported exercise of the option by GHIL.

Submissions

Submissions for the appellants

[51] The appellants argued that the Associate Judge was wrong to find that the option had been effectively exercised in para 2 of the letter dated 18 August 2003 because Auckland Property was not able to comply with any purported exercise of the option, having nominated Gulf Corporation as purchaser of the global site. They said that, even if this submission were not accepted, the purported exercise was deficient because the letter of 18 August 2003 referred to the need to enter into an agreement for sale and purchase which would be prepared for signature, and thus was not consistent with the terms of the option itself.

[52] The appellants also argued that the purported exercise of the option by the letter of 21 August 2003 to Gulf Corporation was ineffective because the letter of 21 August 2003 had to be read as a whole, and when this was done it was apparent

that the exercise of the option was not in accordance with the terms of the option itself. In particular it was argued that:

(a) The letter said that Gulf Corporation was required to enter into an agreement for sale and purchase, which was contrary to the terms of the option when no such requirement existed;

(b) The contract which would have been formed if the enclosed agreement for sale and purchase had been signed was different from what the option contemplated. In particular:

(i) the deletion of the "OIC consent required" box on the front page meant that the contract was not conditional on compliance with the Overseas Investment Act and the warranty by the purchaser in cl 8.3(1) of the ADLS form was effectively excluded;

(ii) The requirement of the additional provision, cl 14.3, was more onerous than the equivalent requirement under the terms of the option.

[53] The appellants also argued that the purported exercise of the option on 29 January 2004 failed for essentially the same reasons as those relating to the 21 August 2003 letter.

Submissions for GHIL

[54] GHIL contended that the Associate Judge was correct in his finding that the option was validly exercised by the 18 August 2003 and the 21 August 2003 letters, particularly para 2 of those letters. It argued that the content of paras 3 and 4 of those letters, which contemplated the signing of a fresh agreement for sale and purchase, did not make any variation to the terms of the option but simply dealt with mechanics and procedural steps. It said that there had been no material change to the terms of the option in the letters exercising the options.

[55] Counsel for GHIL, Ms Lim said the appellants' stance was "immoral". She said it was trying to prevent GHIL getting title to land that the parties always intended to exclude from the Head Agreement: the use of the device of an option to purchase for $1.00 was simply a way of achieving that commercial objective. She noted that the appellants' case in the High Court was based on the failure to obtain OIC consent, and that there had been no challenge to the validity of the exercise of the option until GHIL issued proceedings.

New Zealand cases: *Reporoa* and *Buckland*

[56] An analysis of the issues which arise in this case requires a close consideration of two previous decisions of this Court, *Reporoa Stores Limited v Treloar* [1958] NZLR 177 and *Buckland v Bay of Islands Electric Power Board* (1980) 1 NZCPR 217. Before embarking on a discussion of the issues which arise in this case, I propose to summarise those cases briefly.

Reporoa Stores Limited v Treloar

[57] In this case, an agreement to lease a property in Reporoa gave to the lessee an irrevocable option to purchase the property, provided the lessee gave the lessor, prior to 29 September 1953, three months notice in writing of its desire to purchase. On expiration of the notice and payment by the lessee of £1,855, the property would be conveyed to the lessee.

[58] On 6 May 1953, the lessee purported to exercise this option to purchase. The solicitors for the lessee wrote to the lessor a letter, which read:

> I am instructed [by the lessee] to notify you that it intends to exercise its right to purchase pursuant to Clause 2 sub-clause (i) of the lease given by you, dated the 20th November, 1951. Settlement will accordingly be effected on or before the 29th September, 1954.
>
> I shall be pleased if you will acknowledge receipt of this Notice and of the terms contained therein as this will make a binding contract of Sale and Purchase.

[59] The issue before the Court was whether the lessee had effectively exercised the option notwithstanding that, in the second sentence, the lessee appeared to alter a term of the option, namely the date of settlement, and then requested acknowledgement of the notice and that term. The majority of the Court found that the option was not effectively exercised.

[60] Gresson J said, at 188, that to bring about a binding contract the offeree must unreservedly assent to the exact terms proposed by the offeror. The Judge approached the issue of whether an offeree had so assented as one of construction. Anybody receiving the letter, the Judge said, would understand the lessee to be proposing a variation to the terms offered. Gresson J put particular emphasis on the use of the words "the terms contained therein", which he said indicated that the change to the settlement date was being proposed as new term. Further, the lessee asked for an acknowledgement of receipt of the notice and the terms contained within so as to "make a binding contract of sale and purchase".

[61] Gresson J considered that if the letter was not an attempt to vary the terms of the offer, it was clear that the lessee was under a misapprehension as to the terms. If this was the case, the Judge said at 192 that, again, there could be no contract as there was no consensus ad idem: the contract was voided by the then law of unilateral mistake.

[62] T A Gresson and McGregor JJ concurred, writing separately in similar terms.

[63] Barrowclough CJ, dissenting, took the view that the construction apprehended by the majority should not be adopted if a construction is permissible which would give effect to the first sentence. He stated at 181:

> The other construction is to regard the letter as an unconditional and effective acceptance of the offer with, superadded thereto, a statement of the writer's understanding (mistaken as it certainly was) of one of the legal consequences of the acceptance. If it is proper to adopt this latter construction, neither of the two sentences would be ineffectual. The second of them would, it is true, have failed to fix the date for settlement; but it would have effected its purpose in that it did set out the writer's interpretation of one of the legal consequences of the contract which, on that interpretation, had come into existence.

[64] Thus, the appellant intended to accept the offer with all its legal consequences, even though one of them should be different from what his letter shows him to have contemplated, and the option, therefore, was validly exercised.

[65] F B Adams J took a similar approach to Barrowclough CJ, noting at 198:

> In my opinion, the letter, when read as a whole, is an unqualified acceptance. The first sentence is clear and unambiguous, and, whatever one may make of the two remaining ambiguous sentences, they do not mean that the option is not exercised. They are not repugnant to, and do not contradict, the first sentence, and are insufficient to negative the clearly expressed intention to exercise the option. As to what their meaning may be, I do not propose to add to what the learned Chief Justice has said. Indeed, once one has arrived at the conclusion that, whatever they may really mean, they do not contradict the opening sentence, it becomes unnecessary to proceed further in the endeavour to construe them. In holding that they do not negative the antecedent acceptance, I am not relying on any merely literal construction of the words of the last two sentences, or placing a strained construction upon them on the principle expressed in the maxim *Ut res magis valeat quam pereat* (though I think that principle might be relevant in the last resort) but am merely giving to the document the meaning which it has always, when read as a whole, conveyed to my mind as being the real meaning and intention of the writer, and the meaning and intention which a reasonable recipient would have attributed to him, as Mr Treloar in fact did.

[66] It is apparent that all the members of the Court treated the matter as a question of construction dependent on the terms of the particular document. Indeed, even the majority Judges broadly accepted that they should seek to find a contract if possible. However, they felt constrained by the inclusion of what seemed to be a new term extending the settlement date beyond what was contemplated in the option.

Buckland v Bay of Islands Electric Power Board

[67] This case concerned an option to purchase a property at Kerikeri. The Deed of Covenant provided that the buyer, to exercise the option, should give the vendor notice of its intention to purchase the land "at the amount of a special Government Valuation to be made by the Valuation Department at the date of such notice". A notice in the following form was served on the vendor:

> TAKE NOTICE that in exercise of the right or option to repurchase…the [buyer] hereby elects and agrees to [purchase] the land…at a price of THIRTY THREE THOUSAND DOLLARS ($33000) being the amount of a special Government Valuation dated the 5th day of March 1976…
>
> DATED this 19th day of March 1976

[68] Thus, while the right to purchase in the Deed of Covenant was a right to purchase at a valuation to be made on the date of the notice, 19 March 1976, the buyer purported to elect and agree to purchase the land at a valuation dated 5 March 1976. The issue was, again, whether this mistake meant that the option had not been validly exercised.

[69] The Court found that the option had not been validly exercised. Richmond P, Cooke and Richardson JJ, writing separately, emphasised that strict compliance with the terms of the option was necessary for acceptance. Richmond P said at 221 that, by altering the date of valuation, "the [buyer] failed to convey to [the vendor] its willingness to exercise the right of [purchase] on the terms stipulated in the Deed of Covenant". Cooke and Richardson JJ cited the majority's decision in *Reporoa*. Cooke J noted that in this case it was clear that there was a misapprehension as to the terms, and following Gresson J's analysis in *Reporoa*, there was accordingly no consensus ad idem.

[70] Richmond P and Cooke J acknowledged that in some circumstances the difference between the terms of an offer and the purported acceptance of that offer could be so trivial that the principle of de minimis might apply. The facts of this case, however, did not warrant its application, as no assurance could be given that the valuation would necessarily have been the same if made at 19 March. On this point, Richardson J commented at 223:

> A valuation date in an option to purchase is clearly material to the fixing of the purchase price. If the purported election to exercise the option is at a valuation fixed as at a different date, prima facie the necessary correspondence between the offer and its acceptance is lacking.

[71] I now turn to the consideration of the three attempts at exercising the option.

18 August 2003 letter

[72] I am satisfied that the 18 August 2003 letter did not effectively exercise the option. That letter was addressed to Auckland Property which, to the knowledge of GPIL, had nominated another party to take a transfer of the land conveyed by the Head Agreement. Thus Auckland Property was not in any position to transfer the carpark site to GPIL. While Auckland Property remained liable for the obligations of Gulf Corporation, that pre-supposed that Gulf Corporation had an obligation for which Auckland Property could be bound. Until the option was properly exercised against Gulf Corporation, that situation simply did not arise.

[73] I am satisfied therefore, that the Judge was wrong to find that the option was effectively exercised by the letter of 18 August 2003.

21 August 2003 letter

[74] The Judge found that the letter of 21 August 2003 was effective to exercise the option against Gulf Corporation. I think that it is clear that if only paras 1 and 2 of that letter are read in isolation, that conclusion is justified. Paragraph 2 is clear in its terms. Although it refers to an intention to exercise rather than an actual exercise of the option, I think that the explicit reference to the letter being the notice required by cl 5.1(b) of the Easement Transfer is conclusive.

[75] The issue which must be determined, however, is whether paras 1 and 2 of the 21 August 2003 letter can be read in isolation, and paras 3 and 4 of the letter can be ignored or treated as not undermining the clear terms of para 2. If that cannot be done, then it will also be necessary to determine whether, when read as a whole, the letter of 21 August 2003 can be construed as an effective exercise of the option.

[76] On behalf of the appellants, Mr Commons, said that the entirety of the letter must be construed to determine whether there has been an effective exercise of the option. He said that the Associate Judge had been wrong to consider paras 1 and 2 alone. He relied for that proposition on observations to that effect in the *Reporoa Stores* case (particularly the judgment of Gresson J at 187-188 and the judgment of

McGregor J at 203). I agree that it is the document as a whole which must be considered, when determining whether an option has been validly exercised. It is possible that an unequivocal statement that an option as exercised can be undermined by the following language which calls into question the earlier unequivocal statement. That was precisely the situation which arose in the *Reporoa Stores* case.

[77] Mr Commons said that the present case was on all fours with both *Reporoa Stores* and *Buckland*. He said that when read as a whole, the letter of 21 August 2003 must be seen as proposing variations to the precise terms of the option in cl 5.1 of the Easement Transfer. In particular, he highlighted the following factors:

(a) The request for the signing of an Agreement for Sale and Purchase, when the option did not require this and, in fact, specified the terms by reference to the Real Estate Institute of New Zealand and Auckland District Law Society form;

(b) The deletion of the "OIA Consent required" box from the annexed form of Agreement, and the consequent non-applicability of the warranty in cl 8.3(1);

(c) The form of cl 14.3 which was more extensive in scope than the equivalent provision in cl 5.1 of the Easement Transfer.

[78] Mr Commons made much of these matters but in my view they were not as significant as he contended. However, notwithstanding my skepticism as to the extent of the differences between the contract which would arise from a simple exercise of the option, and that which would arise from the execution of the Agreement enclosed with the 21 August 2003 letter, I accept Mr Commons' submission that they are differences, and that they put the present case in the same category as both *Reporoa Stores* and *Buckland*. Unless those cases are distinguishable, the Court must apply them.

[79] On behalf of GHIL, Ms Lim argued that *Reporoa Stores* and *Buckland* could be distinguished in the present case for a number of reasons. Those reasons, and my evaluation of them, are as follows:

(a) The option in the present case is described as being "unconditional" and "irrevocable". I do not see why that makes the case distinguishable: the question is whether the option was exercised, not whether there were conditions attaching to it or it was able to be revoked;

(b) The option is registered against the certificate of title for the land as part of the Easement Transfer. Again, I do not see why this distinguishes the present case: the issue is whether the steps taken to exercise the option amounted to a valid exercise. There is no different rule for options contained in documents registered against the title as distinct from options contained in deeds or contracts;

(c) The option is able to be exercised from 3 April 2001 to 3 April 2011. Again this does not distinguish the present case, which is about the effectiveness or otherwise of the purported exercise of the option, not about any future rights which GHIL may have to exercise the option;

(d) The option in the present case was to be exercised by giving notice, and upon receipt of the notice and agreement was to come into existence. She said this validated Associate Judge Lang's view that, once there had been an exercise of the option in para 2, the contract came into being and the remaining contents of the 21 August 2003 letter became redundant. For reasons I have already given, I cannot accept that submission: in my view it is clear from *Reporoa Stores* that the document purporting to exercise the option must be considered in its entirety;

(e) Even if there were additional terms proposed in the 21 August 2003 letter, these terms were not material as the additional terms were in

both *Reporoa Stores* (a change to the settlement date) and *Buckland* (a valuation on the wrong date, potentially affecting the price). I think the starting point for consideration of that submission is a statement made by Lord Denning MR in *United Dominions Trust (Commercial) Limited v Eagle Aircraft Services Limited* [1968] 1 WLR 74 at 81:

> In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer.

This passage was cited with approval by Richmond P in *Buckland* at 219. Later in his judgment Richmond P accepted that there may be certain circumstances where the apparent differences between the terms of an offer and the purported acceptance of the offer would be so trivial that there would be room for an argument based on the principle of de minimis. Cooke J also contemplated the possibility of the application of a de minimis rule, but like Richmond P said that it could not apply to the facts of *Buckland*. Richardson J questioned whether the de minimis rule could apply at all. I am satisfied that, even though the differences between the purported acceptance and the offer contained in cl 5 of the Easement Transfer were not as significant as Mr Commons argued, they cannot be classified as merely "de minimis". I think that the requirement which applies in this case is what Lord Denning described as the need for "exact compliance" with the terms of the option.

(f) The request for execution of the Agreement was different from the "acknowledgement" required in the *Reporoa* case. I cannot accept that that is a difference: it seems to me that the request for execution of a document is similar in nature to the request for an acknowledgement of the existence of a contract in the terms set out in the letter of acceptance itself.

[80] I accept that *Reporoa Stores* and *Buckland* involve strict applications of the requirement for "exact compliance". There is scope for argument that a more benign approach, along the lines of that adopted by F B Adams J in his dissenting judgment in *Reporoa Stores* could be adopted. That approach is supported by some Australian authority, for example *Prudential Assurance Co Limited* v *Health Minders Pty Limited* (1987) 9 NSWLR 673. But *Reporoa Stores* and *Buckland* are clear authority of this Court and neither party suggested that it was appropriate to depart from them.

[81] In my view the 21 August 2003 letter was not an effective exercise of the option.

29 January 2004 letter

[82] The 29 January 2004 letter was in essentially the same terms as the 21 August 2003 letter, and therefore suffers from the same defects. It is true that GHIL had ceased to be an overseas person by the time this letter was sent, but that was not necessarily known to Gulf Corporation. In my view the letter of 29 January 2004 was not in exact compliance with the terms of the option contained in cl 5 of the Easement Transfer and it was also ineffective to exercise the option.

Result

[83] I would therefore allow the appeal and quash the order for specific performance made in the High Court.

Costs

[84] The appellants are entitled to costs. I would award costs of $3,000 to each appellant, plus usual disbursements.

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