

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA105/2015  
[2016] NZCA 427**

BETWEEN

HO KOK SUN AND ORS  
Appellants

AND

PENINSULA ROAD LIMITED (IN  
RECEIVERSHIP AND IN  
LIQUIDATION)  
First Respondent

KAWARAU VILLAGE HOLDINGS  
LIMITED  
Second Respondent

RUSSELL McVEAGH  
Third Respondent

MELVIEW (KAWARAU FALLS  
STATION) INVESTMENTS LIMITED  
(IN RECEIVERSHIP)  
Fourth Respondent

Hearing: 16 and 17 August 2016

Court: Randerson, Wild and Brown JJ

Counsel: S J Mills QC, ARB Barker and M Singh for Appellants  
D J Goddard QC, M G Colson and T B Fitzgerald for Second  
and Fourth Respondents  
No appearance for First and Third Respondents

Judgment: 9 September 2016 at 10 am

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed in part.**
- B The finding in the High Court that the second and fourth respondents were not obliged to complete Stages 2 and 3 of the Kawarau Falls development is set aside.**
- C The judgments entered in the High Court on the claim and counterclaim are set aside.**
- D Judgment is entered against the second and fourth respondents on the appellants’ claim for the return of their deposits.**
- E Judgment is entered in favour of the appellants on the counterclaim by the second and fourth respondents.**
- F The second and fourth respondents are jointly and severally liable to pay the appellants 75 per cent of the costs for a complex appeal on a band B basis and usual disbursements. We allow for second counsel.**
- G Any issue as to costs in the High Court and any other consequential issues are to be dealt with in that Court.**
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## REASONS OF THE COURT

(Given by Randerson J)

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## **Introduction**

[1] This appeal arises from a planned three-stage development on the shores of Lake Wakatipu. The project was only partially complete when financial difficulties resulted in the developers being placed into receivership. The appeal is brought by a substantial number of purchasers who entered into agreements to buy units<sup>1</sup> in two buildings in Stage 1 of the development.<sup>2</sup> These buildings were known as Lakeside West and Kingston West. The former was marketed as a luxury residential apartment complex and the latter was to contain serviced apartments operated as a four star hotel.

<sup>1</sup> The agreements referred to Units but it is convenient to refer to them as units.

<sup>2</sup> There are 25 appellants in respect of Lakeside West and 45 for Kingston West.

[2] The global financial crisis occurred before Lakeside West and Kingston West were completed. In consequence, the market value of the units fell significantly. The first respondent (PRL) was the original developer. It assigned the Stage 1 assets to the fourth respondent (Melview). Melview was placed in receivership in May 2009, and PRL in early 2010. Melview subsequently assigned the vendors' rights under the agreements for sale and purchase (ASPs) to a subsidiary, the second respondent (KVHL).

[3] The receivers completed Stage 1 but Stages 2 and 3 have not progressed. Upon completion of the Lakeside West and Kingston West developments, settlement notices were issued to the appellant purchasers in late 2011. When the appellants refused to settle, KVHL purported to cancel the ASPs in March 2012 and to forfeit the deposits totalling some \$10 million. The deposits and accrued interest are held by a stakeholder pending the final outcome of the ensuing litigation.

[4] In the High Court, the appellants sought an order for return of their deposits. They claimed that KVHL was not ready, willing and able to settle because it was not able to deliver what it had promised under the ASPs in various material respects, including the completion of Stages 2 and 3 of the development. The appellants claimed that the settlement notices were invalid and the notices of cancellation amounted to a repudiation of the ASPs by KVHL. The appellants purported to accept this repudiation and cancelled the ASPs.

[5] In turn, KVHL counterclaimed for damages for loss of bargain, claiming the difference between the contract price and the market value of the units at the date of cancellation. The amount claimed at the time of the hearing in the High Court was approximately \$46 million including accrued interest. Taking into account the deposits and accrued interest, the net amount claimed by KVHL is approximately \$36 million.

[6] In the High Court, Gilbert J rejected the appellants' claim and entered judgment in favour of KVHL on its counterclaim for the damages sought.<sup>3</sup> The principal issue before the High Court was whether it was an essential term of the

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<sup>3</sup> *Sun v Peninsula Road Ltd* [2015] NZHC 126.

ASPs that the vendors were obliged to complete Stages 2 and 3. The Judge found that the vendors were not obliged to complete Stages 2 and 3. The appellants challenge this finding. It is the central issue of interpretation on appeal affecting the purchasers in both the Lakeside West and Kingston West developments.

[7] There were a number of subsidiary issues before the High Court, all of which were determined against the appellants. Only some of these findings are challenged on appeal. These are that the respondents did not breach essential terms that:

- (a) The Lakeside West building would be an exclusively residential development;
- (b) The common property in the Kingston West building would include as a minimum the areas necessary for the servicing of the appellants' units and the operation of the hotel; and
- (c) The lease to the hotel operator for Kingston West would not exceed a term of 30 years.

[8] We record there is no challenge to the quantum of the judgment entered in the High Court and no challenge to the Judge's finding as to the effects (if any) on the value of the appellants' units in consequence of the breaches alleged by the appellants.

### **Background facts**

[9] The material facts are not in dispute.

[10] The following summary is drawn from the High Court judgment and an agreed summary of facts. The development was conceived about 2005 and was known as the Kawarau Falls development. The original application to the Queenstown Lakes District Council (QLDC) for resource consent for the development was made in September 2005. Consent was granted in July 2006. The development was planned as an integrated world class village resort. It included three five star hotels with a total of 596 rooms, a Quadrant four plus star hotel, and

three Quadrant branded serviced apartment buildings providing a further 333 units. As the Judge said, this was an ambitious project since the total of 929 rooms or units would have equated to approximately 30 per cent of the total hotel accommodation available in the Queenstown area. The completed development was also intended to include 728 square metres of conferencing areas within Stage 1 and a further 3,797 square metres in Stages 2 and 3, creating the largest dedicated conferencing facility of its kind in the greater Queenstown area.

[11] The buildings to be constructed in each stage of the Kawarau Falls development were:

**Stage 1**

- (a) Reserve North — a luxury five star spa and resort hotel with 178 rooms. This is now known as the Hilton Hotel.
- (b) Reserve Central — five luxury townhouses, five duplex units and four two-bedroom units.
- (c) Reserve South — three luxury townhouses, three duplex units and eight two- and three-bedroom serviced apartments to be operated and managed under the Quadrant brand.
- (d) Lakeside West — 42 studio, one- and two-bedroom luxury residential apartments with owners entitled to use the facilities located in the adjoining Hilton Hotel.
- (e) Kingston West — a four star serviced apartment complex comprising 98 one-bedroom units.

**Stage 2**

- (f) Escarpment — a five star conference hotel with 223 rooms to be operated as an InterContinental.
- (g) Lakeside Central West — 16 three- and four-bedroom luxury apartments.
- (h) Peninsula West — a luxury serviced apartment complex with 93 one-bedroom and studio apartments to be operated under the Quadrant brand.

**Stage 3**

- (i) Lakeside Central East — 26 luxury apartments.
- (j) Lakeside East — 88 one-bedroom serviced apartments.

- (k) Kingston Central — a four star 109-bedroom hotel.
- (l) Peninsula East — a 13-level five star hotel with 195 suites to be operated as a Quay West.

[12] The units in Lakeside West and Kingston West were marketed for sale in Asia by Austpac Investment Consultancy Ltd (Austpac) pursuant to underwriting agreements with PRL to market and sell the units. At the time the agreements were entered into, most of the appellants were resident in Singapore or Malaysia; none was resident in New Zealand. Austpac's obligations under the underwriting agreements were guaranteed by David Yuen, the principal of Austpac. KVHL has taken an assignment of PRL's rights under all of these agreements.<sup>4</sup>

[13] The extensive marketing materials depicted the proposed buildings within an overall concept plan. The design of the development by a master planning approach was emphasised, as was the opportunity to access a variety of world class facilities within a community setting. The material also referred to the way in which the overall development had been designed to integrate matters such as landscaping, design features, roading and parking.

[14] The appellants agreed to purchase 31 of the 42 units in Lakeside West and 80 of the 90 units in Kingston West. The agreements were entered into between 2006 and 2009, apart from one signed in 2010.

[15] PRL was the vendor under the agreements concluded from 2006 to mid-2008. Melview was the vendor under all subsequent agreements.

### **The ASPs**

[16] The principal difference between the parties on appeal relates to the Judge's finding that there was no contractual obligation on the part of the vendors to complete Stages 2 and 3 of the development. Mr Mills QC for the appellant submitted there was a contractual commitment to do so and that this was an essential term for the purposes of s 7 of the Contractual Remedies Act 1979 (the CRA). For

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<sup>4</sup> We were told that litigation has been pursued by KVHL to enforce the guarantee but the proceeding is still in the interlocutory stages.

KVHL and Melview, Mr Goddard QC submitted there was no such contractual obligation and, even if there were, it was not an essential term.

[17] As the Judge noted, the ASPs were prepared in the form of a template that allowed for flexibility in the design and specification of the buildings and the overall development (described in the ASPs as the Precinct). Although most of the terms of the ASPs were substantially similar, there was one significant difference between the agreements relating to Lakeside West and Kingston West. The former were designed for owner occupation and there was no provision for any lease to a hotel operator. The Kingston West units were sold on the basis that a lease to a hotel operator would be in place at settlement. A rental of six per cent of the purchase price was guaranteed for the first three years after which the owner would receive rent calculated in accordance with a formula set out in the lease. The Kingston West units were sold as investments and the owners had no right of personal occupation.

#### *Lakeside West*

[18] The appellant Dr Ho was one of the 25 appellants who agreed to buy a unit in the Lakeside West building. We will take his ASP as a typical example. Dr Ho agreed to purchase from PRL unit number 202 in the Lakeside West development with an associated carpark, furniture, fittings and equipment for \$1.195 million (inclusive of GST). A deposit of 10 per cent was payable with instalments over a 12-month period. The balance was payable on the settlement date which was to follow practical completion and the availability of title. There is no issue that the time for completion of the agreement had arrived by the time settlement notices were issued and the transactions were cancelled.

[19] The definitions in cl 1.1 of the ASP carefully differentiated between the “Building” in which the unit was to be located and the “Precinct”. The former was defined as meaning the building erected or to be erected generally in accordance with the Draft Outline Plans and Specifications. The associated term “Development” was defined as meaning the development of the Building and immediately adjoining land by way of a curtilage to the Building in accordance with the agreement.



[20] In contrast, the term “Precinct” was defined as meaning the development to be undertaken on the Precinct Land which was defined as the land contained in four certificates of title comprising a total of approximately 16 acres (6.5 hectares) of land.

[21] The Draft Outline Plans and Specifications were appended to the ASP as “Annexure 2”. Section 1 of Annexure 2 was expressed in these terms:

**1.0 GENERAL**

**1.1 General description**

Lakeside West is intended to be a luxury lakefront residential apartment building providing between 40 to 45 residential units that will have the option of benefitting from the amenities and services provided by the adjacent hotel. A lounge, spa pool, sauna and gym are provided within the building for the residents.

**1.2 Location**

The building is located on the lakefront in the north west quarter of the site and is part of a 17 acre Masterplanned development comprising a variety of individual buildings set amongst landscaped parks, squares, plazas, tree-lined avenues and roads. The building is bound by Lake Wakatipu to the north, a tree lined boulevard to the south, Kawarau Park to the east and the Wakatipu Steps to the west.

**1.3 Building description**

The accommodation is laid out over 4 levels and takes advantages of the natural incline to provide views north over Lake Wakatipu and the surrounding mountains. The entrance lobby is accessed off the foot path at level 3 and leads on to a reception/waiting area and lift lobby.

Subject to design, construction and operational requirements, a connection to the adjacent hotel will be provided enabling residents to access the services and amenities in the hotel; the amenities will include a Health Spa, swimming pool, gym, restaurant, business centre, and meeting rooms; resident’s use of these services and amenities will be subject to the fees, terms and conditions required by the hotel operator (to be selected). A service tunnel will also be provided linking the building to the back of house areas in the adjacent hotel. Car parks for the residents will be provided under the adjacent building.

[22] Annexure 2 went on to set out specifications for the Building and units in considerable detail and in section 5 described the residents’ lounge (level 2) and spa

pool, sauna and gymnasium (level 1) as common areas for the use of residents and their guests.

[23] Annexure 2 included plans of each of the four levels of the proposed building showing the location of individual units. As we later discuss in detail, these plans also contain blank areas subsequently developed for commercial or retail purposes. Finally, Annexure 2 contains a plan of the Precinct showing the location of the Building in relation to other parts of the overall development of the Precinct. These include the proposed locations of the other buildings in Stages 1, 2 and 3 as well as infrastructure including roading.

[24] Clause 2.1 of the ASP is expressed in these terms:

**2.1 Agreement conditional:** This Agreement is subject to and conditional upon:

- (a) the Vendor obtaining by 31 December 2009 a minimum level of sales of units in the Building which in the Vendor's sole opinion justifies completion of the Building.
- (b) the Vendor obtaining by 31 December 2009, on terms acceptable to the Vendor acting in its sole discretion, the Consents.
- (c) the Vendor confirming by 31 December 2009 that the projected construction costs for the Development are acceptable to the Vendor acting in its sole discretion.
- (d) the Vendor obtaining the issue of a certificate of title to the Property in respect of a stratum estate in freehold in accordance with the Act (and both parties acknowledge that this condition is in substitution for and replaces the condition implied by Section 225(2)(b) of the Resource Management Act 1991).

[25] Significantly, the term "the Consents" in cl 2.1(b) is defined by cl 1.1 as meaning:

... the full and final approvals for the Development, the development of the Precinct, the construction of the Building, and the subdivision of the Building by the Relevant Authority, including written consents and approvals from parties other than the Vendor or the Relevant Authority necessary to give effect to the Development, the disposal of any objection or appeal and the expiry of any objection or appeal period.

[26] As earlier noted, it is common ground that the resource consent originally granted for the Kawarau Falls development embraced the entire development of the Precinct.

[27] We now set out the remaining specific terms of the ASP relevant to the resolution of the principal issue of interpretation:

**2.9 Precinct Amenities and Infrastructure:** The Purchaser acknowledges and accepts that not all of the Precinct Amenities and Infrastructure will be completed at the Settlement Date and that the Purchaser shall not be entitled to avoid this Agreement, delay Settlement or claim any compensation damages, right of set-off or any other right or remedy by reason of the fact that all of the Precinct Amenities and Infrastructure are not completed at the Settlement Date. The Purchaser further acknowledges and accepts that the Vendor may, prior to completion of the Precinct Amenities and Infrastructure, alter, vary, add to or omit any amenities or facilities from time to time proposed to be installed or constructed.

...

#### **4. DEVELOPMENT AND ISSUE OF TITLE**

**4.1 Disclosure and Acknowledgements:** The Vendor discloses and the Purchaser acknowledges and agrees that (subject to any express provision to the contrary herein):

- (a) a separate certificate of title has not yet issued for the Unit;
- (b) the estate to be acquired by the Purchaser will be a stratum estate in freehold under the Unit Titles Act 1972;
- (c) the certificate of title for the Unit will be (and is to remain) subject to the Memorandum of Encumbrance (Precinct);
- (d) the Purchaser will be required to be a member of the Precinct Society and to comply with the Precinct Rules and to pay all levies demanded by the Precinct Society in accordance with the Precinct Rules;
- (e) the Vendor may enter into utility supply agreements for and on behalf of the Body Corporate or the Precinct Society and the Purchaser will acquire the Unit subject to such agreements, provided that such utility supply agreements will be arms length and on usual commercial terms as determined by the Vendor acting reasonably;
- (f) the Vendor may enter into agreements for and on behalf of the Body Corporate, for the supply of Body Corporate secretarial services and property management services in accordance with clauses 4.14 and 4.15 respectively and the Purchaser will acquire the Unit subject to such agreements;

- (g) completion of the development of the Precinct, or parts of it, may be deferred or suspended and the development of the Precinct will be completed in stages and may be subject to change from time to time in whatever manner and for whatever reason the Vendor deems necessary.
- (h) completion of the development of the Building, or parts of it, may be deferred or suspended and may be subject to change from time to time in whatever manner and for whatever reason the Vendor deems necessary.
- (i) the Purchaser is required to give its full co-operation to the Vendor and shall support all applications to allow completion of the Development and the development of the Precinct. The Purchaser hereby agrees that it shall not lodge or permit to be lodged with any Relevant Authority any objection to the Consents or any other consents required or applied for by the Vendor (or its successors in title) in connection with the development of the Precinct. The Purchaser further agrees to execute all documents which the Vendor may require in order to enable the Vendor to complete the Development and deposit the Unit Plan;
- (j) failure by the Purchaser to comply with the terms of this Agreement, and in particular the obligation to co-operate with completion of the Development and the development of the Precinct is likely to expose the Vendor to substantial loss or damage and that the Purchaser may become liable for all or part of such loss or damage by virtue of any failure to so comply or co-operate;
- (k) save as expressly stated otherwise in this Agreement the Purchaser is not purchasing the Unit in reliance upon completion of the development of the Precinct or of any part of that Development proceeding, other than (subject to any other term of this Agreement) completion of the Unit and the Building and, the issue of a separate certificate of title for the Unit;
- ...
- (n) on or before Settlement, the Vendor shall procure the Precinct Society to enter into the Precinct Management Agreement and the Precinct Society shall be obliged to comply with all obligations contained therein. The Purchaser shall pay all levies demanded by the Precinct Society including, without limitation, all levies required to enable the Precinct Society to pay to the Precinct Manager all amounts due under the Precinct Management Agreement.

**4.2 No requisitions:** The Purchaser is not entitled to avoid this Agreement or any of its provisions, raise any objection or make any requisition or delay settlement or claim any compensation, damages, right of set-off or any other right or remedy under this Agreement or otherwise at law or in equity in respect of:

- (a) any of the matters referred to in clause 4.1; or
- (b) any alteration, variation or cancellation made by the Vendor under any provision in this Agreement.

...

**4.6 Easements, encumbrances, rights and obligations:** The Vendor reserves the right to grant or receive the benefit of any easements, building line restrictions, consent notices, covenants or other encumbrances, rights or obligations which may be required:

- (a) in order to satisfy any conditions of the Consent; or
- (b) by any statute, regulation or Relevant Authority; or
- (c) which in the sole discretion of the Vendor are deemed to be necessary or desirable for the completion of the Development, or use and operation of the Precinct or the development or use of the Building,

provided that such easements, building line restrictions, consent notices, covenants or other encumbrances, rights or obligations shall not materially adversely affect the value of the Property.

**4.7** The Purchaser shall take title to the Property subject to or with the benefit of such easements, building line restrictions, encumbrances, rights or obligations referred to in clause 4.6, and shall execute all documents (with the inclusion of all terms considered reasonably desirable by the Vendor or the solicitors for the Vendor) and do such acts and things as may be required to obtain the deposit of the Unit Plan for the Subdivision and the implementation of any such easements, building line restrictions, encumbrances or other rights or obligations.

...

**4.9 Variations to the Draft Outline Plans and Specifications:** The Purchaser acknowledges that

- (a) the Draft Outline Plans and Specifications represent the Vendor's current intentions with regard to the Development and will need to be evolved and detailed during the progression of the Development; and
- (b) the Vendor may at any time alter or vary the Draft Outline Plans and Specifications and any subsequent plan relating to the Development (including inverting or "mirroring" the Unit, varying, altering, adding to or omitting parts of the Common Property, varying, adding to or substituting external components and finishes on the Building and the alteration, variation or cancellation of any proposed easement shown on any such plan) in such manner as the Vendor considers appropriate having regard to the circumstances, and provided that such alteration or

variation does not materially adversely affect the value of the Unit, the Purchaser shall not be entitled to claim any compensation, damages, right of set off or to make any objection or requisition based on such alteration, variation or cancellation.

[28] Section 5 of the ASP relates to the Precinct Society and is important to the resolution of the interpretation issue. The “Precinct Society” is defined by cl 1.1 as meaning “the Kawarau Falls Station Precinct Society Incorporated (to be formed)”. Clause 5.1 contains the following acknowledgement:

**5.1 Purchaser acknowledgement:** The Purchaser acknowledges that the Unit is part of the Precinct. The public have access to the Precinct via public roads, footpaths and other means. Commercial, retail, restaurant, licensed premises for the sale of liquor, tourist accommodation and other activities may take place within and adjacent to the Precinct at all and at any times. The Purchaser shall not be entitled to object to such uses of the Precinct or seek or recover from the Vendor or the Precinct Society any damages or compensation arising therefrom.

[29] The purchaser acknowledges in cl 5.2 that the Precinct Society will be incorporated prior to settlement and that the owners of the units must be members of the Society. It is further acknowledged that each of the properties within the Precinct is intended to be subject to a scheme for the benefit of each property within the Precinct (including the Building) so that each owner and any occupier of each of the properties within the Precinct shall be bound by the provisions in this part of the agreement.

[30] Clause 5.5 provides:

**5.5 Role of Precinct Society:** The parties acknowledge that the Precinct Society has a key role in:

**(a) Management of Precinct:** To manage the Precinct and maintain the amenity represented by the Precinct so that it achieves and maintains a quality brand in the market by reference to its unique location through:

- (i) upholding the Precinct standards;
- (ii) enforcing the Rules; and
- (iii) achieving integrated management of the Precinct.

- (b) **Services:** To maintain the level and quality of services provided so that the quality and standard of the Precinct is maintained over time.
- (c) **Value Enhancement:** To maintain and/or enhance the value of the Precinct as a whole so that Kawarau Falls Station achieves and maintains a quality brand in the market.

[31] Of critical importance to the resolution of the interpretation issue is cl 5.7:

**5.7 Disclosure:** The development of the Precinct is an evolving concept which the Vendor will develop in stages and over time. The concept and development of the Precinct may be altered or varied as the Vendor determines and the Vendor shall not be obliged to consult with or give any notice to the Purchaser except that the Vendor covenants that it will (or will procure that) the Precinct shall be developed (albeit in stages) in a manner consistent with the Draft Outline Plans and Specifications provided that any alteration or variation shall not be such as to materially adversely affect the value of the Unit.

[32] Finally, in terms of cl 5.8, the purchaser acknowledges that the vendor will, prior to settlement, procure the Precinct Society to enter into the Precinct Management Agreement to appoint the Precinct Manager to:

- (a) enhance the amenity the Precinct represents for each of the owners and occupiers of the Precinct (including the Units);
- (b) enhance the value of each Owner's asset within the Precinct;
- (c) regulate the use and operation of the Precinct as a whole; and
- (d) coordinate the provision of events and festivities for the benefit of all owners and occupiers of the Precinct.

[33] The Precinct Management Agreement is to be on terms and conditions agreed between the Vendor and the Precinct Manager incorporating the key terms set out in Annexure 1 of the agreement.<sup>5</sup> In terms of Annexure 1, Kawarau Falls Station is described as being in a unique location and that it is being developed as an integrated world class village resort. The Precinct Objectives are described in these terms:<sup>6</sup>

- (a) **Management of Precinct:** To manage the Precinct and maintain the amenity represented by the Precinct so that it achieves and maintains

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<sup>5</sup> Clause 5.9 of the ASP.

<sup>6</sup> Clause 4.1 of Annexure 1 to the ASP.

a quality brand in the market by reference to its unique location through:

- (i) upholding the Precinct standards;
  - (ii) enforcing the Rules; and
  - (iii) achieving integrated management of the Precinct.
- (b) **Services:** To maintain the level and quality of services provided so that the quality and standard of the Precinct is maintained over time.
- (c) **Value Enhancement:** To maintain and/or enhance the value of the Precinct as a whole so that Kawarau Falls Station achieves and maintains a quality brand in the market.
- (d) **Future Objectives:** Such other objectives as the parties may identify and agree in writing from time to time.

[34] Clause 7.1 of the Precinct Management Agreement provides for the Manager's annual fee to be collected from the members of the Precinct Society.

[35] We also mention the following provisions to conclude our review of the material terms of the ASP. Section 6 of the ASP is headed "Undertaking of Development". Under cl 6.1, the vendor is required to ensure construction of the Development is conducted in a proper and workmanlike manner and completed substantially in accordance with the content and intent of the Draft Outline Plans and Specifications and in accordance with all regulatory and local authority requirements. In terms of cl 8.1, the Purchaser appoints the Vendor or nominee to be the attorney of the Purchaser for the purposes of executing all documents, plans and consents and to perform all acts, matters and things as may be necessary to complete the Development (including any stage of the Development) and to complete the Precinct (including any stage of the Precinct). Under cl 10.1, the Purchaser is deemed to have accepted the Vendor's title for the Property and will not issue objections or requisitions; cl 10.2 provides that no error or misdescription of the Property or title shall annul the sale and no compensation shall be made or given. Finally, cl 12 sets out the provisions applicable in the event of default under the ASPs.



*Kingston West*

[36] So far as they are relevant to the central interpretation issue, there is no material difference in the terms of the Kingston West ASPs. We deal later with the terms relevant to the subsidiary issues.

**Events after the ASPs were entered into**

[37] In October 2007 there was a split of the assets relating to Stage 1 and those relating to Stages 2 and 3. PRL transferred ownership of the assets of Stage 1 (including the ASPs) to its subsidiary, Melview. PRL retained ownership of the Stage 2 and 3 land.

[38] In May 2009 Melview was placed into receivership. Partners of KordaMentha were appointed as receivers. In March 2010 PRL was placed into receivership and then into liquidation.

[39] In October 2010 Melview transferred ownership of the Stage 1 assets including the ASPs to its subsidiary KVHL.

[40] The sequence of events that followed is best set out in the following chronology:

9 December 2010	Certificates of title issued for the principal units in both Lakeside West and Kingston West.
25 November 2011	KVHL serves the appellants' solicitors with certificates of practical completion in respect of both Lakeside West and Kingston West. The certificates state that Practical Completion was achieved on 11 April 2011.
14, 17, 18 and 21 November, and 2 and 5 December 2011	The appellants' solicitors purport to make requisitions and objections in respect of both Lakeside West and Kingston West. KVHL's solicitors respond but there was a dispute between the parties as to whether the appellants were entitled to make the requisitions and objections.

November–December 2011	KVHL serves settlement statements on the appellants with the final settlement statement nominating a settlement date of either 16 or 19 December 2011.
13 December 2011	The appellants file proceedings seeking orders that the ASPs are void under the Fair Trading Act 1986 and the Securities Act 1978. The appellants were successful in obtaining without notice orders restraining the release of their deposits.
16 and 19 December 2011	The appellants did not settle in accordance with the settlement statements.
19 and 20 December 2011	KVHL serves settlement notices on the appellants (with the exception of plaintiff 94). The settlement notices called for settlement dates within 12 working days of the settlement notice (being various dates in early January 2012 for the majority of the appellants).
January 2012	Again, none of the appellants settled in accordance with the settlement notices.
15 March 2012	KVHL gives notice to cancel the ASPs (with the exception of plaintiff 94).
17 April and 9 May 2012	The appellants purport to cancel the ASPs and demand repayment of their deposits.
27 July 2012	KVHL purports to cancel plaintiff 94's ASP. In response, plaintiff 94 purports to cancel the ASP on the same day.

**The interpretation issue: was there an obligation on the vendors to complete Stages 2 and 3?**

*The Judge's approach*

[41] The Judge acknowledged that cl 5.7 of the ASPs is not well drafted and that its correct interpretation is not without difficulty. Indeed, all counsel agreed before us that the ASPs are not a model of Chancery drafting. Gilbert J accepted that, read

literally, and in isolation, there was force in the appellants' submission that cl 5.7 appeared to contain a promise by the vendors to complete the entire Precinct in a manner consistent with the Draft Outline Plans and Specifications and not to make any alteration or variation which would materially affect the value of the units. However, the Judge concluded that on its proper construction, cl 5.7 related to how the Precinct might be developed. It should properly be construed as a negative covenant constraining the vendors from carrying out any works in the Precinct unless they conformed to the Draft Outline Plans and Specifications or any variations having no material adverse effect on the value of the units at issue.

[42] By way of example given by the Judge, a purchaser of a unit in Kingston West would be able to rely on cl 5.7 to prevent the construction of a building not shown on the Draft Outline Plans and Specifications that would obstruct sunlight or block views. Similarly if it were proposed to relocate one of the buildings shown on the Draft Outline Plans and Specifications to a place where it would materially adversely affect the value of the unit.

[43] In finding there was no positive covenant on the part of the vendors to complete all three stages of the development the Judge gave a number of reasons. First, he did not consider the interpretation advanced by the appellants could be reconciled with cl 4.1(k).

[44] Second, the ASPs provided almost no definition of the buildings, amenities and infrastructure to be completed in the balance of Stage 1, let alone in Stages 2 and 3. In that respect, it was inherently unlikely that the parties would have contracted for the construction of a project of the scale of the entire Kawarau Falls development with such scant detail of what the vendor was obliged to do and when.

[45] Third, the purchaser's acknowledgement in cl 5.1 that commercial, retail, restaurant, licensed premises, tourist accommodation and other activities might take place within and adjacent to the Precinct would be redundant if the vendors were obliged to complete all three stages as planned. Further, if this were the intention, the acknowledgement would be that the activities "will" take place not "may" take place.

[46] Fourth, it was difficult to reconcile cl 4.1(g) with an interpretation of cl 5.7 as a positive obligation to complete the entire development of all three stages since this provision permitted the vendors to defer or suspend the development of the Precinct and the purchasers acknowledged that the plans for the Precinct might be subject to change from time to time in whatever manner and for whatever reason the vendor deemed necessary. Gilbert J noted that cl 2.9 was to similar effect in relation to the Precinct amenities and infrastructure.

[47] Finally, the Judge observed that the ASPs were conditional on the vendors achieving a minimum level of sales and being satisfied about the projected costs of construction. The Judge considered it most unlikely that if the parties intended that the vendors had to be satisfied with the level of sales and construction costs for the particular building, the vendors would be unconditionally obliged to construct not only that particular building, but also the 12 other buildings and associated infrastructure and amenities planned in all three stages of the development.

[48] The Judge summarised his conclusions in these terms:<sup>7</sup>

[80] In summary, the agreements imposed an obligation on the vendor to complete the Building and the Units, conditional on satisfactory presales and construction costs making this viable. The vendor intended to construct the buildings and amenities planned in all three stages of the Kawarau Falls development. However, the parties must have understood that this would be similarly dependent on the viability of these other parts of this major project. There was inevitably a risk that parts of the Kawarau Falls development might not be able to be completed and the vendor made no promise that they would be. The purchaser acknowledged this by confirming that it was not purchasing the Unit in reliance on the completion of the Precinct or of any part of the wider development proceeding.

[49] The Judge concluded this part of his decision by referring to Dr Ho's evidence that he would not have proceeded with the purchase as a stand-alone project with just Stage 1 developments in place. Gilbert J said it was difficult to reconcile this with the terms of the ASP including, in particular, cls 4.1(g), 4.1(k) and 4.2.

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<sup>7</sup> *Sun*, above n 3.

*The argument on appeal*

[50] In a detailed analysis, Mr Mills submitted that the correct approach to the interpretation issue is to construe the agreement by reference to its terms and in context including the relevant marketing material and the terms of the resource consent. He accepted the appellants were not entitled to resist settling the purchase of the units in Lakeside West and Kingston West because Stages 2 and 3 had not been completed at the time of settlement. However, the essence of counsel's argument was that the vendors were nevertheless obliged over time to complete Stages 2 and 3. Although this was an obligation to be fulfilled in the future, the vendors nevertheless had a present obligation at the time of settlement of the ASPs to deliver a unit that would in due course be part of the wider Precinct. This was so despite the fact that the completion of the Precinct could be in a form that was varied by the vendors within the terms of the ASPs and at a time that could depend on matters such as supply and demand, economic viability, and other factors considered material by the vendors.

[51] Mr Mills submitted that at the time the respondents called for settlement, they were not ready, willing and able to settle in terms of the bargain struck by the ASPs because they had effectively disabled themselves from ever fulfilling their obligation to complete Stages 2 and 3 of the Precinct, whether by themselves or by procuring someone else to do so. On that footing, the respondents had committed an anticipatory breach at the time they called for settlement because they were unable to fulfil all the terms of the ASPs. The consequence was that the respondents had no right to cancel; they had repudiated the ASPs; the appellants had properly accepted the repudiation and had validly cancelled the ASPs.

[52] Mr Goddard did not accept any part of the appellants' argument. He essentially relied on the Judge's reasoning on the interpretation issue. There was no positive obligation to complete Stages 2 and 3; even if there were such an obligation it was not an essential term; there was no anticipatory breach; and the appellants had not validly cancelled the ASPs.

*Interpretation issue — analysis*

[53] We approach our consideration of the interpretation issue in two parts. First, was there a positive obligation on the vendors to complete Stages 2 and 3? Second, if so, was any such obligation an essential term of the bargain? We recognise these issues overlap to an extent.

*Was there a positive obligation on the vendors to complete Stages 2 and 3?*

[54] In addressing the first question we adopt the most recent guidance on this topic from the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.<sup>8</sup> The proper approach is an objective one, the aim being to ascertain the meaning the document would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation they were in at the time of the contract. This would include the marketing material and, since the ASPs were expressed to be conditional on the grant of resource consents for the entire project, we consider it is legitimate in terms of context to take into account the terms upon which the resource consents were sought and granted.

[55] As the Supreme Court emphasised in *Firm PI*, the text of the agreement remains centrally important.<sup>9</sup> Focusing on the meaning of the relevant words in their documentary, factual and commercial context was also emphasised in *Arnold v Britton*.<sup>10</sup> We begin by agreeing with the Judge that, on its face, cl 5.7 imposed a positive obligation on the vendor to complete Stages 2 and 3 of the Precinct. The clause clearly states that “the Vendor covenants that it *will* (or *will* procure that) the Precinct *shall be* developed (albeit in stages)”.<sup>11</sup> That obligation is subject to three important qualifications. First, the development is to be an evolving concept, developed in stages over time. Second, the concept and development of the Precinct could be altered or varied as the vendor determined. The vendor has no obligation to consult with or give notice to the purchasers of any such alteration. Third, the development of the Precinct is to be consistent with the Draft Outline Plans and

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<sup>8</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[61].

<sup>9</sup> At [63].

<sup>10</sup> See the observations of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15], Lord Sumption and Lord Hughes concurring.

<sup>11</sup> Emphasis added.

Specifications with the further proviso that any alteration or variation would not impact adversely on the value of the units.

[56] We accept it might be thought odd to find an obligation to complete the Precinct expressed as an acknowledgement in a section of the ASP relating to the Precinct Society rather than, for example, under Section 6 dealing with the undertaking of the Development but we do not attach weight to this point given our observation that the ASPs are not well drawn and the need to view the ASPs as a whole in the light of the factual matrix.

[57] Construing the ASPs as imposing a qualified but positive obligation on the vendors to complete Stages 2 and 3 is supported by other terms. Clause 4.1(g) recognises a positive obligation on the vendors by providing that completion of the Precinct may be deferred or suspended although it “will be completed in stages”. The ASPs do not specify a time for completion of Stages 2 and 3 and the terms of the resource consent we discuss below allow considerable latitude for the developers to complete the project. However, the Court would, if necessary, impose a duty to complete the project within a reasonable time.<sup>12</sup> What is a reasonable time is a question of fact. In the present case, it would likely be measured in years and would reflect the discretions available to the developers under the ASPs.

[58] The provisions relating to the Precinct Society are important since they are premised on completion of all three stages and call for the Precinct Society to be established prior to completion of the ASPs in Stage 1. Clause 4.1(n) obliges the vendor to form the Precinct Society and the Precinct Management Agreement on or prior to settlement. This provision also obliges the purchaser to pay levies to the Precinct Society. As noted above at [30], Section 5 of the ASP and the terms of Annexure 1 contain elaborate and detailed provisions relating to the operation and objectives of the Precinct Society and the Management Agreement. By way of example, cl 5.5(c) of the ASP speaks of maintaining and/or enhancing “the value of the Precinct as a whole so that the Kawarau Falls Station achieves and maintains a quality brand in the market”. These provisions emphasise the intention to develop

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<sup>12</sup> *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 268; *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [61] per Tipping J with whom Blanchard and Anderson JJ agreed.

the Precinct as an integrated whole as well as the benefits to be gained by enhancing the amenities of the Precinct and the value of each owner's assets within it. It would not have been necessary to include any of these provisions if completion of Stages 2 and 3 were not a matter of obligation.

[59] The integrated nature of the overall development is also underlined by cl 2.1(b) of the ASPs, which makes the agreements expressly conditional on the vendor obtaining the Consents on terms acceptable to the vendor. As already noted, the "Consents" are not confined to territorial authority approval of the specific Buildings the subject of the ASPs. They extend to include consents to the development of the wider Precinct.

[60] The application for the original resource consent for the development and the terms upon which the consent were granted confirm the integrated nature of the development of the Precinct. The proposal detailed in the application outlined a comprehensively designed and integrated development consisting of 13 buildings for specified residential or visitor accommodation activities within the then High Density Residential Zone in the QLDC District Plan. Each of the 13 buildings was designed by one of five architects and unified by way of a cohesive masterplan. The application stated that this approach had been adopted rather than subdividing and developing individual parcels in an ad hoc and unattractive way. The application featured a construction programme providing for the development to be undertaken in three stages commencing in July 2006 with completion of the entire development by the end of April 2010. Plans submitted with the application included both the masterplan and designs for the individual buildings to be constructed within the overall concept.

[61] The resource consent granted on 28 July 2006 by the QLDC approved the specific plans submitted with the application. The development was to be carried out in accordance with the application and supporting documentation including the construction management plan already mentioned. Condition 4 of the resource consent provided that the development could be constructed in stages with the proviso that any part of any stage could be commenced prior to completion of the previous stage. The three separate stages and the total of 13 buildings proposed were



specified. Condition 5 required the consent holder to amalgamate the four titles of the subject site prior to construction of any buildings.

[62] Condition 50 specified that the consent was to expire 10 years from the date of the consent (28 July 2016). This condition was varied on 5 October 2006 to provide that the resource consent would lapse in terms of s 125 of the Resource Management Act 1991 after a 10-year period. However, as explained by an expert witness called by the appellants, this provided greater flexibility to the developers so long as progress was being made within the 10-year period towards giving effect to the consent.<sup>13</sup>

[63] To summarise this point, we consider that cl 5.7 and the other provisions to which we have drawn attention, considered in context, firmly support the conclusion that the vendors under the ASPs had a positive obligation to complete Stages 2 and 3 of the development or to procure the completion of those stages. In doing so, they had a substantial degree of flexibility as to the time by which the Precinct had to be completed as demonstrated particularly by their ability in terms of cl 4.1(g) to suspend or defer completion.

[64] The vendors were also permitted to vary the form of the development of the wider Precinct. Their ability to do so is expressed in apparently wide terms in cl 4.1(g), but this provision must be read subject to any express term to the contrary. We consider the apparently broad discretion under cl 4.1(g) must be subject to and qualified by cl 5.7. Although there are some imperfections in the drafting of cl 5.7, we consider the parties intended it to mean that any alteration or variation of the plan for the development of the Precinct must not be such as to materially adversely affect the value of the units under the ASPs. The ability of the vendors to vary the design of the Precinct was also constrained by the terms of the resource consent unless the QLDC agreed to amend them.

[65] We now consider the reasons given by the Judge for concluding that cl 5.7 should be construed only as a negative covenant. The strongest argument to support this view is to be found in cl 4.1(k). For convenience, we set out this clause again:

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<sup>13</sup> Resource Management Act 1991, s 125(1A).

**4.1 Disclosure and Acknowledgements:** The Vendor discloses and the Purchaser acknowledges and agrees that (subject to any express provision to the contrary herein):

...

- (k) save as expressly stated otherwise in this Agreement the Purchaser is not purchasing the Unit in reliance upon completion of the development of the Precinct or of any part of that Development proceeding, other than (subject to any other term of this Agreement) completion of the Unit and the Building and, the issue of a separate certificate of title for the Unit;

[66] Mr Goddard relied strongly on this provision as demonstrating an acceptance by the purchasers that no reliance was placed on the completion of the development of the Precinct. That meant, in counsel's submission, that the purchaser was accepting there was no obligation to complete the development of the Precinct or, at the very least, that the completion of the Precinct was not regarded by the purchasers as an essential term.

[67] We accept Mr Mills' submission that, considering the ASPs as a whole, cl 4.1(k) cannot be construed in the way contended for by the second and fourth respondents. The operation of cl 4.1(k) is stated on three occasions in cl 4.1 to be subject to any express provision to the contrary (or words to similar effect): once at the beginning of cl 4.1 and twice in cl 4.1(k) itself.

[68] Clause 4.1(k) must therefore be read as subject to the express terms requiring completion of the Precinct. To construe cl 4.1(k) otherwise would be to negate the effect of these positive obligations in a manner not permitted by the terms of the contract.

[69] We acknowledge the force of Mr Goddard's second point about essentiality, given the apparent acknowledgement that the purchaser is not purchasing the unit "in reliance upon completion of the development of the Precinct or of any part of that Development proceeding". However, we do not accept this clause amounts to an acknowledgement by the purchaser for all purposes that he or she is not relying on completion of the Precinct. Rather, it is more likely in the context of the ASP as a whole that the parties intended that the purchaser must complete the purchase of the

unit whether or not the Precinct was completed by the time settlement of the purchase is due.

[70] This interpretation is consistent with cl 2.9 in which the purchasers acknowledge they have no remedy if the Precinct amenities and infrastructure are not completed at settlement date. Similarly with cl 4.2 restricting the ability of the purchaser to requisition or to delay settlement. It is also consistent with the ability of the vendors to defer or suspend development of the Precinct under cl 4.1(g). As Mr Mills pointed out, if cl 4.1(k) were to be construed in the way advanced by the respondents, it would mean the express clauses to the contrary in the ASPs are to be ignored and would deprive those clauses of any material effect. On the one hand, the vendors are accepting the obligation to complete Stages 2 and 3 (an obligation upon which the purchasers must be taken to be relying), while on the other, the purchasers are agreeing not to place any reliance on that obligation. In other words, the inclusion of detailed provisions supporting a positive obligation to complete Stages 2 and 3 would be rendered redundant.

[71] The final point in respect of cl 4.1(k) is to note a degree of ambiguity about the phrase “that Development”. Mr Mills submitted this should be construed as meaning “the Development” as that term is defined, meaning the development of the Building and the immediately adjoining land by way of a curtilage. If, on the other hand, “that Development” meant the development of the Precinct (the view favoured by the Judge), then this might be seen as adding support to the second and fourth respondents’ argument that the purchasers were acknowledging they did not rely on any part of the Precinct being developed. It is not necessary to reach a view on this since we are satisfied for the reasons already given that the construction advanced by the second and fourth respondents cannot be supported even if the Judge’s approach to the construction of the words “that Development” is adopted.

[72] The second reason relied upon by Gilbert J in support of the interpretation he favoured was the inherent unlikelihood that the parties would have contracted for the construction of a project of this scale with such scant detail of what the vendor was obliged to do and when. With respect, we have a different view. From the outset, the Kawarau Falls development was to proceed in a comprehensive and integrated

way. That is reflected in the marketing material, in the resource consent application and by the terms of the ASPs themselves. We accept that the concept plans for the Precinct were described in relatively general terms but the vendors protected themselves by reserving flexibility as to the timing and design of the development. Subject to the obligation to complete within a reasonable time, it was within their discretion to defer or suspend parts of the development depending on their assessment of market conditions and other factors material to the completion of Stages 2 and 3.

[73] Mr Goddard expressly disavowed any reliance on an argument that cl 5.7 was void for uncertainty. Given the terms on which the resource consent was granted and the qualified ability of the vendors to amend the design, we do not consider any such argument could have been successfully mounted. The important point is that, by virtue of the flexibility they reserved to themselves in respect of the timing and design of Stages 2 and 3, the vendors were not assuming an obligation that did not make commercial sense.

[74] For similar reasons, we do not agree with the Judge that the fact the ASPs were conditional on the vendors achieving a minimum level of sales and being satisfied about the projected costs of construction made it unlikely the vendors would have agreed to an unconditional obligation to construct not only the particular buildings that were the subject of the ASPs, but also the other buildings and associated infrastructure and amenities planned for all three stages of the development. The flexibility the vendors reserved to themselves gave them ample latitude to assess when the time was ripe for completion of the remaining stages.

[75] Finally, the Judge referred to cl 5.1 of the ASPs in which the purchasers acknowledged that commercial, retail, restaurant, licenced premises for the sale of liquor, tourist accommodation and other activities “may” take place within and adjacent to the Precinct. We do not consider this point is material in the overall context of the agreement. It is contained in Section 5 of the ASPs dealing with the Precinct Society and may be viewed as a “belt and braces” provision designed to protect the vendors from any later complaint by the purchasers that activities of the nature referred to might be included in the Precinct.

*Was the obligation on the vendors to complete Stages 2 and 3 an essential term from the point of view of the purchasers?*

[76] Counsel were agreed that the test for essentiality in terms of s 7(4)(a) of the CRA is as expressed by the Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd*:<sup>14</sup>

... 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 contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[77] Viewed objectively, we are satisfied that, from the point of view of Dr Ho and the other appellant purchasers, the obligation on the vendors to complete Stages 2 and 3 of the development in due course must be treated as an essential term of the ASPs. We consider it unlikely a purchaser would have proceeded to purchase a unit in a stand-alone building in the absence of an obligation to complete the overall development. In that respect, there was valuation evidence supporting the conclusion that the prices paid for the units would have included a resort premium in the range of 10 to 25 per cent to reflect the place of the building in the overall development.

[78] The centrality of the completion of the overall project is amply demonstrated in the marketing materials, the terms of the resource consent and in the provisions of the ASPs themselves as already discussed in detail. The purchasers were entitled to expect the vendors would live up to their promise that the units they were purchasing would ultimately be included as part of an integrated development which would maintain and enhance the amenities of their units and improve their value.

[79] Apart from anything else, the provisions relating to the Precinct Society strongly support this conclusion. The central role of the Society in the development is demonstrated by the terms of the ASPs. The vendors were required to form the Society for the purposes we have already outlined prior to settlement of the ASPs.

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<sup>14</sup> *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25]. This test was confirmed by the Supreme Court in *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [60].

The purchasers bound themselves to becoming members of the Society and to meeting any levies associated with the Society.

[80] In all the circumstances, we consider it is more probable than not that the purchasers would have declined to enter into the ASPs if there were no positive obligation to complete Stages 2 and 3.

**Was there an anticipatory breach of the obligation to complete Stages 2 and 3 of the development?**

[81] Mr Mills accepted that the contractual terms permitted the vendors to complete Stages 2 and 3 after the time for settlement of the ASPs. It was therefore an essential part of counsel's argument that the appellants must demonstrate that, at the time for settlement of the ASPs, the vendors had committed an anticipatory breach of their obligation to complete Stages 2 and 3.

[82] Section 7 of the CRA contains two distinct but often overlapping grounds for validly cancelling a contract: repudiation by another party (s 7(2)) and misrepresentation, breach or anticipatory breach by another party (s 7(3) and (4)). In terms of s 7(2), a party to a contract may cancel if, by words or conduct, another party repudiates the contract by making it clear he or she does not intend to perform the obligations under it or, as the case may be, to complete such performance. As the Supreme Court noted in *Kumar*, repudiatory conduct may relate to the whole or part of the contractual obligations.<sup>15</sup> However, the Supreme Court held that, where the repudiation is only partial, the innocent party's recourse is under s 7(3) and (4).<sup>16</sup> Relevantly to the present case, the innocent party has a right to cancel under s 7(3)(c) of the CRA if it is clear that a term of the contract will be broken by another party and one of the alternatives in s 7(4)(a) or (b) is established. The present case concerns an anticipatory breach of the vendors' obligation to complete the Precinct. The appellants rely on s 7(4)(a) which applies where the parties have expressly or impliedly agreed that the performance of the term is essential to that party.

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<sup>15</sup> *Kumar*, above n 14, at [56].

<sup>16</sup> At [57].

[83] As earlier noted, the next step in Mr Mills' argument is that the respondent vendors were not entitled to cancel because they were not ready, willing and able to perform the ASPs. That was so because they had effectively disabled themselves from ever completing Stages 2 and 3 as required as an essential term of the overall bargain.

[84] In advancing his submissions, Mr Mills relied particularly on the judgment of Devlin J in *Universal Cargo Carriers Corporation v Citati*.<sup>17</sup> In that case, Devlin J discussed two circumstances in which a discharge of contract may arise: renunciation by a party of their obligations under it and impossibility created by their own acts.<sup>18</sup> He went on to state:<sup>19</sup>

The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact — or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited.

...

If when the day comes for performance a party cannot perform, he is in breach, quite irrespective of how he became disabled. The inability which justifies the assumption of an anticipatory breach cannot be of any different character.

...

It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen.

[85] We accept Mr Goddard's submission that a conclusion that a party has repudiated a contract will not be reached lightly since repudiation is a "drastic conclusion". The evidence must show an unequivocal intention not to perform the

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<sup>17</sup> *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401.

<sup>18</sup> At 436–437.

<sup>19</sup> At 438.

contract.<sup>20</sup> However, so long as the evidence is clear that a breach of an essential term is inevitable, the right to cancellation arises.

[86] In *Jack v Guy* this Court approved the following test formulated by Blanchard J in *Brooklands Motor Co Ltd v Bridge Wholesale Acceptance Corp (Australia) Ltd*:<sup>21</sup>

The test [under s 7(3)(c)] is whether a reasonable by-stander, aware of all relevant existing and future facts, would have believed that by the time of the purported cancellation it was clear that there would be a breach of the requisite essentiality or seriousness.

[87] In considering whether there was an anticipatory breach of the term requiring the vendors to complete Stages 2 and 3, it does not matter whether the relevant dates for this assessment are on 16 and 19 December 2011 (when the appellants did not settle in accordance with the settlement statements served on them) or on 15 March 2012 (when KVHL gave notice to cancel all but one of the ASPs). We are satisfied the evidence shows unequivocally that it was inevitable prior to any of those dates that the vendors would not be able to complete Stages 2 and 3 either themselves or by procuring someone else to do so.

[88] The principal evidence in that respect came from two witnesses. First, Mr Downes gave evidence on behalf of himself and Mr Simpson, the joint receivers and managers of PRL. They were appointed on 2 March 2010 by Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) under a general security agreement. Shortly afterwards, a liquidator of the company was appointed by special resolution of the shareholders. Mr Downes gave unchallenged evidence that, at the date of receivership, PRL was insolvent. It had no prospect that funds would be available from the receivership to meet the claims of the company's unsecured creditors.

[89] PRL's main asset was the land upon which it had been planned to build Stages 2 and 3. At the time of receivership, PRL did not have any funds or financial backing to commence either Stage 2 or Stage 3. Nevertheless, the receivers had undertaken an analysis to determine the viability of undertaking Stages 2 and 3.

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<sup>20</sup> *Kumar*, above n 14, at [58].

<sup>21</sup> *Jack v Guy* CA164/03, 1 December 2004; *Brooklands Motor Co Ltd v Bridge Wholesale Acceptance Corp (Australia) Ltd* (1994) 7 NZCLC 260,449 (HC) at 260,461.



Costings obtained pre-receivership showed a total project cost to complete both stages of approximately \$300 million. The receivers decided it would not be viable for them to undertake development of either stage. The key reasons were a lack of available funding for a project of the size at issue; the high financial risk of borrowing, even if funding were available; the risk that purchasers would refuse to complete contracts with the prospect the receivers would become embroiled in litigation; and the view of Fortress as the security holder.

[90] During the period from May 2010 to February 2011, PRL's receivers agreed to the termination of the sale and purchase agreements that were in place in respect of Stages 2 and 3 of the development. The receivers also negotiated the refund of deposits paid under the sale and purchase agreements. Then, on 27 February 2014, PRL entered into an agreement to sell the land comprising Stages 2 and 3 of the development to a third party for the sum of \$10.15 million. At the time of the High Court trial, the agreement remained conditional but we were told the sale has now proceeded to completion.

[91] The second relevant witness was Mr Garrett of KordaMentha. He had day-to-day responsibility for the receivership of Melview and was familiar with all aspects of the inter-relationship between the various companies involved in the development. Mr Garrett gave evidence regarding the events leading to the split of assets between Stage 1 and Stages 2 and 3. His understanding was that PRL was unable to secure funding sufficient for the entire development. Its solution was to separate the ownership of the Stage 1 land and assets from the remainder of the Kawarau Falls development. This was to enable separate funders to take first-priority security over the assets relevant to each stage. By the time KordaMentha became involved with the companies in 2009, ownership of the Stage 1 assets had been transferred from PRL to Melview. BOSI International (Australia) Ltd (BOSI) had loaned funds to Melview and was the first-ranking secured creditor for Stage 1. Separately, PRL retained ownership of the land needed for Stages 2 and 3.

[92] Mr Garrett confirmed that on 26 May 2009 BOSI appointed Mr Gibson and Mr Graham of KordaMentha as joint receivers. It was necessary for the receivers to consider the feasibility of completing Stage 1. That required an assessment of the

cost to complete that stage and the availability of funding. Ultimately, in October 2009 advice was received that BOSI would provide funding to complete Stage 1. Because Melview was insolvent, it was necessary for the receivers to restructure the ownership of the Stage 1 assets into a viable trading entity before finalising arrangements with the various stakeholders including the appellant purchasers. The primary goal was to maximise the value of Stage 1 assets and the return to BOSI. To that end, it was decided to incorporate the two subsidiary companies, KVHL and Kawarau Village Limited (KVL). The receivers were appointed as directors of KVHL while Gary Looker was appointed the director of KVL. As already noted, KVHL purchased the Stage 1 assets including all rights under the ASPs.

[93] Mr Garrett was cross-examined about the completion of Stages 2 and 3. He confirmed that BOSI did not acquire from Fortress the Stage 2 debt Fortress had advanced to PRL and that, at the time the receivers were appointed, BOSI was not considering funding Stage 2 as far as he was aware. He accepted that, to the extent the ASPs required either Melview or KVHL to undertake steps on Stages 2 and 3, those companies were unable to do so. There were no contractual arrangements in place that would have enabled KVHL to procure other parties to complete Stages 2 and 3.

[94] Mr Goddard pointed to answers given earlier in cross-examination when Mr Garrett refused to accept that he knew PRL had no ability or intention of completing Stages 2 and 3. Mr Garrett had referred to negotiations conducted with PRL to preserve the opportunity for Stages 2 or 3, or particularly Stage 2, to be built as designed. He referred to significant expense having been incurred in negotiating an agreement for the purpose of completing Stage 2. Although he did not have any detail of the agreement to hand, he recalled that it required the receivers to construct a “bridge” between Kingston West and Lakeside Central West, the Stage 2 building immediately to the east of Lakeside West. That bridge was constructed to allow a tunnel to be excavated from the carpark in Kingston West to the basement of Lakeside Central West as a means of allowing parking for the latter building. He thought this agreement had been reached some time in the second half of 2011.

[95] We are not persuaded that Mr Garrett's evidence of this agreement detracts from the strong inference to be drawn from the overall effect of his evidence and that of Mr Downes. First, the Stage 2 and 3 land was owned by PRL, not by KVHL as the assignee of the ASPs for Stage 1. PRL was insolvent with no resources to complete Stages 2 and 3. The analysis undertaken by PRL's receivers had demonstrated that completion of Stages 2 and 3 was not viable. Stages 2 and 3 were not progressed and the land was ultimately sold to a third party.

[96] Second, KVHL had no power itself to complete Stages 2 and 3 and had turned down the possibility of buying the Stage 2 debt from Fortress at a discounted price. BOSI was not willing to fund any work beyond the completion of Stage 1. In reality, there was no realistic prospect of funds becoming available for the completion of any part of Stages 2 and 3 in the foreseeable future, let alone all of it as the vendors had promised. In the light of these realities, Mr Garrett's evidence about preserving the future opportunity to complete Stage 2 is not at all persuasive.

### *Conclusions*

[97] Put shortly, the evidence clearly demonstrates that neither PRL nor KVHL had the capacity to complete Stages 2 and 3 themselves or to procure someone else to do so. The breach of the term requiring them to do so was therefore inevitable at the time the vendors called for settlement of the ASPs.

[98] Since we are satisfied the performance of the term requiring completion of Stages 2 and 3 was essential to the appellants, two consequences follow. First, the vendors were not ready, willing and able to perform all of the terms of the contract between the parties and were not therefore entitled to cancel unless the appellants had affirmed the contract.<sup>22</sup> Mr Goddard made it clear that the vendors did not suggest the appellants had affirmed. Second, the vendors' anticipatory breach of an essential term amounted to a repudiation. It does not matter that the completion of Stages 2 and 3 was an obligation to be fulfilled in the future if it was clear at the time settlement of the ASPs was called for that a breach of this essential term would inevitably occur. The appellants were entitled to accept the vendors' repudiation and

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<sup>22</sup> *Kumar*, above n 14, at [94]; and *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [82].

cancel the ASPs as they did. In those circumstances, it is not in dispute that the appellants are not obliged to perform the contract further and are entitled to a return of their deposits.

[99] In view of our conclusions on the principal issue it is not strictly necessary for us to address the three subsidiary issues but we will do so notwithstanding.

**Did the respondents breach an essential term that the Lakeside West building would be an exclusively residential development?**

*The arguments*

[100] The essence of the appellants' argument on this issue is that the units in Lakeside West were marketed and sold on the basis they would be exclusively for residential use. This was an essential term that was breached by the vendors since, by the time settlement was due, the vendors had obtained a variation to the resource consent to permit the use of the Lakeside West units for visitor accommodation. As well, they had introduced commercial uses including a gastro pub and a hairdressing salon.

[101] In response, the second and fourth respondents argue that the Judge was correct to determine this issue against the appellants; there was no term requiring the Lakeside West units to be exclusively residential; if there were such a term it was not essential and, in any event, it had not been breached.

*The Judge's approach*

[102] The Judge's reasoning on this issue was relatively brief. Essentially, the Judge considered cl 1.1 of the Draft Outline Plans and Specifications<sup>23</sup> was nothing more than a general description of what the vendors intended when the agreements were signed and could not be construed as a contractual promise that no commercial or retail activity would take place anywhere in the Building. In any event, the Lakeside West units conformed to the general description. As well, the vendors were entitled in terms of cl 4.9 of the ASPs to alter or vary the Draft Outline Plans and Specifications as they considered appropriate. The appellants were not entitled to

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<sup>23</sup> See above at [21].

claim any compensation, damages, set-off or to make any objection or requisition based on any such alteration or variation provided it did not have a material adverse effect on the value of the units. On the evidence of the valuers, the Judge was not satisfied that any additional noise or disruption as a result of the gastro pub or the business of the hair salon would have a material adverse effect on the value of the units.

[103] On the related issue of the change to visitor accommodation, the Judge found that the QLDC required the registration of an encumbrance on the titles to the Lakeside West units in order to provide two accessible units available for use by persons with disabilities.<sup>24</sup> This was a requirement of the Building Code and was imposed by the QLDC as a condition of granting the resource consents for visitor accommodation.

[104] On this issue the Judge considered the QLDC encumbrance fell within the terms of cl 4.6 of the ASPs.<sup>25</sup> He found there was no real challenge to Mr Garrett's evidence that the receivers considered the encumbrance was desirable because it increased the permissible uses of the Building. The Judge accepted this was a genuine and reasonable assessment in all the circumstances. In terms of cl 4.6, the Judge considered it was sufficient if the vendors considered the encumbrance was desirable for the use of a Building and did not have a material adverse effect on the value of the units.

[105] In that respect Mr Humphries, an expert witness for the appellants, considered the encumbrance did adversely affect the value of the units. He allowed a 2.5 per cent reduction on that account. On the other hand, Mr Schellekens, an expert witness for the second and fourth respondents, considered the encumbrance, taken with the resource consent permitting visitor accommodation, enhanced the value of the units by providing additional use rights. On the evidence, the Judge found the encumbrance did not materially adversely affect the value of the units and that it was permitted by the terms of the ASPs.

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<sup>24</sup> *Sun*, above n 3, at [123]–[131].

<sup>25</sup> See above at [27].

*The evidential background*

[106] The Draft Outline Plans and Specifications showed blank spaces on each side of the entry lobby at level three of the Lakeside West building. Mr Garrett said in evidence that after the receivers had been appointed, consideration was given to creating a workable structure for the ownership and operation of retail spaces in Lakeside West and Kingston West. In creating KVHL and KVL as subsidiaries, the intention was that KVL would act in a management capacity in relation to both Lakeside West (if required) and Kingston West. KVL was also to interact with the body corporates established for those buildings and the manager of the hotel intended to be part of Stage 1. In October 2010 KVL entered into two hotel management agreements with Hilton International. The first provided for the hotel to be operated under the Hilton brand. The second provided for Hilton to manage the Kingston West units as a hotel operation.

[107] Mr Garrett's evidence was that Lakeside West did not have a resource consent for use as visitor accommodation. This term as defined in the QLDC District Plan permitted the units to be used by short-term visitors on a fee-paying basis for terms of less than three months. A resource consent was obtained on 4 October 2010 authorising Lakeside West to be used for residential and visitor accommodation. This was to enable unit holders in Lakeside West to derive income from their units by making them available for short-term visitors as well as giving the unit holders the opportunity to include their units in the hotel pool operated by Hilton. According to Mr Giddens' evidence, the consent also authorised the sale of liquor from "visitor accommodation facilities", namely a bar or restaurant within the building and associated room service and mini-bar facilities.<sup>26</sup> It appears to be common ground that the sale of liquor was to be in connection with the gastro pub and mini-bars in the individual units.

[108] Before Lakeside West could be used for visitor accommodation, it was necessary to obtain a certificate from the QLDC under s 224(f) of the Resource Management Act confirming that the building complied with the requirements of the Building Code. Amongst other things, this required units to be

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<sup>26</sup> Mr Giddens was an expert witness for the appellants.

provided that were accessible for persons with disabilities. Agreement was reached with the QLDC to issue the necessary certificate on condition that two of the Lakeside West units were converted to provide the necessary access. In that context, the QLDC required an encumbrance to be entered into between KVHL as the encumbrancer and QLDC as encumbrancee. The operative clause of the encumbrance provided:

**Covenant restricting use as visitor accommodation**

The Encumbrancer covenants and agrees with the Encumbrancee as a covenant for the benefit of the Encumbrancee, that without the consent of the Encumbrancee, no Unit may be used for the purpose of visitor accommodation other than while it is managed and/or operated by the same person or persons who manage and operate the accommodation business from the building comprised in Unit Plan DP422631 (Otago Registry).

*Analysis*

[109] Mr Mills' principal argument was that the Judge had erred by relying on cl 4.9 and treating the commercial use issue as turning on matters of valuation. Instead, the Judge ought to have asked the prior question: was the pleaded term an essential one? If it were, counsel submitted cl 4.9 did not permit the variation of such a term.

[110] On this issue we accept Mr Goddard's submission that the Judge's reasoning is sound. We accept the Lakeside West units are described as residential but we do not consider there is any term in the ASPs that could be construed as a contractual obligation to exclude all commercial uses. Even if there were such a term, it could not be construed as essential since cl 4.9 specifically permits the Draft Outline Plans and Specifications to be varied or altered as the vendors consider appropriate. This is subject only to the proviso that the change does not have any material adverse effect upon the value of the Unit. On that point, the Judge's unchallenged conclusion on the evidence was that neither the gastro pub nor the hairdressing salon had any such effect.

[111] As to the gastro pub, we note it is located in a position on level 3 where it may be accessed from public areas. The Wakatipu Steps are located immediately to the west of the Lakeside West building. The Hilton hotel is also located in close

proximity on the opposite side of the Wakatipu Steps in the Reserve North building. The Kingston West building is located immediately to the south of the Lakeside West building. In that direction, the gastro pub opens onto a public access area between these two buildings. It was not clear to us whether there may be some access directly from the Lakeside West units into the gastro pub. However, it is plain that the principal access is from public areas adjoining the Lakeside West building. As the Judge accepted, the location of the Lakeside West building is such that the purchasers must have been aware that their units would be located in the vicinity of substantial hotel developments and the public areas adjoining them.

[112] As to the hairdressing salon, there is nothing to suggest it is anything other than a facility useful to unit owners and visitors alike. It too is accessed from public areas at level 3.

[113] We also agree with the Judge that the QLDC encumbrance was specifically permitted by cl 4.6 of the ASPs. The encumbrance was required by a statute, regulation or Relevant Authority in terms of cl 4.6(b). It was also deemed necessary or desirable by the vendors for the purposes of cl 4.6(c). The sole discretion reserved to the vendors in that respect is subject only to the proviso that the encumbrance is not to have any material adverse effect on the value of the Property. Again, the Judge's unchallenged conclusion on the evidence was that the encumbrance did not have any such effect. On Mr Schellekens' evidence, which it was open to the Judge to accept, the encumbrance, taken together with the resource consent permitting visitor accommodation, enhanced the value of the units by providing additional use rights. Mr Humphries' evidence of the 2.5 per cent reduction in value arising from the encumbrance was de minimis.

[114] This conclusion is consistent with the evidence of Dr Ho himself. This was that he intended to let his unit for investment purposes and to use it after his retirement as a holiday home as required. Indeed, the complaint in the High Court appears to have been that the appellants were restricted in their choice of visitors by the arrangement with the Hilton. The complaint was not directed to the use of the units for visitor accommodation per se. The use of the units in Lakeside West for visitor accommodation under the management of the Hilton hotel may be viewed as



enhancing the value of the units as an investment while not precluding the owners from residing in their units for such periods as they see fit. That conclusion is supported by the evidence of the valuers.

[115] Mr Mills relied on other matters he submitted contributed to a breach of the pleaded terms. He referred to the sale of liquor in the bar and mini-bar facilities; the introduction of a coachpark in the vicinity of the Lakeside West building; and changes to car parking arrangements. We are satisfied these matters were not pleaded. Nor were they referred to in closing submissions in the High Court. With the possible exception of the sale of liquor associated with the gastro pub, they do not amount to a breach of the pleaded term prohibiting commercial uses.

[116] The Judge made no findings in these respects and we do not consider it appropriate to expand the scope of the appeal to include consideration of any of these matters. In any event, none of these additional matters affords any basis to alter our conclusions for the reasons given.

**Did the respondents breach an essential term that the common property in the Kingston West building would include as a minimum the areas necessary for the servicing of the appellants' units and the operation of the hotel?**

*The arguments*

[117] It is common ground that it was never intended the appellants would have any right personally to occupy units in the Kingston West building. Rather, the Kingston West ASPs provided that the building would be leased on a long term basis to a hotel operator. The complaint made by the appellants under this heading is that unallocated space shown in the Draft Outline Plans and Specifications for the Kingston West ASPs was wrongly allocated to KVHL for use as Management Units in connection with the operation of the hotel. The appellants' argument is that the unallocated space should have been owned by them as common property including, as a minimum, the basic services needed for their unit (water, gas, utilities, boiler, PABX, maintenance) and the areas necessary to run a hotel such as reception, lobby, luggage storage, front- and back-of-house facilities. Instead, the common property was reduced to lifts, corridors, driveways and a narrow passage through the hotel reception to the lifts.

[118] In response, Mr Goddard submitted the Judge was right to conclude there was no restriction in the ASPs over what KVHL could do with the unallocated areas. The ASPs contemplated Management Units and there was no breach by KVHL to allocate those units to itself. Even if there were such a term, it could not be regarded as essential given the ability of the vendors to vary or alter the terms of the lease.

*The Judge's findings*

[119] Gilbert J found that in December 2010 a number of areas within the Kingston West Building were incorporated into a Principal Unit, PU323KW. These areas included facilities for conferences, pre-functions, reception, luggage, offices, maintenance, a boiler, rubbish, water, gas, utility, plant, a cinema, PABX, toilets, a staffroom and various inter-floor ducts.

[120] The Judge referred to two definitions in the Kingston West ASPs relevant to this issue:

**“Common Property”** means the common property to be vested in the Body Corporate following deposit of the Unit Plan.

...

**“Unit Plan”** means the unit plan to be prepared in accordance with the Act to be deposited in respect of the Land and which, subject to the provisions of this agreement, will be based upon the content and intent of the Draft Outline Plans and Specifications.

[121] As the Judge noted, the Draft Outline Plans and Specifications refer only in general terms to facilities associated with the hotel and to general building services. However, they do not specify whether any such areas or facilities would be included in the common areas.

[122] Addressing the Draft Outline Plans and Specifications, the Judge said:

[86] The plans attached to most of the agreements contain little detail. They show the car parking units on levels 1, 2 and 3 and the location of the lifts, stairways and lobby entrance doors. The accommodation units are shown on levels 4 to 7. These are numbered and each purchaser signed alongside the particular unit being purchased. Significant areas, particularly on level 4, are left blank. Again, there is no indication as to whether these areas will be principal units or part of the common property.

[123] The Judge found no assistance in the further detail provided in the application to the QLDC for resource consent. Although the consented plans described the intended use of particular areas, they said nothing about whether those areas were to form part of the common area.

[124] Noting that common property is defined in s 3 of the Unit Titles Act 1972 (in force at the relevant time) as meaning “so much of the land as is not comprised in any unit”, the Judge identified the critical issue to be whether the vendor was obliged to include any of these areas in the common property or whether it was entitled to create principal units in respect of them.

[125] Although the Draft Outline Plans and Specifications do not show any Management Units, the Judge noted that the template lease attached to the ASPs for Kingston West defines “Management Unit” as meaning “Principal Units [ ] on the Unit Plan”. It also refers to the “Management Unit Lease” as meaning the “lease in respect of the Management Unit”. The Judge considered this showed that the parties anticipated the creation of Management Units. He agreed with a submission made by counsel for the respondents that it was most likely these Management Units would be created in the spaces left blank. There was nothing to indicate this would not be the case.

[126] The conclusion reached by the Judge was that there was nothing in the ASPs obliging the vendor to include the areas now comprised in Principal Unit 323KW in the common property.

*The terms of the Kingston West ASPs in more detail*

[127] As earlier noted, the terms of the Kingston West ASPs are materially identical to the Lakeside West ASPs with the exception of the terms relating to the hotel lease. Although the body of the Kingston West ASPs do not refer to a lease, a Lease Addendum is attached to the ASPs along with a further annexure described in the High Court as the template lease. At the beginning of the Lease Addendum, these words appear: “To Be Signed And Read In Conjunction With Kingston West Agreement Form”.

[128] The first three paragraphs of the Lease Addendum are set out in full:

**Request for Lease**

- A. The Vendor shall procure a lease of the Property from the Lessee<sup>27</sup> on the terms set out below. The Lease shall be in the form of the Lease with such modifications or in such other form as the Vendor and the Lessee may reasonably require provided that such modifications or other form do not materially and detrimentally affect the value of the Unit and provided further that the term of the Lease must commence prior to the settlement date (such date being the “**Commencement Date**”). The Vendor and Lessor agree that the Property shall be sold subject to such Lease and the commencement date of the Lease shall be prior to the Settlement Date. The Vendor and the Purchaser requests a Lease from the Lessee in the form attached or as converted into a deed of lease form in the Vendor’s absolute discretion.

**Rental and Term**

- B. The Lease shall provide that the Lessee agrees to pay the Lessor a fixed rental equal to 6% net per annum (plus GST) of the purchase price (GST Exclusive) for a period of three years from the Commencement Date. The Term of the Lease shall be determined by the Vendor but the initial term of the Lease (including renewals) shall not be greater than 20 years with further renewal periods of no more than 10 years in total.

**Possession**

- C. In consideration of the Lessee paying the rental due pursuant to the Lease for the term the Lessor grants the Lessee the right of possession and right to manage and/or lease the Property for the term and the Lessor shall have no rights to possession of the Property during the term (together with any renewals).

[129] The lease then contains certain other terms and provides for the amendment or insertion of terms in the ASPs relating to the lease. These include a term that the purchaser and the vendor agree that the Property is sold subject to the lease. The ASPs are also to include a warranty by the vendor that, as at the settlement date, the vendor would have put in place contractual arrangements between the vendor and the lessee to manage the Building, the Property and the letting of the Property.

[130] In the Lease Addendum, the “Lease” is defined as meaning the lease attached to the addendum; the “lessee” is defined as meaning an entity nominated by the

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<sup>27</sup> The lessee is defined in the Lease Addendum to mean an entity nominated by the Vendor as lessee under the Lease, and its successors and assigns.

vendor as lessee; and “lessor” is defined as meaning the entity leasing the property pursuant to the lease, such entity initially being the vendor and, on settlement, being the purchaser, and subsequently being entities to whom the property is transferred subject to the lease.

[131] As the Judge noted, the reference to Management Units and a Management Unit Lease appears for the first time in the template lease in the definitions already mentioned. The Management Unit Lease is also referred to in the definition of “Operating Costs” in the template lease:

- (m) all rent, expenses and outgoings incurred by the Lessee in its capacity as lessee in respect of the Management Unit Lease and the lease of other hotel areas including but without limitation, food and beverage areas, retail areas, spa and recreational facility areas.

[132] Operating Costs are specifically excluded from “Ownership Costs”, which are those outgoings relating to the ownership of the Unit to be met by the owner including items such as rates, insurance, body corporate levies and connection charges for utilities.

[133] The template lease also included provisions about the term of the lease which we will refer to in more detail when considering the final issue on appeal.

### *Analysis*

[134] It is not in dispute that the Unit Titles Act provided at the relevant time for principal units, accessory units and common property “being so much of the land as is not comprised in any unit”.<sup>28</sup> However, the critical question is whether, and to what extent, the parties to the Kingston West ASPs agreed that the unallocated areas on levels 3 and 4 could be allocated as Principal Units to be owned by KVHL rather than the appellant owners of individual units in that building.

[135] Regrettably, as the Judge found, the Kingston West ASPs and the annexed documents contain little guidance on this issue. However, we agree with the Judge that the reference to “Management Units” and to a “Management Unit Lease” in the

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<sup>28</sup> Unit Titles Act 1972, s 3(1)(b).

template lease suggests the parties contemplated the allocation of Management Units as Principal Units on the Unit Plan. When combined with the reference to operating costs incurred by the lessee in respect of the Management Unit Lease and the lease of other hotel areas, it is reasonable to infer that the parties contemplated the allocation of principal units to KVHL as the initial lessee for hotel management purposes.<sup>29</sup>

[136] Since the location and extent of the Management Units is not marked on the Draft Outline Plans and Specifications, those units could only be located in the unallocated spaces shown on the plans. Christopher Moore, an expert witness called by the respondents, acknowledged this point. He also accepted it was not unusual for plans such as those attached to the Kingston West ASPs to be incomplete, with the understanding they would be detailed by the time the Unit Plan is deposited.

[137] The thrust of Mr Moore's evidence was about what he would normally expect to find in a lease to a hotel operator in a development such as Kingston West. His expectation was that the principal hotel facilities such as reception, conference, food and beverage areas as well as front- and back-of-house areas would be included as common property owned by the body corporate to be established. So too the basic services necessary for the residential units. He considered it important for the unit owners to have control of these facilities if, for example, there were a change of hotel operator. In Mr Moore's view, the Management Units referred to in the template lease would normally be confined to items such as an office and a staff room.

[138] In contrast, John Harkness gave expert evidence for the respondents to the effect that he would have expected the Management Units to include those parts of the building required for the efficient operation of the hotel business such as offices, reception, front-of-house and similar functions.

[139] In the end, evidence as to what would normally be expected as common property in a development such as Kingston West is of little assistance. We are satisfied the Judge was right to conclude that the Kingston West ASPs were so

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<sup>29</sup> By the time the final lease was delivered, the lessee was KVL.

lacking in detail as to the areas to be allocated as common property that it is not possible to identify any specific contractual obligation as to the location and extent of such areas. All that can be said with any confidence is that it is likely the parties intended that Management Units for hotel purposes would be retained in the ownership of the vendor/lessee and that these units would be allocated by the vendor out of the areas shown to be unallocated on levels 3 and 4 in the Draft Outline Plans and Specifications.

[140] This conclusion is consistent with cl 4.9(a) of the Kingston West ASPs in which the purchasers acknowledge that the Draft Outline Plans and Specifications represent the vendor's current intentions and that the Development will need to be evolved and detailed as it progresses. The conclusion is also consistent with cl 4.9(b) which reserves wide powers to the vendor to vary, alter, add to or omit parts of the common property in such manner as the vendor considers appropriate. As earlier noted, this power is subject to the proviso that the alteration or variation does not have a material adverse effect on the value of the units.

[141] The Judge did not find it necessary to make any finding on valuation issues or whether, if the pleaded terms were established, it was essential. Mr Mills made no submissions on the first point but submitted the term must have been regarded as essential. Mr Goddard referred to Mr Schellekens' evidence that the effect of the incorporation of property into PU323KW was nil or extremely minor. He also submitted the existence of cl 4.9 pointed strongly against the pleaded term being essential. We agree.

**Did the respondents breach an essential term that the lease to the hotel operator for Kingston West would not exceed a term of 30 years?**

*The arguments*

[142] This ground of appeal relates to 24 of the 45 appellants who purchased units in Kingston West with the first version of the attached Lease Addendum. Clause B of the Lease Addendum (set out above at [128]) provides that the term of the lease to a hotel operator is to be no greater than a total of 30 years (20 years with further renewal periods of no more than 10 years in total). The lease ultimately tendered at

settlement was for a total term of 40 years (comprising an initial term of 10 years, with six rights of renewal, each of five years).

[143] It is not in dispute that the lease tendered did not conform to the maximum 30-year term referred to in the Lease Addendum at the time the Kingston West ASPs were signed. The position of the affected Kingston West appellants is that the maximum 30-year period was an essential term that was breached by KVHL as vendor. It followed that KVHL was not ready, willing and able to settle at the time the relevant Kingston West ASPs were due for settlement. Those appellants were entitled to treat KVHL's breach as a repudiation which they accepted. In consequence, the ASPs relating to these appellants were validly cancelled.

[144] In response, Mr Goddard's submission was that the Judge correctly found that any breach in relation to this issue was not essential.

#### *The Judge's findings*

[145] The Judge began by rejecting a submission made by the appellants' then counsel that the tender of a lease with a potential maximum term of 40 years was a defect in title with the consequence that the vendor was not ready, willing and able to settle. That submission was based on the decision of this Court in *Holmes v Booth*.<sup>30</sup> The Judge distinguished that decision on the footing that the difference between the potential maximum terms of 30 and 40 years was a misdescription of little significance since the difference had no material impact on the value of the units. The Judge considered that, either way, the units were subject to long-term leases intended to provide a return to the appellants who were purchasing the units as investments. There was no evidence that any of them intended to occupy the units personally at the expiry of the 30-year term. He also accepted Mr Schellekens' evidence that the discrepancy relating to the terms of the leases had no impact on value as borne out by the sales evidence. Finally, the Judge considered there was no basis for a conclusion that the affected appellants would not have entered into the ASPs if they had known of the misdescription.

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<sup>30</sup> *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA).



## *Analysis*

[146] Mr Mills submitted the discrepancy in the length of the lease term was not a misdescription but constituted a defect in title. He also submitted the Judge was wrong to determine the issue of essentiality wholly or mainly by an inquiry into the effects on the value of the units. Rather, the correct approach in terms of *Mana Property* was to determine on an objective basis whether the appellants would probably not have entered into the ASPs if the maximum potential term was 40 years rather than 30 years.<sup>31</sup>

[147] The Kingston West ASPs contain two clauses relevant to this issue:

- 10.1 Requisitions:** The purchaser is deemed to have accepted the Vendor's title for the Property and will not issue objections or requisitions on it.
- 10.2 Errors and Misdescriptions:** No error or misdescription of the Property or title shall annul the sale and no compensation shall be made or given.

[148] Mr Mills submitted there was no misdescription in terms of cl 10.2 of the ASPs relying on the majority view of the Supreme Court in *Property Ventures* to the effect that a misdescription is an error in the description of the property at the date of the agreement.<sup>32</sup> Here, counsel submitted there was no error of that kind at the time the ASPs were signed.

[149] Whether or not this is so, we are satisfied a court will not order specific performance of a sale against an unwilling purchaser if the effect of a breach or of an error in description is such that it may reasonably be inferred that the purchaser would probably not have entered into the agreement if the purchaser had been aware of it at the time of contracting. This proposition was affirmed by all members of the Supreme Court in *Property Ventures*,<sup>33</sup> citing the principle established in *Flight v Booth*.<sup>34</sup> This approach is consistent with the right of cancellation conferred by s 7

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<sup>31</sup> *Mana Property*, above n 14.

<sup>32</sup> *Property Ventures*, above n 22, at [57].

<sup>33</sup> At [10] per Elias CJ, at [55] per Blanchard, McGrath and Wilson JJ, and at [105] per Tipping J.

<sup>34</sup> *Flight v Booth* (1834) 1 Bing (NC) 370, 131 ER 1160 (CP).

of the CRA as already discussed and applies notwithstanding provisions such as cl 10.2 in the Kingston West ASPs at issue here.<sup>35</sup>

[150] As the Supreme Court held in *Mana Property*, in considering whether the parties have impliedly agreed that a term of a contract will be essential, the question is one of interpretation.<sup>36</sup> That involves ascertaining the intention of the parties from the language of the particular term read in the context of the contract as a whole and in the light of the surrounding circumstances when it was made. The Supreme Court emphasised that what must have been in the contemplation of the parties concerning the likely effect of a breach of the term at issue will be of particular importance.

[151] Whether the effect of the breach is to diminish the value of the property being purchased and the extent of any such reduction in value may also be material but is not necessarily decisive. For example, in a case such as *Mana Property*, the difference between the area of land stipulated and that delivered was minimal but, in the context of a contract for the sale of high-value land to a developer, the court was willing to find that the term was regarded as essential by the parties notwithstanding. Similarly, in *Holmes v Booth*, a term that the property being purchased be free of any tenancies beyond those of a monthly nature was found to be essential despite the absence of evidence that a breach of the term would have had a material effect on the value of the property being purchased.<sup>37</sup>

[152] We are not persuaded the Judge was wrong to conclude that a maximum potential lease term of 30 years was not essential to the appellant purchasers. We acknowledge that cl B of the Lease Addendum was expressed in reasonably emphatic language (“shall not be greater than”) but the purpose and context of the lease is important. The units were being acquired by the appellants purely for investment purposes. They must be taken to have been concerned solely or mainly with the return on their investment which was set for the initial three years at 6 per cent of the purchase price and thereafter in terms of a formula set out in the lease. No complaint is made about the rental terms.

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<sup>35</sup> See for example the views expressed by the majority of this Court in *Holmes v Booth*, above n 30, at 191,636 per Casey J and at 191,642 per Gault J.

<sup>36</sup> *Mana Property*, above n 14, at [24].

<sup>37</sup> Above n 30.

[153] Second, the Judge accepted Mr Schellekens' evidence that the difference between the maximum potential terms of 30 and 40 years respectively had no material effect on the value of the units. This was dramatically demonstrated by evidence that identical units in similar parts of the building were sold for the same price irrespective of whether the terms were 30 or 40 years.

[154] Third, the purchasers were committing in any event to a long term lease for up to 30 years. Any issue about re-negotiating a new lease at the expiry of the 30-year term was therefore only a distant prospect at the time the ASPs were signed.

[155] Finally, although we accept it is not decisive, the issue of the term of the lease was not raised at the time of settlement or at the time the ASPs were cancelled. As the Judge noted, this issue was first raised at trial and was the subject of an amendment to the appellants' claim.

### **Summary**

[156] On the principal issue of interpretation, we have concluded, contrary to the view of Gilbert J, that it was an essential term of the ASPs for both Lakeside West and Kingston West that the vendors were obliged to complete Stages 2 and 3. We have found that at the time KVHL called upon the appellants to settle the purchase of their units, KVHL had committed an anticipatory breach of this essential term. This had two consequences. First, KVHL was not ready, willing and able to perform all the terms of the contract between the parties and was not therefore entitled to cancel. Second, KVHL's anticipatory breach of this essential term amounted to a repudiation. The appellants were entitled to accept the repudiation and cancel the ASPs as they did. The appellants were not obliged to perform the ASPs and are entitled to the return of the deposits paid under the ASPs.

[157] In relation to the three subsidiary issues identified above at [7] of this judgment, we have upheld the decision of the High Court that the respondents did not breach an essential term that the Lakeside West building would be an exclusively residential development. Nor was there a breach of the pleaded term that the common property in the Kingston West building would include as a minimum the areas necessary for the servicing of the appellants' units and the operation of the

hotel. We have also found that the Judge correctly concluded that the breach of the term that the lease to the hotel operator for Kingston West would not exceed a term of 30 years was not a breach of an essential term entitling the relevant appellants to cancel the ASPs.

## **Result**

[158] The formal orders of the Court are:

- (a) The appeal is allowed in part.
- (b) The finding in the High Court that the second and fourth respondents were not obliged to complete Stages 2 and 3 of the Kawarau Falls development is set aside.
- (c) The judgments entered in the High Court on the claim and counterclaim are set aside.
- (d) Judgment is entered against the second and fourth respondents on the appellants' claim for the return of their deposits.
- (e) Judgment is entered in favour of the appellants on the counterclaim by the second and fourth respondents.
- (f) The second and fourth respondents are jointly and severally liable to pay the appellants 75 per cent of the costs for a complex appeal on a band B basis and usual disbursements. We allow for second counsel.
- (g) Any issue as to costs in the High Court and any other consequential issues are to be dealt with in that Court.

Solicitors:  
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