

[4] In correspondence to the Authority it was submitted that Mr Mercer had no authority to commit CTL to purchasing Mr McIntyre's shares. I have no further information about that matter but the doctrine of ostensible authority must apply. The settlement agreement records that the parties to it are Core Technology Ltd and Robert McIntyre. Mr Mercer's signature is at the bottom of the first page, his name is typed underneath his signature and states "*On behalf of Core Technology Limited (Respondent)*". The settlement agreement reflects Mr Mercer's purported authority to agree to terms on CTL's behalf and Mr McIntyre was entitled to rely on Mr Mercer's representations in this respect. If Mr Mercer exceeded his authority that is a matter between him and CTL.

[5] In any event Mr Mercer accepts that he is a respondent in this matter and he has been joined to this application pursuant to s.221.¹

[6] With the exception of provision for a first instalment payment to be made on 1 March 2014 it is notable that clause 3 does not specify how many instalments should be paid and when these should occur. However it appears the parties have assumed these would be at the beginning of every month over the course of a year and I take this matter no further.

[7] Mr Mercer provided Mr McIntyre a schedule of when payments would be made including his assessment of interest payments. That document recorded that monthly payments would be made comprising \$9,166.67 for the principal of the purchase price of the shares, and monthly interest payments (calculated on a per annum basis) would be paid albeit proportionally decreasing as principal payments were made. Using this methodology Mr Mercer calculated that the total sum of interest payable over the course of 12 monthly payments was \$5,916.90. Mr Mercer commenced making payments according to his schedule.

[8] Mr McIntyre disputes Mr Mercer's methodology and says it does not accord with the settlement agreement. He says it was agreed that interest of 10% was fixed

¹ Employment Relations Act 2000

according to the price of the share purchase (\$110,000) and therefore the interest payable is \$11,000.

[9] Mr McIntyre seeks an order that CTL and Mr Mercer comply with the settlement agreement. He also seeks a penalty, costs and reimbursement of the filing fee.

[10] Mr Mercer says he has complied with the settlement agreement and rejects Mr McIntyre's claim.

[11] The representatives for both parties agreed during a telephone conference that that the matter was limited to determining the correct interpretation of the settlement agreement. Each party agreed that the matter should be decided on the papers and arrangements were made for the exchange of submissions.

The issues

[12] The Authority needs to determine whether CTL and/or Mr Mercer has complied with the settlement agreement. In deciding this matter, I need to examine what was agreed between the parties with respect to how interest would be quantified.

Mr McIntyre's position

[13] Mr McIntyre says the words used in the settlement agreement are simple and should be given their plain and ordinary meaning.

Mr Mercer's position

[14] Mr Mercer says he has complied with the spirit of the agreement by paying the principal in equal and consecutive instalments and has paid interest in the generally understood and accepted way. Alternatively he says that, if the agreement was to pay both principal and interest in equal instalments (total payments equalling \$116,052), then he had been open to structuring payments in that way and had made that offer to Mr McIntyre when their dispute arose.

Discussion

[15] Interpretation of a contract is assessed against what a reasonable (but impartial) person with knowledge of the background to the agreement, would understand the agreement to convey².

[16] The starting point when parties dispute the interpretation of an agreement or contract is to first look at the words they have used. In the Supreme Court judgement of *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 Wilson J stated:

*The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.*³

[17] The Supreme Court in *Vector*⁴ also noted that extrinsic material could be used to clarify the meaning of a disputed clause even if the provision was not ambiguous. The Court recognised that it is possible a plain interpretation may not always properly reflect what a reasonable person with an understanding of the circumstances surrounding the arrangement would consider the parties intended by the words used. However the use of extrinsic material is constrained. If the material establishes the parties agreed to a particular meaning of a word, term or phrase within an agreement, then that information is relevant, but subjective evidence about what the parties individually intended by particular words is not.

[18] Although the settlement agreement contains a confidentiality clause, for the purpose of ascertaining if enforcement action is required it is necessary to examine the material portion of clause 3 as follows:

3. *the Respondent (or nominee) will purchase the Applicant's total share allocation for Core Technology the total sum of \$110,000 plus interest of 10% in equal and consecutive instalments over 12 months with the first instalment due on 1 March 2014.*

[19] Mr McIntyre says the settlement agreement provides for interest at 10% of the share allocation purchase price (being \$11,000). He says this sum was to be added to the principal sum owed and paid over 12 months in equal amounts.

² *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444

³ at para [119]

⁴ *ibid* at n.2

[20] Against that argument Mr Mercer says if the parties had agreed that interest was fixed at the precise sum of \$11,000 then the agreement would have simply recorded a payment of "\$121,000" or "\$110,000 plus 10%" and there would have been no need for the phrase "*plus interest*".

[21] There is some force to Mr Mercer's submission that if the parties had agreed to an identifiable sum of money as the "*interest*" price then this could and would have been articulated in the settlement agreement.

[22] Mr Mercer further contends that the word "interest" is a well known and accepted term and says "*its understood meaning is that it refers to an amount which is paid for the use of money or the deferment of a debt. Interest is only payable on that portion of a debt that is unpaid*". By this submission I understand Mr Mercer to say that it goes against standard practice that a party would be required to continue to pay interest on a debt at the same amount despite reduction of the principal debt.

[23] There is a difficulty with Mr Mercer's view that the concept of "interest" (in a financial context) has an accepted and understood meaning. I am unwilling to conclude that there is one single definition of the word "interest" or that there is a singular practice which governs the application of interest on a debt between parties. When and how interest is set or accrues is a matter for parties entering into such an arrangement to decide for themselves.

[24] It consider it likely that Mr Mercer has assumed, in reliance of his understanding of a common business practice as expressed above, that interest was to be calculated on a per annum basis and that the sum of that interest would be reduced by monthly payments. I agree that instalment payments were to occur over 12 months but there is no reference in the settlement agreement to indicate that the parties agreed to calculate interest on a per annum basis or words which suggest the sum of the interest component, in and of itself, will be reduced by monthly payments made within the notional 12 months.

[25] I am not willing to accept that Mr Mercer's view about how interest was to be calculated is so obvious that it was not necessary for the arrangement to be expressly recorded. There is no evidence that Mr Mercer's view about interest structures was conveyed to Mr McIntyre or that Mr McIntyre agreed to that approach. In the absence of clear words that stipulated interest would be calculated on a per annum

basis or that the quantum of interest would reduce I do not consider there was agreement amongst the parties on that matter.

[26] Next Mr Mercer says that, if the interest component contained in the settlement was fixed at \$11,000 at the time of signing the agreement, that rate would equate to 17.97% per annum. There is an inference that he would never have agreed to the transaction on those terms and that the content of clause 3 goes against commercial common sense. However I am not satisfied that effect of clause 3 provides a result that can objectively be regarded as so manifestly wrong that no reasonable person would consent to the arrangement.

[27] I accept clause 3 is not artfully written but I consider the agreement between the parties is captured by applying a natural and ordinary meaning to the plain words used in the settlement agreement. The phrase "*the total sum of \$110,000 plus interest of 10%*" links the interest component directly to the principal sum. In this respect I agree that interest was set at 10% of the total sum of the purchase price of shares and is \$11,000 as Mr McIntyre contends. It follows that Mr McIntyre's claim prevails.

Determination

[28] Core Technology Limited and Mr Mercer are jointly and severally liable to as comply with clause 3 of the settlement agreement within 28 days of this determination.

[29] I have found that the interest component of clause 3 was set at \$11,000. That sum must be paid minus whatever interest payments that have already been paid.

[30] I have found that Core Technology Limited and/or Mr Mercer have been misguided about the interpretation and application of the settlement agreement but I have no evidence that those actions have been undertaken as a means to avoid obligations under clause 3 of the settlement agreement. On the information provided it is clear there was a genuine dispute between the parties which they were unable to resolve. In this situation I do not consider it appropriate to award a penalty for breach of a settlement agreement.

[31] Costs are reserved.

[32] Core Technology Limited and Mr Mercer are jointly and severally liable to pay Mr McIntyre the sum of \$71.56 as the filing fee.

Michele Ryan
Member of the Employment Relations Authority