IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2022-488-63
[2026] NZHC 1630

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Forex Technical Analyst Systems Limited
BETWEEN	GARRY CECIL WHIMP First Plaintiff
	FOREX TECHNICAL ANALYST SYSTEMS LIMITED (in liquidation) Second Plaintiff
AND	KENNETH RODNEY PEEL DUGDALE, LINDA YVONNE DUGDALE and JOHN MURU WALTERS First Defendants
	KENNETH RODNEY PEEL DUGDALE Second Defendant

Hearing:	31 March 2026
Appearances:	S O McAnally and S Liu for Plaintiffs M J Francis and J W Murison for third-named First Defendant
Judgment:	11 June 2026

JUDGMENT OF O'GORMAN J
[Preliminary determination]

This judgment was delivered by me on 11 June 2026 at 11 am
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Introduction

[1] This is a hearing under rr 10.15 and 10.20 of the High Court Rules 2016 to determine the following question prior to trial:

> When, on or about 13 April 2023, the plaintiffs gave notice purporting to cancel the settlement agreement that had been entered between them and Mr Walters, did they have sufficient grounds upon which to do so effectively?

[2] If the Court answers "yes" to the proposed question, the parties agree that a declaratory order should be made to that effect and Mr Walters' counterclaim should be struck out.

[3] If the Court answers "no" to the proposed question, the parties agree that a declaratory order should be made to that effect, along with a declaratory order that Mr Walters' liability is limited to the assets of the Trust. Further, judgment should be entered in Mr Walters' favour on his counterclaim.

Facts

[4] The substantive proceeding includes a claim by a liquidator, Mr Whimp, and the company in liquidation, Forex Technical Analyst Systems Ltd (Forex), against the trustees of the Eternal Trust (including Mr Walters) for receiving goods and services from Forex for inadequate consideration, and for dishonestly assisting the first-named defendant, Mr Dugdale, in breach of his fiduciary duties owed to Forex as its director.

[5] Mr and Mrs Dugdale are husband and wife. Until 22 December 2023, they were both trustees of the Trust. Mr Walters is a solicitor who was a professional trustee of the Trust from 18 December 2019.

[6] The Trust owned land in Cames Road, Mangawhai. On 6 November 2020, Forex contracted with the Dugdales as trustees of the Trust to build a house on the land for a price of $670,000 (GST inclusive). After the house was built, in February 2022, Mr Dugdale placed Forex into liquidation by passing a special shareholder resolution (Mr Dugdale was the sole director and shareholder of Forex).

[7] Mr Whimp, as liquidator, takes the position that the agreed price and net sum earned (if any) for constructing the house was at a substantial undervalue.

[8] On 2 September 2022, the plaintiffs applied for and obtained an interim injunction. Brewer J recognised the plaintiffs' interest in maintaining the asset from which compensatory damages can be obtained[1] and made the following orders (with leave reserved to apply to vary or rescind on five days' notice):[2]

> (a) An order by way of interlocutory injunction prohibiting the sale or other disposition of the property [the details of which were specified], pending further order of the Court.
>
> (b) A further order prohibiting reducing the defendants' equity in the said property by pledging it as security by whatever means whatsoever, pending further order of the Court.

[9] A copy of the judgment dated 2 September 2022 was attached to an email sent from Crimson Legal (acting for the plaintiffs) directly to Mr Walters' email address at 5.43 pm on 2 September 2022.

[10] On 5 September 2022 at 11.47 am, Mr Walters replied to that email, confirming authority to accept service of the proceedings. Mr Walters received copies of those further documents by email at 11.54 am that same day.

[11] On 7 September 2022, Mr Walters confirmed to Crimson Legal that he was no longer acting for Mr Dugdale or the Trust.

[12] On 6 October 2022, Wotton Kearney, acting for Mr Walters, wrote to the lawyers acting for the plaintiffs and the Dugdales respectively, proposing a settlement. Before doing so, they commented on the merits of the statement of claim. They said Mr Walters was not a party to the building contract with Forex (so it might be void for lack of trustee unanimity) and took the position that there was no basis for pleading

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1 *Whimp v Dugdale* [2022] NZHC 2242 at [15].
2 At [19]–[20].

dishonest assistance against Mr Walters. The proposed settlement and its rationale were explained as follows:

> 6. In any event, we see this proceeding as a matter between the liquidators, and the first and second named first defendants (Mr and Mrs Dugdale). As you will appreciate Mr Walters' liability as trustee, if anything, is limited to the assets of the trust. Further, if Mr Walters takes active steps to defend the proceeding, the costs of those steps will ultimately fall against the trust and erode the Trust's assets – given Mr Walters is entitled to an indemnity for his costs in defending the claims against him as trustee.
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> 7. Rather than see the Trust's assets eroded in this way, Mr Walters proposes instead that:
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>   7.1 [Forex], the liquidators and Mr and Mrs Dugdale agree Mr Walters' liability, if any, is limited to the net assets of the trust and that no judgment or order (including as to costs) will be enforced personally against Mr Walters; and
>
>   7.2 In exchange for which, Mr Walters will take no active steps to defend the claim and will instead abide the decision of the Court – thereby minimising cost and preserving the trust assets.
>
> 8. If all parties agree to this proposal, please let us know. We can then prepare a formal agreement.

[13] The 6 October 2022 cover email observed that a defence for Mr Walters was due on the following Monday (10 October 2022), which did not leave much time to take instructions on the proposal. Wotton Kearney suggested a one- or two-week extension of the time frame for Mr Walters' defence.

[14] On 7 October 2022, the plaintiffs' solicitors said "The proposal is sensible. Please send through a draft agreement." Haigh Lyon, acting for the Dugdales, said "We do not anticipate any issue with that approach".

[15] On 11 October 2022, the Dugdales filed and served their statement of defence.

[16] On 19 October 2022, Wotton Kearney forwarded the draft settlement agreement to the other parties.

[17] On 7 November 2022, Wotton Kearney emailed to follow up, stating:

> Dear All,
>
> We haven't yet heard from you on the proposed agreement.
>
> Can you please review the draft agreement and let me or [another lawyer at the firm] know of any comments or concerns? Otherwise, if the agreement is acceptable, please let us know so we can progress its execution.

[18] The same day, Crimson Legal confirmed they were happy with the terms but said they were awaiting confirmation from their client.

[19] On 7 November 2022, counsel for the plaintiffs and the Dugdales filed a joint memorandum proposing a court timetable and indicating that it was anticipated Mr Walters would abide the decision of the court.[3]

[20] On 8 November 2022, Haigh Lyon emailed the other lawyers saying "Yes, the agreement can be finalised and signed".

[21] The settlement agreement was signed by the plaintiffs on 14 December 2022 and sent to the lawyers for the other parties that day.

[22] On 16 December 2022, Wotton Kearney replied to all email recipients of the 14 December 2022 copy executed by the plaintiffs, stating "It would be great if we can have this signed up by everyone before the year end".

[23] When that did not happen, on 17 January 2023, Wotton Kearney sent another reply-all email saying: "Please have your clients countersign the agreement. Once it is signed by your clients, we will have Mr Walter sign it, and we will file the appearance and memorandum contemplated in clause 3.1."

[24] The remaining steps for execution of the settlement agreement were completed:

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3 Although it stated "the second defendant", this was in the context of describing those who had filed a defence as the "first defendants".

(a) on 18 January 2023 by the Dugdales, with the signed page circulated to the other parties on 21 January 2023; and

(b) on 27 January 2023, when it was signed by Mr Walters.

[25] Meanwhile, in breach of the interim injunction orders and without the knowledge or consent of the plaintiffs, the trustees refinanced the borrowing secured over the Trust's property in Mangawhai:[4]

> The refinancing occurred on 22 December 2022. Mr Dugdale resigned as trustee. The property was transferred to Mrs Dugdale and Mr Walters, as remaining trustees. They received an advance of $970,105 from Secure Funding [Ltd]. From that sum, $812,811.81 was paid to Avanti Finance [Ltd] to discharge the existing mortgage over the property. The balance was used to pay various debts (including some debts of Forex) or was made available to Mr and Mrs Dugdale.

[26] Walters Law, with Mr Walters acting as the solicitor, acted for the Trust on the refinancing. Mr Walters sent the agreement for legal services, client information form and terms of engagement to the Trust on 7 December 2022.

[27] The refinancing resulted in the defendants' equity in the property reducing by $103,080.45,[5] with those funds progressively disbursed, leaving $61,731.11 by 22 December 2022 and only $38,025 by 27 March 2023.

[28] Haigh Lyon became aware of the refinancing in February 2023. They advised Crimson Legal on 2 March 2023.

[29] On 13 April 2023, Crimson Legal gave notice terminating the settlement agreement for breach, on the grounds that Mr Walters had participated in the refinance of the property, thereby reducing the equity in it. Crimson Legal offered 25 working days from the date of the letter for Mr Walters to file his defence. An application for contempt was filed and served the same day.

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4 *Whimp v* Dugdale, above n 1, at [29].

5 In addition, a sum of $54,212.74 was paid to United Timber Merchants Ltd.

[30] On 19 May 2023, Wotton Kearney filed the statement of defence and counterclaim for Mr Walters. They also wrote to Crimson Legal denying there were grounds to cancel the settlement agreement.

[31] On 31 May 2023, the Court heard an application for contempt in respect of the refinance. Campbell J delivered his judgment on 31 July 2023, declining the application. Notably, he observed that:

(a) By the time of the hearing, the defendants had collectively paid $103,080.45 to their solicitors, to be held pending further order of the Court or agreement between the parties. This matched the amount by which the defendants say the refinancing reduced their equity in the property.[6] The defendants had thereby remedied their breach,[7] and the interim order had been "enforced" successfully by putting the plaintiffs in the same position they would have been in had the order not been breached.[8] This was found to preclude any orders for contempt.

(b) The above findings were determinative, so the balance of findings about knowledge were dicta. Although Mr Walters had received proper notice of the order prohibiting the defendants from reducing their equity in the property,[9] and it would be extraordinary for a solicitor with Mr Walters' experience not to read the entirety of what was a very short judgment,[10] it was not proved beyond reasonable doubt that Mr Walters knowingly failed to comply with the order.[11] On the other hand, it was established beyond reasonable doubt that Mr Dugdale knowingly failed to comply with the order.[12]

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6 *Whimp v Dugdale*, above n 1, at [39].
7 At [58].
8 At [66].
9 At [76].
10 At [77].
11 At [77].
12 At [81].

Issues

[32] The plaintiffs contend there are three sub-issues for determining whether they were entitled to cancel the settlement agreement:

(a) What is the significance of the timing of the execution of the settlement agreement?

(b) Was there an implied term in the settlement agreement that Mr Walters would not cause, assist or facilitate a material dealing with Trust assets inconsistent with preservation of the Trust asset pool?

(c) If so, did the breach of that term give rise to a right to cancel?

Legal principles

Intention to be bound

[33] The prerequisites to formation of a contract are:[13]

(a) an intention to be immediately bound (at the point when the bargain is said to have been agreed); and

(b) an agreement, express or found by implication, or the means of achieving an agreement (for example, an arbitration clause), on every term which:

(i) was legally essential to the formation of such a bargain; or

(ii) was regarded by the parties themselves as essential to their particular bargain.

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13 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [53].

[34] Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. It is permissible to look beyond the words of their "agreement" to the background circumstances from which it arose.[14]

[35] Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may fall in one of various categories:[15]

(a) The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

(b) The parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

(c) The parties do not intend to make a concluded bargain at all, unless and until they execute a formal contract.

(d) The parties are content to be bound immediately and exclusively by the terms they have agreed upon while expecting to make a further contract in substitution for the first contract, containing additional terms by consent.

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14 At [54]. See also *Smada Group Ltd v Miro Farms Ltd* [2007] NZCA 568, [2009] NZCCLR 4 at [13].

15 The first three are referred to in *Masters v Cameron* (1954) 91 CLR 353 at 360, quoted in *Corporate Securities Ltd v Macken* [2017] NZHC 2700 at [3]. The fourth is added in D W McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at [3.12] (with supporting cases), and is also referred to in *Keith v Waeranga Land Company Ltd* [2015] NZHC 1192 at [20].

[36] In contracts for the sale of land, the usual (rebuttable) inference is that the third category applies, namely that even though all the terms to be included in the document have been agreed, there is no contract (and each party has the opportunity to withdraw) until the document is executed by both parties.[16] Cases in which the parties have said their agreement is "subject to contract" fall in the third category.[17]

Pre-contractual representations

[37] Section 35(1) of the Contract and Commercial Law Act 2017 (CCLA) provides as follows:

> **35 Damages for misrepresentation**
>
> (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—
>
> (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
>
> (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

[38] "No reliance" clauses that purport to avoid the effect of s 35 are subject to s 50. Section 50 applies if a contract, or any other document, contains a provision purporting to prevent a court from inquiring into or determining the question of:[18]

(a) whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) whether, if it was so made or given, it constituted a representation or a term of the contract; or

(c) whether, if it was a representation, it was relied on.

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16 *Smada Group Ltd v Miro Farms Ltd*, above n 14, at [15] and [17], referring to *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA); and *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 (CA).

17 See discussion in *Carruthers v Whitaker*, above n 16, at 672–674.

18 Contact and Commercial Law Act 2017, s 50(1).

[39] Under s 50(2), the court is not prevented by the provision from inquiring into and determining any of the above questions, unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case.[19]

Implied terms

[40] The concept of implied terms is closely related to questions of interpretation of express terms.[20] Both are part of the process of construction of a contract generally.

[41] Traditionally, a sequential approach has been adopted — that is, only once the process of construing express words is complete does the issue of implied terms fall to be considered.[21] The issue of implication only arises after the express terms of the contract have been interpreted and found not to provide for the eventuality, including any logical or necessary inferences from the expressly agreed terms.[22] Where the contract does not address the eventuality through express language or necessary inferences from that language, the court then moves on to address whether a term should be implied.[23] However, notions of clear sequence and bright lines risk obscuring an iterative process, in which implication arises from the text of the contract, interpreted against the relevant background.[24]

[42] The general approach to contractual interpretation is settled:[25]

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19 See *Shabor Ltd v Graham* [2021] NZCA 448, [2021] 22 NZCPR 466 at [93]–[96] for a summary of the relevant principles. Under s 50(3), relevant circumstances expressly include the subject matter and value of the transaction, the respective bargaining strengths of the parties, and whether any party was represented or advised by a lawyer at the time of the negotiations or at any other relevant time.

20 *Westgate Town Centre (in liq) v Auckland Council* [2025] NZCA 474, [2025] 3 NZLR 822 at [21] and [69]–[72].

21 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [28] per Lord Neuberger.

22 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2011] 1 NZLR 696 at [113].

23 At [113].

24 At [114]–[115]. In *Jia v Yang* [2025] NZSC 153 at [12], the Supreme Court declined leave to appeal on a question of law about the iterative versus sequential approach, saying that the case did not provide an appropriate vehicle to consider it.

25 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63] (footnotes omitted) per McGrath, Glazebrook and Arnold JJ, quoted with approval in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 22, at [43].

> [T]he proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey 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". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
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> …
>
> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[43] The traditional test for implied contractual terms had five requirements set out in *BP Refinery*, namely that:[26]

(a) The term must be reasonable and equitable.

(b) It must be necessary to give business efficacy to the contract, so that no term would be implied if the contract is effective without it.

(c) It must be so obvious that "it goes without saying".

(d) It must be capable of clear expression.

(e) It must not contradict any express term of the contract.

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26 *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.

[44] In *Bathurst Resources v L & M Coal Holdings,* the Supreme Court confirmed that the above factors remain relevant but should "not be applied in a rigid and formulaic way".[27] The Supreme Court gave the following guidance:[28]

> To conclude, the principal points that govern the implication of terms are as follows:
>
> (a) The legal test for the implication of a term is a standard of strict necessity, a high hurdle to overcome.
>
> (b) The starting point is the words of the contract. If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.
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> (c) While the task of implication only begins when the court finds that the text of the contract does not provide for the eventuality, the implication of a term is nevertheless part of the construction of the written contract as a whole. An unexpressed term can only be implied if the court finds that the term would spell out what the contract, read against the relevant background, must be understood to mean.
>
> (d) As with the task of interpreting a contract, the inquiry for the court when considering the implication of a term is an objective inquiry — it is the understanding of the notional reasonable person with all of the background knowledge reasonably available to the parties at the time of contract that is the focus of this assessment. The court is tasked with the role of constructing the understanding of that reasonable person.
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> (e) Thus, the implication of a term does not depend upon proof of the parties' actual intentions, nor does it require the court to speculate on how the actual parties would have wanted the contract to regulate the eventuality if confronted with it prior to contracting.
>
> (f) The *BP Refinery* conditions are a useful tool to test whether the proposed implied term is strictly necessary to spell out what the contract, read against the relevant background, must be understood to mean. Whilst conditions (4) and (5) must always be met before a term will be implied, conditions (1)–(3) can be viewed as analytical tools which overlap and are not cumulative. The business efficacy and the "so obvious that 'it goes without saying'" conditions are both ways, useful in their own right, of testing whether the implication of a term is strictly necessary to give effect to what the contract, objectively interpreted by the court, must be understood to mean.
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> We see this approach to the implication of terms as aligning with the objective theory of contractual interpretation. It promotes the primacy of the words of the contract, while also seeking to reach a complete understanding of what the

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27 *Bathurst Resources Ltd v L&M Coal Holdings*, above n 22, at [108], agreeing with Lord Hoffman's observations in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [27].

28 *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 22, at [116]–[117] (footnotes omitted).

> contract, read against the relevant background, must be understood to mean. By excluding speculation as to how the actual parties would have wanted the contract to regulate an unforeseen eventuality, this approach treats as irrelevant (and unreliable) evidence of subjective intent, given with the benefit of hindsight. It thereby promotes the efficient and just conduct of proceedings.

[45] Following *Bathurst Resources*, the *BP Refinery* conditions of "necessary to give business efficacy" and "so obvious that it goes without saying" are subordinate to the overarching inquiry of what the contract must be understood to mean and thus what is strictly necessary to give effect to that meaning.[29]

Breach and cancellation

[46] Under s 37 of the CCLA, a right of cancellation arises where a party breaches a term in the contract (or it is clear that it will breach a term) and:

(a) the parties have expressly or impliedly agreed that the performance of the term is essential to the cancelling party;[30] or

(b) the effect of the breach or anticipated breach of the contract is, or will be, to substantially reduce the benefit or increase the burden of the contract to the cancelling party or (in relation to the cancelling party) make the benefit or burden of the contract substantially different from that represented or contracted for.[31]

[47] In respect of s 37(2)(a), the Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd* described the general test for implied essentiality as follows:[32]

> [T]he preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contractual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

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29 *Jia v Yang* [2025] NZCA 231 at [46], leave to appeal declined in *Jia v Yang*, above n 24. See also *Investment Services Ltd v First NZ Properties Ltd* [2025] NZCA 228, [2025] NZCCLR 481 at [94].

30 Contract and Commercial Law Act, s 37(2)(a).

31 Section 37(2)(b).

32 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25]. See also *Kawarau Village Holdings Ltd v Ho* [2017] NZSC 150, [2018] 1 NZLR 378 at [78], [159] and [218]–[219].

[48] The requirement of a substantial reduction in the benefit of the contract must be considered on the facts of the case, having regard to the nature of the contract, its subject matter and all the circumstances.[33]

Trustee liability and indemnities

[49] Under s 81(1) of the Trust Act 2019, a trustee is personally liable for an expense or a liability incurred by the trustee when acting as a trustee. However, s 81(2) provides that a trustee who incurs an expense or a liability when acting reasonably on behalf of the trust is entitled:

> (a) if the trustee has paid the expense or discharged the liability out of the trustee's own funds, to reimbursement from the trust property; or
>
> (b) in any other case, to pay the expense or discharge the liability directly from the trust property (or to have it paid or discharged by a remaining trustee).

[50] Common law and equity rules for the operation and enforcement of the indemnity remain relevant,[34] and s 81 does not limit any additional right of indemnity available at common law or in equity.[35] The general principles for a trustee's right of indemnity were summarised in *S and S Ltd v XYZ Ltd*:[36]

> (a) As against a third party, a trustee is personally liable for debts and liabilities incurred as a trustee.
>
> (b) The trustee has a right of indemnity out of the trust assets for expenses or liabilities incurred by the trustee by recoupment of expenditure and exoneration of liability.

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33 *Stratton Properties Ltd v Construction Properties Ltd* [2023] NZHC 2666 at [31], citing *Jolly v Palmer* [1985] 1 NZLR 658 (HC) at 662; and *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 284–285.

34 Trusts Act 2019, s 81(3).

35 Section 81(4).

36 *S and S Ltd v XYZ Ltd* [2016] NZHC 26 at [38], referring to s 38(2) of the Trustee Act 1956, the predecessor to s 81.

(c) The right of indemnity is secured by an equitable lien over the trust assets, which arises by operation of law, confers a proprietary interest by way of security in the trust assets and takes priority over the claims of beneficiaries.

(d) The lien extends to all the trust assets, except for those specifically excluded by the trust deed.

(e) As the lien is equitable, the trustee can enforce it only by judicial sale or appointment of a receiver, not by sale out of court.

(f) The right of indemnity accrues at the time the obligation is incurred.

(g) Upon bankruptcy or liquidation of the trustee, the right of indemnity vests in the Official Assignee or liquidator.

(h) If the trust property is transferred to a new trustee, the lien survives, and the new trustee takes subject to the lien of the old trustee, except in the case of a bona fide purchaser for value.

(i) A trustee is entitled to retain possession of trust property against a beneficiary until its indemnity is exercised.

[51] A trustee's indemnity has different aspects:[37]

(a) Reimbursement: A trustee who incurs a liability may discharge it out of their own pocket and then reimburse themself from the trust fund.

(b) Exoneration: Alternatively, they may discharge the liability by paying directly from the trust fund, so as to exonerate themself.

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[37] *S and S Ltd v XYZ Ltd*, above n 36, at [39], referring to Lynton Tucker, Nicholas Le Poidevin and James Brightwell (eds) *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [21-043].

(c) Retention: A trustee may retain the trust fund until they have been indemnified for present liabilities and for contingent or future liabilities.

(d) Realisation: A trustee may realise trust assets to meet their expenses and liabilities.

[52] Although it is common for professional trustees to limit their liability within the trust deed, that does not affect a claim by a non-beneficiary such as a creditor.[38] In addition, any liability exclusion or indemnity clause cannot release trustees from liability for the trustee's dishonesty, wilful misconduct or gross negligence.[39]

Plaintiffs' submissions

[53] In summary, the plaintiffs' position on the disputed issues is as follows:

(a) The relevant date, for purposes of interpretation and implication, is 14 December 2022 at the latest. That is because, irrespective of when the Dugdales and Mr Walters signed the settlement agreement, the parties' contract was in place (all parties bound) by that date.

(b) Even if not, the plaintiffs were induced into the settlement agreement by the statement made on Mr Walters's behalf on 6 October 2022, which amounted to a misrepresentation that Mr Walters failed to correct by the time the plaintiffs signed the agreement on 14 December 2022.[40]

(c) There is an implied term in the settlement agreement that Mr Walters must not cause, assist or facilitate a material dealing with Trust assets

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38 Chris Kelly and Greg Kelly *Garrow and Kelly The Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [28.119], citing *Sovereign Homes Ltd v Meurant HC Auckland* CIV-2006-404-7394, 15 May 2007, Doogue J; and *Jaques v UDC Finance Ltd* [2010] NZCCLR 7 (HC) at [16]–[17].

39 Trusts Act, ss 40–42.

40 *West v Quayside Trustee Limited (in rec and in liq)* [2012] NZCA 232 at [30] describes what amounts to a misrepresentation. A representation that is true when made can become untrue due to a change in circumstance: *EZCCC Holdings Ltd v Transport Dynamics Ltd* [2013] NZHC 273 at [29]; and *Overland Development Ltd v Dong* [2018] NZHC 2225 at [96].

inconsistent with preservation of the Trust asset pool (the detail for this submission is referred to later in this judgment).

(d) Mr Walters breached that implied term when he was party to the refinance of the Trust's secured borrowing between 7 and 22 December 2022. During that time, Mr Walters engaged in an activity for the very purpose of "eroding" the Trust assets in the interests of the Dugdales and Walters Law.

(e) The plaintiffs were entitled to cancel from early March 2023, when they first learnt via Haigh Lyon about the refinancing. A right of cancellation arose under s 37 of the CCLA, because performance of the implied term was essential to the plaintiffs,[41] and/or the effect of the breach was to substantially reduce the benefit of the contract to the plaintiffs.[42]

(f) To the extent that the cancellation right depends on a pre-contractual inducing statement, the "no reliance" clause in cl 5.8 of the settlement agreement does not operate as a barrier because s 50 of the CCLA applies — ouster would be unfair and unreasonable given the subject matter of the settlement agreement and the nature of Mr Walters' conduct.[43]

(g) A right of election continues for a reasonable time. The cancellation right was exercised while available. The subsequent fact of the $103,080.45 repayment held in a trust account is irrelevant.

41 *Kawarau Village Holdings Ltd v Ho*, above n 32, demonstrates that an implied term can be essential, even if there is often a tension establishing essentiality for something not expressed. See also *Mana Property Trustee Ltd v James Developments Ltd*, above n 32, at [24]–[25].

42 It is more than trivial or minimal in terms of the test in *Jolly v Palmer*, above n 33, at 662, because the reduction in the equity of the Trust property was $103,080.45, which is substantial compared with the remaining equity of around $200,000 or less.

43 *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992 at [33]–[34] endorsing that fraud is a ground for overriding a "no reliance" clause. While fraud is not alleged against Mr Walters, Mr McAnally submits that breach of an injunction order makes reliance on the clause unfair in an analogous way.

Defendants' submissions

[54] In summary, the defendants' position on the disputed issues is as follows:

(a) Although there was certainty as to terms by 14 December 2022, the parties only intended to be bound upon formal execution by all parties. That did not occur until Mr Walters signed on 27 January 2023. Mr Walters would not have "downed tools" on his defence of the claim until the settlement agreement was signed.

(b) The subject matter of the settlement agreement was narrow, focused on avoiding a discrete drain on the Trust fund from Mr Walters' legal costs, for which he would be indemnified from Trust assets. The exchanged benefit for Mr Walters was a contractually enforceable limitation of liability as against the plaintiffs. Any reference to erosion of the Trust's assets was limited to erosion of that type and gave no assurance that the Trust assets would be preserved more generally.

(c) Correspondingly, any pre-contractual representation was only about the extent to which Mr Walters' own legal fees might erode the assets of the Trust via recourse to his indemnity, not about any wider risk of erosion of the Trust's assets. This narrow representation was not rendered untrue by the refinancing. Silence does not normally amount to a misrepresentation,[44] and the "no reliance" clause in the settlement agreement is fair and reasonable (given equality of bargaining strength and separate, independent legal advice).

(d) Given that the property was the Trust's only significant asset and the injunction already restrained the property's equity (a readily enforceable obligation), an argument that an inferior contractual obligation formed a necessary part of the settlement agreement is "illogical".

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44 *Bell v Lever Bros Ltd* [1932] AC 161 (HL) at 227.

(e) The plaintiffs regret their bargain and should not be permitted to improve it by implying terms for a wider purpose.[45] That does not meet the "strict necessity" test.

(f) Neither essentiality nor substantiality, as alternative prerequisites to cancellation under s 37 of the CCLA, are satisfied. Objectively, the injunction made it unlikely they also agreed that an additional, sweeping, trustee-management restriction was "essential" — because the asset-preservation concern was already being managed through the Court's order and enforcement processes. Taking a "chance-centric approach" (treating the claim as unlikely to succeed), the harm was insubstantial because it only reduced the equity to around 10 per cent of the property's value upon refinancing and to around six per cent by the time of cancellation. The day after the purported cancellation, on 14 April 2023, Mr Walters swore an affidavit advising he was able to return the $15,540 used from the refinancing to pay his fees, and further sums have since been paid to purge the contempt. In any event, the benefits and burdens contemplated under s 37 of the CCLA must be those that arise from the contract.[46] Broader preservation of the Trust assets was not a contracted-for benefit.

Intention to be bound

[55] As outlined in the facts above, agreement in principle was reached between all parties on 7 October 2022, and Wotton Kearney forwarded the draft settlement agreement to the other parties on 19 October 2022. There were no requested amendments or negotiation about those terms. To the contrary, by 8 November 2022, both sets of lawyers had confirmed that the terms were acceptable.

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45 *KBL Investments Ltd v KBL Courtenay Ltd* [2015] NZHC 30 at [141], upheld on appeal in *KBL Investments Ltd v KBL Courtenay Ltd* [2016] NZCA 227.

46 Stephen Todd and Matthew Barber *The Laws of New Zealand* Contract (online ed) at [406], citing *Jolly v Palmer*, above n 33 (where the purchaser's mortgage obligations were not considered a burden under an unconditional contract).

[56] I consider that intention to be bound was manifested by all parties at the latest by the time the plaintiffs signed and returned the settlement agreement on 14 December 2022. This concluded the only remaining uncertainty, namely the qualification in the Crimson Legal email on 7 November 2022 that they were happy with the terms but were awaiting confirmation from their client.

[57] In my view, the context clearly places this case in the second category referred to in *Masters v Cameron* (see [35] above), namely it was a situation where the parties had completely agreed upon all the terms of their bargain and intended no departure from or addition to that but nevertheless had made performance of one or more of the terms conditional upon the execution of a formal document. This is because:

(a) There is no reference in the exchanges between the parties about the negotiations being "subject to contract" or reserving the right to withdraw up until all parties had executed the settlement agreement.

(b) To the contrary, the parties were proceeding on the basis that execution was a formality to record the terms already agreed, with execution impacting only the timing of the required performance obligations.

(c) Contrary to the submission for Mr Walters at [54](a) above, Mr Walters did "down tools" and no statement of defence was filed despite the court deadline of 10 October 2022.

(d) Wotton Kearney's follow-up emails on 16 December 2022 and 17 January 2023 are entirely consistent with execution being regarded as a mere formality to record terms that were already agreed and binding.

[58] Accordingly, I accept that 14 December 2022 is the relevant date for the purposes of interpretation and implication of terms.

[59] Given that finding, I need not determine whether the plaintiffs were induced to enter into the settlement agreement by a pre-contractual representation in the letter from Wotton Kearney dated 6 October 2022, nor any corresponding questions about whether the "no reliance" clause was fair and reasonable.

Implied term, breach and cancellation

Plaintiffs' submissions

[60] The plaintiffs contend that there was an implied term in the settlement agreement that Mr Walters would not cause, assist or facilitate a material dealing with Trust assets inconsistent with preservation of the Trust asset pool.

[61] The plaintiffs rely on the following background facts as relevant for assessing whether there was such an implied term:

(a) The purpose of the settlement agreement was to prevent the erosion of the Trust assets through Mr Walters taking active steps to defend the proceeding, the costs of which, he said, would ultimately fall against the Trust.

(b) An interim injunction was in place, on the plaintiffs' application, enjoining the sale or further charging of the Trust property.

(c) The settlement agreement was not only proposed but also drafted by Mr Walters.

[62] In the above context, Mr McAnally, who appeared for the plaintiffs, submits it was objectively clear that:

(a) what was offered in the settlement agreement, and what was accepted, was a means of preserving the value of the Trust assets against which a judgment might subsequently be enforced, and in return Mr Walters received a limitation upon his potential liability to which he was not otherwise entitled; and

(b) subsequent conduct by Mr Walters that facilitates any "erosion" of the value of the Trust assets is entirely inconsistent with the purpose of, and reason for, the settlement agreement.

[63] The plaintiffs say that the settlement agreement not expressly providing for this possibility is no interpretational barrier, because no one envisaged that a solicitor would act or otherwise be a party to a breach of an interim injunction that already prohibited the very harm in question. This situation formed the basis against which the settlement agreement was negotiated and predicated.[47]

[64] Accordingly, the plaintiffs say that the proposed term is necessary to give business efficacy and is so obvious that "it goes without saying", because otherwise it would leave Mr Walters and his fellow trustees able to change the basis of the settlement so as to destroy or seriously undermine the value acquired by dissipating the Trust assets. The plaintiffs add that the proposed term is capable of clear and simple expression and consistent with the express terms.

Mr Walters' submissions

[65] If a contract does not provide for an eventuality, the usual inference is that no contractual provision was made for it.[48] Mr Murison, who appeared for Mr Walters, says that starting point applies with full force in this case. The settlement agreement was drafted by a law firm, was reviewed by two others with equality of bargaining power, is comprehensive and sufficiently detailed, is not error-ridden and contains cl 5.6, which requires any variation or amendment to be in writing.

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47 *Westgate Town Centre (in liq) v Auckland Council*, above n 20, at [69] and [72]; *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568 (CA) at 579; and *Stirling v Maitland* (1864) 5 B & S 841, 122 ER 1043 (KB) at 852. See also *Manukau Golf Club Inc v Shye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [30]–[32].

48 *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [59]–[65] (given the detailed express rights of termination, there was no implied right to terminate on reasonable notice); and *Harris v GTV Holdings Ltd* [2016] NZHC 3123 at [75]–[80] (rejecting an implied "usual terms of business" requirement for any third party licence that might trigger a clause providing for a financial adjustment between the parties), upheld on appeal in *GTV Holdings Ltd v Harris* [2018] NZCA 95.

[66] As already summarised above, Mr Murison relies on the narrow express scope of the settlement agreement. Mr Murison asks the following question to demonstrate that implying any further term is unnecessary:

> Why would a contractual restriction on reducing Trust assets be necessary where there is a court order in place which already achieves the same outcome (and which provided the plaintiffs a more effective avenue for recourse when it was breached, than a contractual provision)?

[67] For the same reasons, he submits that the business efficacy and "it goes without saying" tests are not satisfied, because the injunction should have prevented Mr Walters from depleting the Trust's assets. He further says:

> … Mr Walters was only one trustee. Mr Walters, on his own, could do nothing without the cooperation of other trustees, similarly bound by the Court's injunction.

[68] Mr Murison relies on the contempt judgment as substantiating that no recourse to the settlement agreement was needed. He says the injunction functioned as intended and was successfully enforced, leading to the sum of $103,080.45 being restored.

[69] Mr Murison submits that the basis cases such as *Rod Milner* are distinguishable.[49] He says the settlement agreement here does not "take effect", or depend for its operability, on the maintenance of an unchanged Trust asset pool or a static level of equity in the property. He maintains that the obligations in the settlement agreement are narrow and were not frustrated by the refinancing.

Analysis

[70] I accept that the settlement agreement does not expressly require ongoing compliance with the court orders, so the relevant question is whether such an obligation can be implied.

[71] Mr Murison seeks to rely on a starting point that if there is a failure to provide for an eventuality, then the usual inference is that there is no such contractual entitlement, and the issue is likely non-essential.

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49 See n 47 above.

[72] The difficulty for Mr Walters is that preservation of the property (and related equity) was so essential to the plaintiffs that they sought and obtained court orders to protect that state of affairs. In this case, the property is the only material asset of the Trust. As a real property asset, a prohibition on the sale or other disposition of the property, and any reduction of the defendants' equity in the property, should have been sufficient to protect the plaintiffs' position. In that context, the alleged implied term is not a broad trustee-management restriction. It simply reflects the state of affairs in place when the settlement was negotiated.

[73] As referred to in the 6 October 2022 letter, by that time Mr Walters had been served with the injunction orders. Mr Walters was holding himself out as an independent professional trustee who was not party to or complicit in any impugned conduct, so for that reason he continued to assert an entitlement to a trustee indemnity. In the context of the injunction, the sole remaining risk of erosion of the Trust's assets should have been the independent trustee's indemnity entitlement for legal costs (assuming the inapplicability of ss 41–42 and 44 of the Trusts Act 2019 on the facts).

[74] Given Mr Walters' disassociation with the impugned conduct and obvious conflicts of interest, Mr Walters confirmed on 7 December 2022 that he was no longer acting for Mr Dugdale or the Trust.

[75] Mr Murison says the implied term and cancellation criteria are not satisfied because the preservation objective should have been achieved by the court injunction, so it should have been entirely unnecessary to include a clause to that same effect in the settlement agreement itself. He submits that the plaintiffs should be held to the bargain of separating the two forms of protection so that any remedy for breach of court orders should be restricted to contempt remedies, without undermining Mr Walters' bargain of limiting his liability.

[76] I disagree. The court injunction orders and the settlement agreement protections are inherently connected and operate together as the means by which the plaintiffs were preserving the property as prospectively available to meet any judgment debt. I reject the argument that essentiality protected in one form makes it inessential for interconnected commitments.

[77] I also consider that an implied term not to breach the court orders satisfies all of the traditional requirements in *BP Refinery*:

(a) The term is reasonable and equitable because compliance with the court orders was an essential state of affairs that formed the basis against which the settlement agreement was negotiated and predicated.

(b) A term not to breach the court orders is both essential and necessary to give business efficacy for both limbs of the settlement.

    (i) As stated in the injunction judgment, the plaintiffs' interest was focused on preserving the equity in the property from which compensatory damages could be obtained. There would quite evidently be no benefit from minimising indemnified legal fees if the Trust assets were already dissipated anyway.

    (ii) Any motivation to limit Mr Walters' liability is undermined by any evident moral hazard. The rationale offered in the 6 October 2022 letter for the limitation of liability was Mr Walters' independence, professionalism and lack of participation in impugned conduct.

(c) If the plaintiffs had sought to include a term in the settlement agreement requiring Mr Walters to comply with the injunction orders, Mr Walters and his lawyers would quite properly have remarked that such an obligation is so obvious that it goes without saying. But I cannot see any proper basis on which Mr Walters and his lawyers could have refused. I have no doubt the plaintiffs would have declined to enter the settlement agreement if Mr Walters had refused or sought to reserve a more general right to dissipate the property's equity. This would flag a moral hazard fundamentally inconsistent with offering him any limitation of liability.

(d) On the facts, an implied term to comply with the court orders is the same as saying there was an implied term that Mr Walters would not be party to any material dealing with Trust assets (namely the property) inconsistent with preservation of the Trust asset pool. This is capable of clear expression. It is stating the obvious to say that any solicitor receiving service of an injunction order, whether as an enjoined party or their legal adviser (in this case both), is expected to read it and comply. In this case, there were only three substantive pages.

(e) Such an implied term does not contradict any express terms of the contract. To the contrary, it is hard to reconcile the two without the implied term. Mr Walters presumably considered it appropriate for him to defend the contempt issues, yet his obligation under the settlement agreement was to abide in the proceeding.

[78] Breach of the implied term is self-evident. Even if Mr Walters chose not to read the injunction orders carefully when received (which seems extraordinary), there was an obvious need to check those court orders as soon as Mr Walters contemplated a dealing to dissipate equity in the property.

[79] For the above reasons, I find that the plaintiffs were entitled to cancel the settlement agreement as at 13 April 2023 for breach of an essential implied term. It was the breach itself that fundamentally undermined the basis for offering Mr Walters any limitation of liability, regardless of whether the dissipated funds were later restored. Alternatively, I find that the harm at the date of cancellation was substantial in proportion to the limited equity in the property, before and even more so after the breach. The unavailable mortgaged value (which the prohibited dealing increased) is not the appropriate measure.

[80] Finally, I note that although the trustees may have subsequently sought to purge their contempt, that does not revive a contract that has been validly cancelled.

Result

[81] The answer to the question prior to trial is "yes".

[82] I make a declaration that the plaintiffs had valid grounds to cancel the settlement agreement on 13 April 2023 and did so effectively.

[83] I strike out Mr Walters' counterclaim.

[84] If the parties cannot agree costs, counsel for the plaintiffs may file their memoranda within 15 working days, and counsel for Mr Walters may file their memorandum 15 working days later. I will then determine costs issues on the papers.

O'Gorman J

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