IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-007991
[2015] NZHC 126

BETWEEN	HO KOK SUN & ORS Plaintiffs
AND	PENINSULA ROAD LIMITED (In Receivership and in Liquidation) First Defendant
	KAWARAU VILLAGE HOLDINGS LIMITED Second Defendant
	RUSSELL McVEAGH Third Defendant
	MELVIEW (KAWARAU FALLS STATION) INVESTMENTS LIMITED (In Receivership) Fourth Defendant

Hearing:	5 - 23 May 2014
Appearances:	P G Skelton QC and R A Edwards for Plaintiffs D J Goddard QC, M G Colson and T B Fitzgerald for Second and Fourth Defendants
Judgment:	10 February 2015

JUDGMENT OF GILBERT J

This judgment is delivered by me on 10 February 2015 at 3pm
pursuant to r 11.5 of the High Court Rules.

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Deputy Registrar

CONTENTS

Introduction

[1] The plaintiffs signed agreements to purchase 'off the plans' units in Lakeside West or Kingston West, two buildings to be constructed on the shores of Lake Wakatipu, near Queenstown. Lakeside West was marketed as a luxury residential apartment complex. Kingston West was to be serviced apartments operated as a four star hotel.

[2] Lakeside West and Kingston West were to be constructed in Stage 1 of a three stage integrated lakeside resort development known as Kawarau Falls Station (the Kawarau Falls development). This ambitious project was conceived in 2005 during a buoyant period for property development in New Zealand. It was intended to comprise 13 hotel and serviced apartment complexes, restaurants, cafes, bars, shops and associated infrastructure and amenities, including landscaped open spaces for common use.

[3] The global financial crisis occurred before Lakeside West and Kingston West were completed. This had a crippling effect on these types of developments and the market value of the units fell significantly. The original developer, Peninsula Road Ltd, and the assignee of the Stage 1 assets, Melview (Kawarau Falls Station) Investments Ltd, were both placed in receivership in early 2010. The receivers completed Stage 1 but Stages 2 and 3 have not progressed.

[4] The plaintiffs refused to settle following service of settlement notices in late 2011. Kawarau Village Holdings Ltd ("Kawarau Village"), a subsidiary of Melview which had by then taken an assignment of the vendor's rights under the agreements, purported to cancel the agreements in March 2012 and forfeit the deposits. These deposits, totalling some $10 million with interest, are held by Russell McVeagh as stakeholder.[1]

[5] The plaintiffs seek an order for return of their deposits. They claim that Kawarau Village was not ready, willing and able to settle because it was not able to deliver what it had promised under the agreements in various material respects,

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[1] Plaintiff 17's deposit is held by Minter Ellison, not Russell McVeagh.

including the completion of Stages 2 and 3 of the development. The plaintiffs claim that the settlement notices were therefore invalid and the notices of cancellation amounted to a repudiation of the agreements by Kawarau Village. The plaintiffs purported to accept this repudiation and cancel the agreements.

[6] The plaintiffs also claim that the agreements resulted from offers of participatory securities to the public in New Zealand without a prospectus and are therefore void. This claim is based on the fact that the plaintiffs were obliged by the agreements to be members of a precinct society which was to manage communal facilities in all three stages of the development.

[7] Kawarau Village counterclaims for damages for loss of bargain. It claims that the difference between the contract price and the market value of the units at the date of cancellation is approximately $46 million. Taking into account the deposits and accrued interest, the amount claimed totals approximately $36 million. Kawarau Village seeks judgment for this amount and an order directing that the deposits be paid to it.

[8] There is a dispute about the proper interpretation of the agreements and the vendors' obligations under them. It is therefore necessary to review the background facts and circumstances and examine the agreements in detail.

Resource consent

[9] The original application for resource consent for the Kawarau Falls development was made in September 2005 and 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. This 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.

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

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.

Marketing and sale of the units

[11] The units in Lakeside West and Kingston West were marketed for sale in Asia by Austpac Investment Consultancy Ltd pursuant to underwriting agreements with Peninsula Road to market and sell the units. At the time the agreements were entered into, most of the plaintiffs 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. Kawarau Village has taken an assignment of Peninsula Road's rights under all of these agreements.

[12] The plaintiffs 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 which was signed in 2010. Most of the agreements are in the same terms but there are some with minor variations.

[13] Peninsula Road was the vendor under the agreements concluded from 2006 to mid 2008. Melview was the vendor under all subsequent agreements.

The agreements

[14] The agreements follow the form of a template prepared for the developer and allowed for flexibility in the design and specification of the buildings and the overall development.

[15] The key difference between the agreements relating to Kingston West and those relating to Lakeside West stems from the intended use of the units. 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 was guaranteed for the first three years following which the owner would receive rent calculated in accordance with a formula set out in the lease. These units were sold as investments and the owners had no personal occupation rights. Annexed to the Kingston West agreements was a form of lease for the unit, referred to as the "Agreed Lease" or the "Template Lease". By contrast, the Lakeside West units were designed for owner occupation and there was no provision for any lease to a hotel operator.

[16] There is a fundamental dispute concerning the vendor's obligations under the agreements. This is critical to many of the plaintiffs' claims. It is therefore necessary to understand the structure of the agreements and the key provisions before considering the competing contentions. I start by examining the terms of the agreements relating to Kingston West.

Kingston West

[17] The Kingston West agreements are divided into 16 sections and have a number of addendums.

[18] Section 1 sets out key definitions:

> (i) "Unit" means the unit specified in the Particulars of Sale which shall, subject to the terms of the agreement, be shown on the Unit Plan and "Units" means collectively all such units shown on the Unit Plan.
>
> (ii) "Property" means the Unit (including the Furniture, Fittings and Equipment (if any)) and the Carpark (if any).
>
> (iii) "Building" means the building erected or to be erected generally in accordance with the Draft Outline Plans and

Specifications. In the addendum attached to some of the agreements, the word "generally" has been replaced with "substantially".

(iv) "Draft Outline Plans and Specifications" means the outline plans and specifications of the Unit and the Building, a copy of which is annexed to the agreement as Annexure 2.

(v) "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 the agreement, will be based upon the content and intent of the Draft Outline Plans and Specifications.

(vi) "Land" means that part of the Precinct Land on which the Development is to be undertaken.

(vii) "Development" means the development of the Building and immediately adjoining land by way of a curtilage to the Building in accordance with the Agreement.

(viii) "Common Property" means the common property to be vested in the Body Corporate following deposit of the Unit Plan.

(ix) "Body Corporate Rules" means the Body Corporate Rules in the form attached to the Act subject to such revisions and variations as the Vendor shall consider appropriate for the benefit of the Building or the proper and efficient operation of the Body Corporate.

(x) "Precinct" means the development to be undertaken on the Precinct Land.

(xi) "Precinct Land" means the land [covering Stages 1, 2 and 3 of the Kawarau Falls development].

(xii) "Precinct Amenities and Infrastructure" means all amenities and infrastructure and associated works from time to time within the Precinct intended for common use by all Owners.

(xiii) "Precinct Management Agreement" means the agreement entered into by the Vendor and the Precinct Manager for the management of the Precinct in accordance with clause 5.8.

(xiv) "Precinct Society" means the Kawarau Falls Station Precinct Society Incorporated (to be formed).

(xv) "Precinct Rules" means the rules of the Precinct Society in the form required by the Vendor.

(xvi) "Memorandum of Encumbrance (Precinct)" means the memorandum of encumbrance for securing levies and contributions payable to the Precinct Society in the form required by the Vendor.

(xvii) "Consents" means 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.

(xviii) "Settlement Date" means the later of:

1. the tenth Working Day after the date upon which the Vendor's solicitor has provided the Purchaser's solicitor with a copy of the Certificate of Practical Completion; and

2. the tenth Working Day after the date upon which the Vendor's solicitor has provided the Purchaser's solicitor with a search copy (as defined by s 172A of the Land Transfer Act 1952) of the new stratum estate certificate of title for the Unit and the Carpark.

[19] Clause 1.2 provides that if there is any conflict between the provisions of the Unit Plan and the terms and conditions of the Consent, the latter shall take precedence.

[20] Section 2 of the agreement is headed "Conditions, Rights of Cancellation and Force Majeure". Clause 2.1 provides that the agreement is conditional on the following:

(a) the Vendor obtaining by 31 December 2008 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 2008, on terms acceptable to the Vendor acting in its sole discretion, the Consents;

(c) the Vendor confirming by 31 December 2008 that the projected construction costs for the Development are acceptable to the Vendor acting in its sole discretion; and

(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.

[21] Of particular relevance in this section is cl 2.9 which provides:

> **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.

[22] Section 4 of the agreement is headed "Development and Issue of Title". Clause 4.1 is headed "Disclosure and Acknowledgements" and relevantly provides:

> The Vendor discloses and the Purchaser acknowledges and agrees that (subject to any express provision to the contrary herein):
>
> ...
>
> (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.
>
> ...
>
> (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.
>
> ...
>
> (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.
>
> ...
>
> (m) the Vendor may, before or after Settlement, create or agree to the creation of (including by or for the Body Corporate) easements (including easements for structural support, rights of way and service easements), rights and other interests of the type referred to in clause 4.6 which may affect the Land, the Building, the Common Property, the Precinct Amenities and Infrastructure and/or the Unit, provided that such easements, rights and other interests shall not have a material adverse effect on the value of the Unit.

[23] Clause 4.2 is headed "No requisitions" and provides:

> 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.

[24] Clause 4.3 is headed "Unit Plan" and provides:

> The Vendor shall at such time as the Vendor considers appropriate (in its reasonable discretion):
>
> (a) submit the plans for the Development to the Relevant Authority to obtain the Consents;
>
> (b) implement the Consents;
>
> (c) carry out all work necessary to subdivide the Building to create the Units as contemplated, subject to the terms of this Agreement, in the Draft Outline Plans and Specifications; and
>
> (d) prepare and deposit the Unit Plans in the Otago Registry of Land Information New Zealand.

[25] Clause 4.6 is headed "Easements, encumbrances, rights and obligations" and provides:

> 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.

[26] Clause 4.8 is headed "Measurements" and relevantly provides that:

> neither party shall be entitled (except only as provided in this clause) to bring any claim whatsoever against the other based on any such variation of measurements, nor shall either party be entitled to claim any compensation, damages, right of set-off or to make any objection or requisition based on such variation except where the area of the Unit as indicated in the Draft Outline Plans and Specifications exceeds the final measured area of the Unit... by more than:

(a) 5%, in which case the Purchase Price for the Unit shall be reduced by the percentage exceeding 5% by which the measured area of the Unit is less than that indicated in the Draft Outline Plans and Specifications; and

(b) 15% in which case the Purchaser may within 10 Working Days of becoming aware of the size adjustment cancel this Agreement, and apart from the Vendor's obligation to refund the deposit neither party shall have any further claim or right against the other. If the Purchaser fails to exercise its right of cancellation under this clause within the 10 Working Day period the right of cancellation shall lapse.[2]

[27] Clause 4.9 is headed "Variations to the Draft Outline Plans and Specifications" and provides:

> 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 agreement deals with the Precinct Society. Clause 5.2 contains an acknowledgement by the purchaser 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. The purchaser is obliged to be a member of the Precinct Society, which is to be incorporated prior to settlement. The purchaser must also comply with the Precinct Rules, pay any levy set by the Precinct Society and comply with the directions of any Manager engaged by the Precinct Society.

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[2] In some of the agreements the reference to 15% in this clause has been replaced with 10%.

[29] Clause 5.6 permits the vendor to amend the Precinct Rules prior to the Settlement Date as necessary or desirable in its reasonable discretion but any such amendments shall not materially detract from the value of the Unit.

[30] The plaintiffs place particular reliance on cl 5.7 which is headed "Disclosure" and provides:

> 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.

[31] Section 6 is headed "Undertaking of Development". Clause 6.1 provides:

> **Vendor to Build**: The Vendor shall ensure construction of the Development (including in respect of the Unit) is undertaken in a proper and workmanlike manner and, save as otherwise set out in this Agreement, completed substantially in accordance with the content and intent of the Draft Outline Plans and Specifications and in accordance with all statutory, regulatory by-laws and requirements of relevant authorities.

[32] Clause 6.2 provides:

> **No money to be retained**: On Settlement the Purchaser shall not retain any money for extras, set-off, deduction or otherwise.

[33] The next relevant provisions are contained in Section 10 which is headed "Title, Boundaries, Etc". Clause 10.1 provides that the purchaser is deemed to have accepted the vendor's title for the Property and will not issue objections or requisitions on it. Clause 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.

[34] Section 12 deals with default and is in common form. It allows either party to serve a settlement notice if the sale is not settled on the Settlement Date. The settlement notice will only be effective if the party serving it is in all respects ready, able and willing to proceed in accordance with the notice or is not ready, able and willing to settle only by reason of the default or omission of the other party to the

agreement. If the purchaser does not settle within 12 working days after the date of service of the notice, the vendor may cancel the agreement, forfeit the deposit and sue for damages.

[35] Section 16 contains some general provisions of relevance. Clause 16.6 is headed "Documentation on Settlement" and provides:

> Upon the balance of the Purchase Price, interest and other monies, due under this Agreement, being paid or satisfied as provided in this Agreement (credit being given for any amount payable by the Vendor ...), the Vendor shall concurrently hand to the Purchaser:
>
> (a) a discharge of any mortgage registered by the Vendor's financiers;
>
> (b) a registrable transfer instrument of the Property, to be prepared by and at the expense of the Purchaser and tendered to the Vendor's solicitor, at least five (5) Working Days prior to the Settlement Date, executed by the Purchaser if necessary; and
>
> (c) the certificate under Section 36 of the [Unit Titles Act 1972].

[36] Clause 16.8 is headed "Representation" and contains an acknowledgment by the purchaser that notwithstanding anything contained in any brochure, report or other document, the purchaser has not been induced to execute the agreement by any representation, verbal or otherwise, made by or on behalf of the vendor, which is not set out in the agreement. The clause also records the parties' acknowledgment that the entire agreement between them is contained in the agreement, the annexures and any other attachments to the agreement, together with any approvals and consents in writing provided for in the agreement and given prior to the execution of the agreement.

[37] Draft Outline Plans and Specifications were annexed to each of the agreements. There are two different versions of these. One is in very general terms, showing little more than the location and position of the hotel units. The other version specifies the intended use of the various spaces in the Building that were not hotel rooms. However, it does not specify how those spaces are to be owned or managed.

[38] The "Lease Addendum" provides for the lease of the Property that the vendor is required to procure prior to settlement. This relevantly provides:

Request for Lease

A. The Vendor shall procure a lease of the Property from the Lessee[3] 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 request the 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

A. 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.[4]

[39] The Lease Addendum adds a further section to the Agreement, Section 17, which is headed "Lease". This contains the parties' agreement that the Property is sold subject to the Lease. The Lease Addendum also contains a vendor's warranty that, as at the Settlement Date, the vendor will have put in place contractual arrangements between the vendor and the Lessee to manage the Building, the Property and the letting of the Property.

Lakeside West

[40] The Lakeside West agreements are in substantially the same form as the Kingston West agreements except that there is no provision for a lease to a hotel operator. The Draft Outline Plans and Specifications are more specific in describing the intended uses of areas other than the Units. They refer to a residents' lounge on level 2 and a spa pool, sauna and gymnasium on level 1. However, other large spaces are left blank on the plans of level 3. Two of these spaces have been leased

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3 The lessee is defined to mean an entity nominated by the Vendor as lessee under the Lease, and its successors and assigns.

4 The Lease Addendum in some of the Agreements provided for a term of up to 40 years.

for use respectively as a gastro pub and a hair salon.[5] The plaintiffs contend that these leases were in breach of the agreements and that these areas should have formed part of the Common Property.

Agreements relating to other buildings in Stage 1

[41] Peninsula Road entered into other sale and purchase agreements for units in Reserve North, Reserve South and Reserve Central buildings. The purchasers under these agreements were also required to be members of the Precinct Society.

Stage 1 split from Stages 2 and 3

[42] In September 2007, the land was subdivided and the stages were split with Melview taking over Stage 1 and Peninsula Road retaining Stages 2 and 3. Melview took an assignment of the agreements for sale and purchase relating to Stage 1 and the Austpac underwriting agreements.

[43] Melview was placed in receivership in May 2009. The receivers resolved to continue with the construction of Stage 1.

[44] Melview assigned the Stage 1 assets, including the agreements and the Austpac underwriting agreements, to Kawarau Village in October 2010. Kawarau Village is wholly owned by Melview and its directors are the receivers of Melview or employees of the receivers.

Alleged breaches of the agreements

[45] The plaintiffs complain that they did not receive what they were promised under the agreements in a number of material respects. I now summarise each of these complaints.

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[5] On the Draft Outline Plans and Specifications annexed to the agreement signed by plaintiff 56, the space currently used as a gastro pub was marked "Residents' Lounge" rather than being left blank.

Non completion of Stages 2 and 3

[46] As noted, Stages 2 and 3 did not progress after Peninsula Road was placed in receivership and in liquidation in March 2010. The plaintiffs claim that the agreements obliged the vendor to complete these stages and that it was accordingly in breach for failing to do so.

Kingston West

Alienation of Common Property

[47] In December 2010, when certificates of title were issued for the Principal Units in Kingston West, a number of areas were incorporated into a private title shown as Principal Unit 323KW. These areas comprised conference, pre-function, reception, luggage, offices, maintenance, boiler, rubbish, water, gas, utility, plant, cinema, PABX, toilets, staff room and various ducts between floors. The plaintiffs complain that this was an unauthorised alienation of common property to which they were entitled under the agreements.

Common property lease

[48] In May 2011, a lease of the common property between the Body Corporate as lessor and Kawarau Village as lessee was registered against the Kingston West titles. The lease covered "all areas designated Common Property on the Unit Plan excluding exterior walls and roof areas." The rent was $1 per annum if demanded. The term, assuming exercise of all rights of renewal, was 40 years. The plaintiffs say that this lease was not authorised under the agreements and is a defect in title.

Hotel lease

[49] The Kingston West titles were issued subject to a registered lease which the plaintiffs claim is materially different to the Agreed Lease. The plaintiffs objected to this lease and Kawarau Village therefore proposed to register a replacement lease in November 2011. However, the plaintiffs also object to the terms of this lease for two reasons. First, the proposed lease was for a term of 40 years whereas some of the

plaintiffs signed agreements allowing for a term of no more than 30 years. Second, the definition of "Operating Costs" was modified to include "Hotel Business" costs and "Management Unit" costs. The plaintiffs say that these changes would require them to share in the costs of the hotel business and the costs of the management units, including PU323KW, which they contend should have formed part of the Common Property.

Body Corporate Rules

[50] Body Corporate Rules were registered against the Kingston West titles in January 2011. As a result of various objections raised by the plaintiffs, the Body Corporate adopted a revised set of Body Corporate Rules which Kawarau Village proposed to register prior to settlement. The plaintiffs contend that the new rules confer rights to control parts of the common property on the hotel operator and correspondingly limit their rights in breach of the agreements.

Lakeside West

[51] Kawarau Village made a number of changes to the Lakeside West building and titles to enable those units to be included in the pool of hotel units available for management by the Hilton Hotel. The plaintiffs contend that each of these changes had a material adverse effect on the value of their units. The plaintiffs say that these changes are inconsistent with the basis upon which the Lakeside West units were sold, namely as luxury residential apartments.

QLDC encumbrance

[52] Kawarau Village registered an encumbrance against the titles to the Lakeside West units. This prohibited the units from being used for visitor accommodation unless managed by the operator of Kingston West, currently the Hilton. The encumbrance relevantly provides:

> **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 [the Lakeside West Unit Plan].

Alienation of Common Property

[53] The plaintiffs complain that some of the areas designated as Common Property have been taken into private ownership through the creation of principal unit titles.[6] Two of these principal units were then leased for commercial and retail uses as discussed below.

Commercial and retail uses

[54] The plaintiffs contend that they purchased their units in Lakeside West on the basis that the building would comprise residential units only. Contrary to this understanding, Kawarau Village leased two of the principal units for commercial use as a gastro pub and a hair salon.[7]

Body Corporate Rules

[55] The plaintiffs say that the change in use from a residential apartment complex was also reflected in the proposed Body Corporate Rules for Lakeside West. For example, these rules authorise the use of the Lakeside West building to operate as a mixed use development with retail, entertainment and commercial uses. Further, the rules limit the rights of the Body Corporate to deal with and determine the use of common property. The plaintiffs say that these rules are objectionable because they remove or limit their rights.

Cancellation of agreements

[56] In November and December 2011, the plaintiffs' solicitors received settlement statements calling for settlement. On 19 and 20 December 2011, Kawarau Village purported to serve settlement notices requiring settlement within

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6 PU312LW, PU315LW, PU319LW and PU320LW.
7 PU312LW and PU320LW respectively.

12 working days of service. None of the plaintiffs settled and accordingly, in letters dated 15 March 2012, Kawarau Village purported to cancel all of the agreements with the exception of the agreement with plaintiff 94. Kawarau Village subsequently purported to cancel plaintiff 94's agreement on 27 July 2012.

[57] By letters dated 17 April, 9 May, 27 July and 1 August 2012, the plaintiffs purported to cancel the agreements on the basis that Kawarau Village had wrongfully repudiated the agreements and was not ready, willing and able to meet its obligations under them. The plaintiffs demanded repayment of the deposits.

Austpac underwriting agreements

[58] Kawarau Village served call notices on Austpac pursuant to the underwriting agreements. In June 2012, Kawarau Village sent Austpac a settlement statement requiring Austpac to settle the agreements for purchase of the plaintiffs' units. Austpac failed to settle, contending that it validly cancelled the underwriting agreements in February 2010. Kawarau Village issued proceedings against Mr Yuen, as guarantor, in March 2014.

Current state of the Kawarau Falls development

[59] Stage 1 of the Kawarau Falls development was completed prior to Kawarau Village calling for settlement. Hilton International Manage LLC manages Kingston West as a Hilton Hotel. It also manages Lakeside West. Kawarau Village retains ownership of both buildings. None of the units in either building has been on-sold.

The plaintiffs' claims

[60] The plaintiffs plead four causes of action:

(a) First cause of action - Kawarau Village's cancellation was a wrongful repudiation of the agreements:

(i) The cancellation was a wrongful repudiation of the agreements because Kawarau Village was not ready, willing and able to settle at the time it served the settlement notices or at the time of cancellation. This allegation is based on the alleged breaches of the agreements summarised in [46] to [55] above. The plaintiffs contend that as a result Kawarau Village was not ready, willing or able to provide the plaintiffs on settlement with the titles they had agreed to purchase.

(ii) The cancellation was a wrongful repudiation of the agreement in the case of plaintiff 94 because no settlement notice was served.[8]

(iii) The plaintiffs accepted Kawarau Village's wrongful repudiation of the agreements and cancelled the agreements.

(iv) The plaintiffs are therefore entitled to the return of their deposits with accrued interest.[9]

(b) Second cause of action – repudiation/anticipatory breach.

(i) The plaintiffs claim that Kawarau Village "evinced an intention not to provide the title each plaintiff had contracted to purchase".

(ii) The terms of the agreement relating to title were essential terms of the agreements.

(iii) Kawarau Village's intention not to be bound by the terms of the agreements was a repudiation of the agreements or an anticipatory breach of essential terms of the agreements or of

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8 The plaintiffs also pleaded that valid certificates of practical completion had not been issued and this was another reason why the cancellation was wrongful. However, this allegation was abandoned at the hearing.

9 The plaintiffs also pleaded a claim for damages for wasted expenditure but this claim was abandoned at the hearing.

terms which substantially reduced the benefit to the plaintiffs or increased their burden under the agreements.

(iv) The plaintiffs rely on this alleged repudiation or anticipatory breach of the agreements as an additional or alternative ground justifying their cancellation of the agreements and entitling them to the return of their deposits.

(c) Third cause of action - repudiation/anticipatory breach of "entire development" terms.

(i) The plaintiffs claim that by 15 December 2011, it was clear that Stages 2 and 3 of the development would not be completed.

(ii) By not completing Stages 2 and 3, Kawarau Village has breached an essential term of the agreements, or its breach has substantially reduced the benefit or increased the burden of the agreements to the plaintiffs. Further, by not completing Stages 2 and 3, Kawarau Village has evinced an intention not to be bound by the "entire development" terms and has thereby repudiated the agreements.

(iii) The plaintiffs say this repudiation and/or anticipatory breach justified their cancellation of the agreements and they are entitled to the return of their deposits.

(d) Fourth cause of action – breach of s 37(1) of the Securities Act 1978.

(i) The plaintiffs claim that the establishment of the Precinct Society involved the establishment of a "Scheme" as defined in s 2(a) of the Act.

(ii) Membership of the Precinct Society constitutes a "participatory security" in terms of s 2(1) of the Act in that

membership confers rights to participate in the ownership and use of the common facilities and levies raised from members were to be the Society's sole source of funding.

(iii) When the agreements became unconditional on 9 December 2010, the "participatory securities" were "allotted" as defined in s 2(1) of the Act.

(iv) Memberships in the Precinct Society were "offered" to the public in New Zealand.

(v) The offer of participatory securities in this scheme was in breach of the Act because there was no registered prospectus or authorised advertisement and no statutory supervisor was appointed as required by s 33(3)(a) of the Act.

(vi) As a result, the agreements are invalid and of no effect and the plaintiffs are entitled to the return of their deposits together with interest.

Counterclaim

[61] Kawarau Village disputes the plaintiffs' claims and says that it validly cancelled the agreements after the plaintiffs failed to comply with the settlement notices. It claims that it is entitled to the deposits which it forfeited and damages in the sum of approximately $36 million. This sum together with the deposits represents the difference between the contract price and the market value of the units at the time of cancellation.

[62] The plaintiffs resist the counterclaim on the same bases as they advance their claims. They further claim that Kawarau Village has not suffered any loss because it sold each of the plaintiffs' units to Austpac pursuant to the underwriting agreements. Alternatively, they claim that Kawarau Village has not mitigated its loss by taking all reasonable steps to recover its loss from Austpac and Mr Yuen. In any event, the

plaintiffs claim that the loss should be assessed at the date of trial rather than at the date of cancellation.

The issues

[63] The issues are:

(a) What were the vendor's obligations under the agreements relating to:

(i) completion of Stages 2 and 3?

(ii) the property to be included in the common property at Kingston West?

(iii) the Kingston West common property lease?

(iv) the lease of the Kingston West Units?

(v) the Kingston West Body Corporate Rules?

(vi) the QLDC encumbrance in relation to Lakeside West?

(vii) the property to be included in the common property at Lakeside West?

(viii) the use of principal units at Lakeside West for commercial or retail purposes?

(ix) the Lakeside West Body Corporate Rules? and

(x) the ability to on-sell the units?

(b) Were any of these obligations breached or repudiated?

(c) If so, was any actual or threatened breach a breach of an essential term or a breach having sufficiently serious adverse consequences as to entitle the plaintiffs to cancel?

(d) Were the agreements void because the Securities Act was breached? In particular:

(i) Did membership of the Precinct Society constitute a participatory security?

(ii) Was there an offer of securities within New Zealand?

(iii) If there was a breach of the Act, should relief be granted under s 37AH?

(e) Was Kawarau Village ready, willing and able to settle when it served the settlement and cancellation notices?

(f) Was Kawarau Village entitled to cancel the agreements?

(g) If not, were the plaintiffs entitled to cancel the agreements?

(h) If Kawarau Village succeeds with its counterclaim, what damages should be awarded? In particular:

(i) What is the relevant date for assessing damages?

(ii) What was the value of the Units at the relevant date?

(iii) Did Kawarau Village mitigate its loss?

Do the agreements oblige the Vendor to complete Stages 2 and 3?

[64] The plaintiffs claim that the Units were marketed to them on the basis that the Building would form part of the wider development, including Stages 2 and 3 and they would benefit from the associated amenities and facilities.

[65] Mr Skelton QC initially placed reliance on cl 4.3(b) of the agreements which requires the vendor to implement the Consents. This was because Consents are defined to include not only final approvals for the Development but also those needed for the development of the Precinct. However, in his closing submissions, Mr Skelton advised that the plaintiffs do not maintain their earlier position that this provision should be construed as a covenant by the vendor to complete all three stages of the development.

[66] This was a proper concession. Section 4 of the agreements, of which this clause forms part, deals with the Development and issue of title. As noted, the Development is defined to mean the Building and the immediately adjoining land by way of a curtilage to the Building, not the wider Precinct. Clause 4.3, quoted at [24], is concerned with the Unit Plan. It sets out the steps the vendor is required to take to complete the Building, create the Units and obtain title to them. These steps are set out in cls 4.3(a) to (d) and are: (a) to submit the plans for the Development to the relevant authorities to obtain the Consents; (b) implement the Consents; (c) carry out all work to subdivide the Building to create the Unit; and (d) prepare and deposit the Unit Plans with the Land Information New Zealand. I consider that the Consents referred to in cl 4.3(b) are the same Consents that are referred to in cl 4.3(a) and relate solely to the Building and curtilage. Clause 4.3(a) obliges the vendor to submit the plans for the Development to obtain the Consents, not plans for the development of the wider Precinct. These are the Consents that must be implemented under cl 4.3(b) to enable the construction of the Building referred to in cl 4.3(c) and the deposit of the Unit Plans under cl 4.3(d).

[67] In closing, Mr Skelton focused on cl 5.7 of the agreements as constituting a covenant by the vendor to complete all three stages of the development. He submits that this was an essential term of the agreements. Although I have already quoted

this clause, it is helpful to set it out again because of its critical importance to this aspect of the plaintiffs' claim:

> **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.

[68] Mr Skelton submits that the Draft Outline Plans and Specifications support the plaintiffs' contention that the vendor was obliged to complete Stages 2 and 3. In particular, he relies on cl 1.2 in Section 1 headed "General":[10]

> **1.2 Location**
>
> The building is located in the central northern 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, avenues and roads. The building is bound by tree lined boulevards to the south, west and north and the Square to the east.

[69] Mr Skelton notes that the plans attached to the agreements provide a broad outline of the "Masterplanned development" referred to in cl 1.2 of the Draft Outline Plans and Specifications showing the names and general location of the buildings.[11] He relies on the Consents referred to in the agreements as providing the detail.

[70] Mr Goddard QC submits that cl 5.7 is not an express term requiring the vendor to complete the entire development. He argues that if the plaintiffs' interpretation is correct, this would be the most onerous obligation imposed on the vendor under the agreements, committing it to spending hundreds of millions of dollars in earthworks and construction. Mr Goddard argues that one would expect any such obligation to be clearly stated, rather than being obscured in a clause headed "Disclosure" in a section of the agreements dealing with the Precinct Society.

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[10] The quoted extract is from the agreements relating to Kingston West. A comparable description is contained in the agreements relating to Lakeside West.

[11] The Draft Outline Plans and Specifications attached to some of the agreements do not contain even this level of detail.

[71] Clause 5.7 of the agreements is not well drafted and ascertaining its correct interpretation is not without difficulty. Read literally and in isolation, there is force in Mr Skelton's submission that the clause appears to contain a promise by the vendor 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.

[72] However, I have come to the conclusion that on its proper construction the covenant in the clause relates to how the Precinct may be developed. In particular, any development must be consistent with the Draft Outline Plans and Specifications. Any variation or alteration to what is shown in the Draft Outline Plans and Specifications will not be permitted if it has a material adverse affect on the value of the Units. For example, a purchaser of a Unit in Kingston West would be able to rely on this covenant as preventing the construction of a building not shown on the Draft Outline Plans and Specifications which would obstruct sunlight or block views from the Unit. Similarly, a purchaser would be able to complain that the vendor would be in breach of its covenant in cl 5.7 if it proposed to relocate one of the Buildings shown in the Draft Outline Plans and Specifications to a place where it would materially adversely affect the value of the Unit. However, I do not consider that the clause can be interpreted as imposing an obligation on the vendor to complete all three stages of the intended Kawarau Falls development. I now set out my reasons for reaching this conclusion.

[73] First, cl 4.1(k) records the purchaser's acknowledgement and agreement that it is not purchasing the Unit in reliance on the completion of the Precinct or any part of that development proceeding other than the Unit it is acquiring and the Building in which the Unit is located. This clause cannot be reconciled with cl 5.7 if the latter is interpreted as an essential term of the agreement requiring the vendor to construct all 13 buildings and amenities planned in all three stages of the Development. However, there is no conflict between the two clauses if cl 5.7 is construed as a negative covenant constraining the vendor from carrying out any works in the Precinct unless these conform to the Draft Outline Plans and Specifications or any variations have no material adverse affect on the value of the Unit.

[74] Second, the agreements provide 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. The Draft Outline Plans and Specifications merely describe the general location of the particular Building and record that it 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 plan depicts the general location of other structures and roads but gives no details. Further, the agreements give no indication of when the other stages of the Development are to be completed.

[75] If cl 5.7 was intended by the parties to impose an obligation on the vendor to build all of the buildings, amenities and infrastructure in all three stages of the Development, one would expect them to have set this out clearly and in considerable detail. I agree with Mr Goddard that you would not expect such an onerous obligation to be contained in a clause headed "Disclosure" in a section of the agreement which primarily deals with the purchaser's obligation to be a member of the Precinct Society. It is 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.

[76] Third, cl 5.1 of the agreement expresses the purchaser's acknowledgement that commercial, retail, restaurant, licensed premises for the sale of liquor, tourist accommodation and other activities may take place within the Precinct. If the vendor was obliged to complete all three stages as planned, these activities would occur in the Precinct and there would be no need for this acknowledgement. Further, if this was the intention, the acknowledgement would be that these activities "will" take place, not that they "may" take place.

[77] Fourth, cl 4.1(g) sets out the vendor's disclosure and the purchaser's corresponding acknowledgement and agreement that completion of the development of the Precinct, 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. This acknowledgement is difficult to reconcile with an interpretation of cl 5.7 as a promise by the vendor to construct all 13 buildings and

associated infrastructure and amenities as planned for all three stages of the development and not make any variation or alteration unless this would have no material adverse affect on the value of the Units.

[78] Clause 2.9 is to similar effect in relation to the Precinct amenities and infrastructure. It records the purchaser's acknowledgement that the vendor may alter, vary, add to or omit any amenities or facilities from time to time proposed to be installed or constructed in the Precinct. This cannot be reconciled with a covenant by the vendor that it will complete all three stages of the intended development and make no changes to it that would have a material adverse affect on the value of the Unit.

[79] Finally, the agreements are for Units in two of the first buildings to be constructed in Stage 1 of the intended development. The vendor's commitment to construct these buildings was conditional on achieving a minimum level of sales of Units in the particular Building which, in the vendor's sole opinion, justified construction of that Building. The agreements were also conditional on the vendor being satisfied with the projected costs of constructing that Building. This is consistent with the vendor's contention that its construction promise in the agreements was limited to the particular Building in which the Unit was to be located. It is most unlikely that the parties intended that if the vendor was satisfied with the level of sales and construction costs of the particular Building then it 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.

[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.

[81] Dr Sun Ho, one of the few plaintiffs to give evidence, stated:

> The successful development and implementation of Stages 2 and 3 (especially with Escarpment and the MICE facilities) were integral to our decision of buying Lakeside West. Without stages 2 and 3, in reality, Kawarau Falls Station is now no different to some other smaller lakefront development projects around Lake Wakatipu and we certainly would not have bought it as a standalone project with just stage 1 developments in place – as is the case now.

[82] The difficulty with this evidence is that Dr Ho, like the other plaintiffs, signed an agreement expressly acknowledging in cl 4.1(k) that he was not purchasing the unit in reliance on completion of the development of Stages 2 and 3. It also confronts the problem that cl 4.2 specifically prevents the purchaser from claiming any right or remedy under the agreement, at law or in equity in respect of any of the matters referred to in cl 4.1. This includes the purchaser's acknowledgement in cl 4.1(g) that completion of development of the Precinct may be deferred or suspended and may be subject to change from time to time in whatever manner and for whatever reason the vendor considers necessary.

What common property was to be included in Kingston West?

[83] In December 2010, a number of areas within the Kingston West building were incorporated into a principal unit, PU323KW. These areas included facilities for conference, pre-function, reception, luggage, offices, maintenance, boiler, rubbish, water, gas, utility, plant, cinema, PABX, toilets, staffroom and various inter-floor ducts. The question is whether the vendor was obliged to include these areas as part of the common property.

[84] "Common Property" is defined in the agreements to mean the common property to be vested in the Body Corporate following deposit of the Unit Plan. The "Unit Plan" is defined as the unit plan to be deposited in accordance with the Act which shall be based upon the content and intent of the Draft Outline Plans and Specifications subject to the provisions of the agreement.

[85] The Draft Outline Plans and Specifications are in two parts. The first part is the outline specification. The second part is comprised of plans showing each level in the building, the general location of the building in the Precinct and a typical guestroom plan. The outline specification is primarily concerned with the specifications for the apartments and the location of these. However, it also contains a general description of the Building which includes reference to a restaurant, bar, lounge, front of house, business centre, car parking and conferencing and meeting facilities. The principal amenities to be included in the Building are said to comprise boutique retail outlets, a cinema and a cafe/restaurant with an outdoor dining area. These are said to be located at ground level around a landscaped courtyard. The main entrance is described as being on the north elevation at level 3 and leading onto the reception area, lifts and a lounge area. The entrance to the car park is also described. There is also reference to a dedicated loading bay to be provided in the adjacent Kawarau Central Building and to be linked by way of a service tunnel. Building services such as electricity, lighting, gas, telephone, data, water services, heating, fire detection and suppression and lifts are also outlined. However, the outline specification does not specify whether these areas and facilities will be included in the common area.

[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.

[87] Mr Skelton drew attention to the fact that the approved plans submitted in connection with the application for resource consent specify in a key what the blank areas are to be used for. Some of the later agreements also contain this detail in the plans that formed part of the Draft Outline Plans and Specifications. Mr Skelton also points out that cl 1.2 of the agreement provides that in the event of a conflict between the provisions of the Unit Plan and the terms of the Consent, the terms of the Consent shall take precedence. However, none of this assists the plaintiffs because although

the consented plans describe the intended use of particular areas, they say nothing about whether these areas are to form part of the common area.

[88] Finally, Mr Skelton submits that all property not shown on the plans as one of the accommodation units must, by default, be common property. This is because common property is defined in s 3 of the Unit Titles Act 1972, which was in force at the relevant time, as meaning "so much of the land as is not comprised in any unit". The critical issue is 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.

[89] Neither the outline specification nor the plans show any management units. However, the template lease attached to the agreement 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". This shows that the parties anticipated the creation of Management Units, despite none being shown in the Draft Outline Plans and Specifications. I agree with Mr Goddard that it is most likely that these Management Units would be created in the spaces left blank. Certainly, there is nothing to indicate that this would not be the case.

[90] I conclude that there is nothing in the agreements obliging the vendor to include the areas now comprised in Principal Unit 323KW in the common property.

Did the agreements permit the lease of common property at Kingston West?

[91] The plaintiffs who purchased in Kingston West were acquiring a unit in a hotel which was to be subject to a long-term lease of either 30 or 40 years if all rights of renewal were exercised. They were acquiring these units as investments and had no personal occupation rights during the term of the lease. The vendor warranted that by settlement date it would have put in place contractual arrangements between the vendor and the lessee to manage the Building and the Property, being the Unit including furniture and any car park, and the letting of the Property.

[92] It was common ground that the right to have access to and manage the common areas would form an essential element of any agreement with a hotel operator to manage the Building. Alan Garrett, a senior employee of KordaMentha who managed the Melview receivership, explained that Hilton required a lease of the common property. Accordingly, the vendor arranged for the Kingston West Body Corporate to grant a lease over all common property excluding exterior walls and roof areas. This lease was in favour of Kawarau Village Ltd ("KVL"), another company formed by the receivers as a subsidiary of Melview. This company was established to act in a management capacity and entered into the relevant contracts with Hilton.

[93] The lease registered against the titles to the Kingston West Units was for a term of up to 40 years at an annual rental of one dollar. The permitted use was to carry on the business of a four star hotel. The lessee was granted exclusive possession of the common property throughout the term. However, this was subject to the owner or occupier of any hotel unit, or any visitor or invitee of any owner or occupier, and any member of the public having access to the common property designated by the Body Corporate for common use. This included corridors, entrances, landscaped areas, lifts, stairway, access to car parks, shared toilet facilities, pool, gym and outdoor courtyards and plazas.

[94] Mr Goddard submits that the common property lease is expressly authorised by cl 17.10 of the lease addendum which reads as follows:

> **Vendor's warranty:** the Vendor warrants to the Purchaser that, as at the Settlement Date, the Vendor will have put in place contractual arrangements between the Vendor and the Lessee to manage the Building, the Property and the letting of the Property.

[95] Mr Goddard drew attention to the definition of Operating Costs in the Template Lease which include:

> (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.

[96] Mr Goddard submits that this provision demonstrates that the parties anticipated that the Lessee, KVL, would lease any principal units comprised in the Management Unit and also "other hotel areas". The reference to "other hotel areas" can only be a reference to common property.

[97] Although he says that cl 17.10 provides specific authorisation for the common property lease, Mr Goddard maintains that it would in any event have been authorised under general provisions in the agreement, which empower the vendor to grant rights necessary or desirable for the development or use of the Building. These general rights are set out in cls 4.1(m) and 4.6(c) which respectively provide:

> the Vendor may, before or after Settlement, create or agree to the creation of (including by or for the Body Corporate) easements (including easements for structural support, rights of way and service easements), rights and other interests of the type referred to in clause 4.6 which may affect the Land, the Building, the Common Property, the Precinct Amenities and Infrastructure and/or the Unit, provided that such easements, rights and other interests shall not have a material adverse effect on the value of the Unit.
>
> 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 ... in the sole discretion of the Vendor are deemed to be necessary or desirable for ... 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.

[98] Mr Skelton submits that the "contractual arrangements" referred to in cl 17.10 do not extend to cover a lease. He contends that the lease is not authorised by cl 4.6(c) because a lease of common property is not necessary or desirable for the development or use of the Building and, in any event, has a materially adverse effect on the value of the Units. Mr Skelton argues that subclause (m) in the definition of Operating Costs in the Template Lease does not assist Kawarau Village because the reference to "other hotel areas" should be taken to mean "hotel business areas" not common property.

[99] For the reasons already given, the plaintiffs were not assured that any particular area would be included in common property. They had no personal occupation rights during the currency of the lease to the hotel operator. The hotel operator was required to manage the entire Building as a four star hotel. The

plaintiffs must have anticipated that the hotel operator would require rights of access and control over all areas of the Building, including the common areas, to enable it to carry out this obligation.

[100] Clause 17.10 required the vendor to put in place contractual arrangements with the lessee to manage the Building. This did not necessarily require a lease; a management agreement coupled with a licence to occupy would have met the requirement. However, in this case, Hilton insisted on a lease of the common property and this was accordingly granted. I consider that the lease of common property was a contractual entitlement of the type envisaged by cl 17.10. I agree with Mr Goddard that this conclusion is reinforced by the definition of Operating Costs in the lease addendum. There is nothing to indicate that "other hotel areas" excludes those areas of the hotel designated as common area on the Unit Plan.

[101] I also consider that the common property lease is within the general power in cl 4.1(m) of the agreement to grant rights and other interests that may affect the Land, the Building, or the Common Property. The vendor reasonably considered that the common property lease was necessary or desirable for the development or use of the Building as a hotel given that this was required by Hilton. It was clearly in the plaintiffs' interests to have a premium hotel operator like Hilton managing the Building.

[102] Dean Humphries, an experienced valuer called by the plaintiffs, considered that the creation of the Management Unit from what he was instructed was common property, combined with the lease of the balance of the common property, resulted in a 15 per cent reduction in the value of the Units. Mr Humphries accepted that his assessment could not be tested against market evidence and was highly subjective. John Schellekens, an experienced valuer called by Kawarau Village, considered that the value impact of these two factors was likely to be nil or extremely minor. Somewhat arbitrarily, he ascribed a 2.5 per cent discount to the value of the Units to reflect this nil or extremely minor affect on value of the creation of the Management Unit and the Common Property Lease. Neither valuer attempted to quantify the value impact of the Common Property Lease considered in isolation.

[103] It is difficult to see how the Common Property Lease could have had a material adverse affect on the value of the Units given that it was required to secure Hilton's involvement. In any event, the plaintiffs accept that Kawarau Village was entitled to confer the right to manage the common areas on a hotel operator and to grant the hotel operator a licence to occupy those areas. There is little practical difference between these arrangements and the Common Property Lease that was granted in this case. The occupation rights conferred under the lease were subject to generous rights of access to Unit owners and occupiers, their respective invitees and members of the public.

[104] For the reasons given, I conclude that the Common Property Lease was authorised under the agreements.

Did the lease of the Kingston West units comply with the agreements?

[105] The plaintiffs make two complaints about the form of the lease that the receivers proposed to register prior to settlement, described as the third lease.

[106] The first issue relates to the term of the lease. If all rights of renewal are exercised under the third lease, it will continue for a term of 40 years. However, the lease addendum to 43 of these agreements allows for a maximum potential term of 30 years:

> **Rental and Term**
>
> 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.

[107] This issue was not raised at the time of settlement or cancellation of the agreements. It was first raised at the trial and was the subject of an amendment to the claim.

[108] Mr Skelton submits that the vendor was not entitled to tender title subject to a lease for a potential maximum term of 40 years when the relevant agreements

stipulated a term not to exceed 30 years in total. He submits that this was a defect in title with the result was that the vendor was not ready, willing and able to settle. He relies on *Holmes v Booth* and submits that whether or not there is any detrimental effect on value is beside the point.[12]

[109] The facts of *Holmes v Booth* were quite different. In that case, the purchase was of a three storey building occupied by three tenants. The purchaser made it clear that it was important to him that the tenants were not long-term because he intended to redevelop the property. The vendor warranted that the tenancies were all monthly. Prior to settlement, one of the tenants asserted that it had a three year tenancy. It was accepted that the existence of a three year tenancy would constitute a defect in title in the circumstances of that case. The issue is whether this was an error or misdescription of the property or the title for the purposes of cl 5.3 of the standard form agreement which provided:

> Except as otherwise expressly set forth in this agreement no error, omission or misdescription of the property or the title shall annul the sale but compensation, if demanded in writing before settlement but not otherwise, shall be made or given as the case may require.

[110] Because the purchaser had not claimed compensation before the settlement date, it was argued that any right to compensation had been lost and the purchaser was obliged to settle. Casey and Gault JJ held that the purchaser was entitled to delay settling until the vendor could show that he could deliver the title contracted for or it was clear that he could not. Further, cl 5.3 did not deprive the purchaser of his right to cancel, if the effect of the misdescription was material and substantial such that it would be reasonable to suppose that he would not have entered into the contract but for the misdescription.

[111] The facts of the present case are in no way comparable to the facts in *Holmes v Booth*. The misdescription in the present case has little significance. Mr Schellekens considered that the difference between potential maximum terms of 40 years and 30 years had no material impact on the value of the units. Either way, the units were subject to long term leases that were intended to provide a return to

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12 *Holmes v Booth* (1993) 2 NZ ConvC 191, 633 (CA).

the plaintiffs who were purchasing the units as investments. There is no evidence that any of the plaintiffs intended to occupy the units personally in 30 years' time.

[112] Mr Schellekens' evidence that the discrepancy relating to the term of the lease had no impact on value is borne out by the sales evidence. A number of identical units in the same locations in Kingston West sold for identical prices despite the discrepancy in the lease term.

[113] There is no basis for a conclusion that the plaintiffs would not have entered into the agreements had they known of the misdescription. In the circumstances of this case, I do not consider that the misdescription amounts to a defect in title justifying the plaintiffs' decision not to settle.

[114] The plaintiffs' next complaint relates to a change in the definition of operating costs between the template lease and the proposed third lease. In particular, the definition of operating expenses was expanded in the proposed third lease to include the costs of "carrying on the Hotel Business". Further, the definition of operating costs was modified to include costs incurred by the Lessee "in its capacity as owner or lessee in respect of the Management Units" whereas the template lease referred to costs incurred by the Lessee "in its capacity as lessee in respect of the Management Unit Lease and the lease of other hotel areas". The plaintiffs contend that this change meant that additional costs could be deducted, thereby reducing their return from the lease of their units.

[115] Mr Garrett explained that this change came about as a result of the receivers' decision to implement a different ownership structure for the management units than was originally contemplated. The original intention was that a third party lessee would lease both the management units and the accommodation units and enter into a management agreement with a hotel operator relating to all units. The receivers decided to adopt a simplified structure whereby the company that owned the management units, KVL, would retain these units, lease the accommodation units from the plaintiffs and enter into the management agreement with the hotel operator. Consequential changes to the definition of operating costs were required to reflect KVL's costs as owner of the management units rather than as lessee of them.

[116] These changes were immaterial. The costs associated with the management units were always going to be deducted from the return available to the plaintiffs. It would make no difference whether the costs of owning and maintaining the units were recoverable as rent or as operating costs.

[117] Clause A of the Lease Addendum, quoted in [38], permitted modifications to the template lease "as the Vendor and the Lessee may reasonably require provided that such modifications … do not materially and detrimentally affect the value of the Unit…". In all of the circumstances, I consider that these modifications were permitted under the agreements.

Did the Kingston West Body Corporate Rules comply with the agreements?

[118] The agreements specified that the Body Corporate Rules were to be in the form attached to the Unit Titles Act 1972 subject to such provisions and variations as the vendor shall consider appropriate for the benefit of the Building or the proper and efficient operation of the Body Corporate. The plaintiffs objected to the Body Corporate Rules that were registered. Kawarau Village proposed to register new Body Corporate Rules prior to settlement to address some of the plaintiffs' concerns. However, the plaintiffs claim that the proposed rules went beyond what was permitted under the agreements.

[119] The plaintiffs relied in this respect on the evidence of Christopher Moore, an experienced commercial property lawyer. Mr Moore noted that the proposed rules required the Body Corporate and unit proprietors to comply with the hotel manager's brand standards. These rules relate to such matters as signage, decoration, repairs and maintenance, alterations and additions and window dressings. Mr Moore also drew attention to other restrictions on the plaintiffs' rights in the proposed new rules. These included rules:

(a) requiring proprietors to comply with the Building Management Agreement, the Common Property Lease and any Signage Licence;

(b) restraining proprietors from interfering with the Building Manager's right of unrestricted access to the common property;

(c) overriding the standard rule in relation to noise from licensed premises; and

(d) granting the hotel manager rights to enforce its intellectual property rights against the proprietors.

[120] Mr Skelton acknowledged that rules providing for hotel use were appropriate. However, he maintained that these rules went further than required, particularly to the extent that they imposed an obligation on the plaintiffs to comply with the hotel operator's brand standards.

[121] I have already concluded that the underlying arrangements with the hotel operator were permitted. It follows that Kawarau Village was entitled to facilitate these arrangements by making appropriate amendments to the standard Body Corporate Rules. Kawarau Village was authorised to make such changes if it reasonably considered that they were for the benefit of the Building. I accept that Kawarau Village considered that this was the case and that it acted reasonably in reaching this view. The rules were appropriate and consistent with the intended hotel operation.

[122] In any event, Mr Skelton conceded in his closing submissions that the plaintiffs' complaint about the proposed rules could not, on its own, justify the plaintiffs' refusal to settle. I agree.

Was the QLDC encumbrance authorised under the Lakeside West agreements?

[123] The original resource consent did not permit Lakeside West to be used for visitor accommodation where the length of stay is less than three months. Mr Garrett explained that the receivers applied for a variation to the resource consent to permit visitor accommodation to allow Lakeside West purchasers to have the option of making their units available for short-term letting as part of the hotel pool.

[124] In order for Lakeside West to be used as a standalone visitor accommodation facility, it needed to have a number of accessible units available for use by persons with disabilities. The Queenstown Lakes District Council advised that this requirement of the Building Code could be complied with by converting two of the units in Lakeside West to provide this access and ensuring that any Lakeside West Units available for short-term visitor accommodation were managed in conjunction with the Kingston West Hotel, where further such facilities were available. The Queenstown Lakes District Council required an encumbrance as a condition of granting the use variation to the consent to secure compliance with this Building Code requirement.

[125] Kawarau Village relies on cl 4.6 of the agreements as permitting the registration of this encumbrance against the titles to the Units. This is because the receivers considered that the encumbrance was desirable for the use of the Building and would enhance the value of the Units.

[126] Mr Skelton submits that the QLDC encumbrance does not come within the words "other encumbrances" in cl 4.6. He argues that "other encumbrances" must be of the same nature as the easements, building line restrictions and consent notices referred to in the clause. I do not accept this submission. Clause 4.6 defines in very wide terms the types of rights that may be granted. Apart from the rights referred to by Mr Skelton, it lists "covenants or other encumbrances, rights or obligations". I do not consider that there is any justification for reading these words down so that they do not bear their natural and ordinary meaning. The vendor's powers under cl 4.6 are not restricted in terms of the types of encumbrance that may be granted, rather by the circumstances in which they may be granted. In my view, the QLDC encumbrance is an encumbrance within the scope of the words "other encumbrances" in cl 4.6.

[127] Mr Skelton next submits that the encumbrance was not authorised because it was not necessary or desirable for the development or use of the Building. He argues that there was no need for such an encumbrance given that the Building was intended for residential use. However, this assessment was left to the sole discretion of the vendor. Although the vendor would have to act reasonably in making this assessment, there was no real challenge to Mr Garrett's evidence that the receivers

considered that the encumbrance was desirable because it increased the permissible uses of the Building. I accept that this assessment was genuine and reasonable in all of the circumstances.

[128] Finally, Mr Skelton argued that it was not necessary to grant the encumbrance because the Council requirements could have been satisfied by converting an additional three units in Lakeside West as "accessible units" for persons with disabilities. As well as granting the encumbrance, the receivers were obliged to convert two of the units for this purpose to obtain the consent variation. Mr Garrett confirmed that the receivers' decision not to convert further units and instead grant the encumbrance was driven by financial considerations.

[129] It is beside the point whether the extended use rights could have been achieved without granting the encumbrance. Clause 4.6 does not restrict the vendor's rights to grant encumbrances to those situations where the desired objective cannot be achieved in any other way. It is sufficient if the vendor considers that the encumbrance is desirable for the use of the Building and it does not materially adversely affect the value of the Units.

[130] Mr Humphries considered that the encumbrance did adversely affect the value of the Units. He allowed a 2.5 per cent reduction for this. Mr Schellekens, on the other hand, considered that the encumbrance, taken together with the resource consent permitting visitor accommodation, enhanced the value of the units by providing additional use rights. Even on Mr Humphries' evidence, the encumbrance did not materially adversely affect the value of the units.

[131] For these reasons, I conclude that the QLDC encumbrance was permitted by the Lakeside West agreements.

What common property was to be included at Lakeside West?

[132] The plaintiffs complain that a number of areas which they maintain were required to be included as common property under the agreements were instead transferred into three principal units, PU312LW, PU315LW, PU319LW and

PU320LW. This is the same complaint as the plaintiffs made in relation to Kingston West. However, there are some important differences between the agreements for Kingston West and those for Lakeside West so it is necessary to consider the issue afresh.

[133] Unlike the outline specification for Kingston West, which made no reference to common areas, the outline specification attached to the Lakeside West agreements has a section headed "Common Areas".

[134] The earlier agreements refer in this section to a residents' lounge on level 2 and a spa pool and sauna and a gymnasium on level 1. However, these facilities were not marked on the plans.

[135] The plans attached to later agreements, which post-dated the resource consent, include a key showing the location of these facilities consistent with the consented plans. This differs from the location shown on the outline specification in the earlier agreements. The gymnasium was still shown on level 1 but the residents' lounge and the spa were now shown on level 3. The outline specification in these later agreements was consistent in indicating that the gymnasium would be on level 1 but do not indicate where the spa pool and sauna and residents' lounge would be located.

[136] The area on level 3 that was shown as the residents' lounge on the plans attached to the later agreements is principal unit PU312LW on the registered Unit Title Plan and is a gastro pub. The area on level 3 that was shown on the later agreements as the spa, remains in this area but is comprised in principal units PU319LW and PU320LW. Although these principal units are both marked "spa" on the Unit Title Plan, PU320LW is a hair salon and PU319LW is vacant. The gymnasium and spa/sauna are part of the common property on level 1 on the Unit Title Plan. The residents' lounge is also part of the common property but is located on level 2, consistent with the earlier agreements.

[137] These variations to the location of the residents' lounge, gymnasium and spa/sauna are permitted by cl 4.9 of the agreements, as set out in [27]. These facilities were provided as part of the common area as promised.

[138] Various small utility areas and an office were also incorporated in principal unit PU315LW. The utility areas were rubbish, cleaner, store, communications, water, gas, electricity, switchboard, transformer and sprinkler. The agreements do not stipulate that these facilities must be included in the common area. Nor do the agreements show that the areas taken into PU315LW form part of the common area. Even if this were not so, these modifications are authorised by cl 4.9.

Were commercial and retail purposes authorised at Lakeside West?

[139] Mr Skelton submits that commercial uses were not contemplated at Lakeside West. There was no mention in the agreements of such uses being included in the Building and the initial resource consent did not permit this as the land was zoned for residential use. Mr Skelton argues that the gastro pub and hair salon, for which resource consent was subsequently obtained by the receivers, detract from the exclusively residential nature of the Building and compromise the value of the apartments.

[140] The plaintiffs rely on cl 1.1 of the Draft Outline Plans and Specifications:

> **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 benefiting 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.

[141] This is simply a general description of what the vendor intended when the agreements were signed. It is only a draft outline. This statement of the vendor's intention in the Draft Outline Plans and Specifications cannot be construed as a contractual promise that no commercial or retail activity will take place anywhere in the Building.

[142] In any event, Lakeside West does conform to the general description. It is accurately described as a luxury lakefront residential apartment building providing between 40 to 45 residential units with the amenities and facilities described in the Draft Outline Plans and Specifications.

[143] By signing the agreements, the plaintiffs accepted that the vendor was entitled to alter or vary these Draft Outline Plans and Specifications at any time and in such manner as the vendor considers appropriate. Purchasers could not claim compensation or damages or exercise any right of set off or make any objection or requisition based on any such variation unless it materially adversely affected the value of the Unit.[13]

[144] Mr Humphries considered that the presence of the gastro pub and the hair salon within the Lakeside West building decreased the value of the plaintiffs' units by five per cent. In relation to the three units immediately above the gastro pub, he assessed the value impact at 10 per cent. This differential appeared to be based on the increased noise that those units would experience as a result of being directly above the gastro pub.

[145] Mr Humphries acknowledged that he had not endeavoured to measure the noise levels in any of the units. He also acknowledged that other restaurant and bar facilities are located in close proximity to the Lakeside West building, as was always intended. The plaintiffs always had to accept that there would be some noise and disruption from these types of facilities located nearby. The issue is therefore whether there is any increased noise or disruption as a result of the gastro pub being located on the ground floor of the Lakeside West building.

[146] Mr Schellekens did not consider that the retail units would have any detrimental effect on the value of the residential units. On the contrary, he considered that these were value enhancing. He supported this opinion by referring to a number of new premium residential apartment buildings in Auckland and Wellington that have ground floor retail operations.

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[13] Clause 4.9.

[147] I am not persuaded on the evidence that the presence of a hair salon on the ground floor of the Lakeside West building has any material adverse effect on the value of the units.

[148] The position in relation to the gastro pub is less clear. However, there was no evidence to show that the gastro pub has caused elevated noise levels in any of the units. In these circumstances, it is difficult to justify a conclusion that the value of the units is materially adversely affected because of the noise. As this was the main justification for the claimed material adverse affect on value, I am not satisfied that this has been established.

Did the Lakeside West Body Corporate Rules comply with the agreements?

[149] The plaintiffs allege that the Lakeside West Body Corporate Rules would have deprived or limited their use and enjoyment of their units and common property because they purported to:

(a) authorise the building to operate as a mixed use development incorporating retail and commercial uses;

(b) enable the hotel manager and hotel operator to appoint another party to perform any of the duties and exercise any of the powers of the hotel manager or hotel operator without the consent of the Body Corporate;

(c) limit the right of the Body Corporate to deal with the common property; and

(d) permit the hotel manager to limit the right of an individual proprietor to deal with his or her own unit.

[150] In his closing submissions, Mr Skelton contended that these rules were objectionable because they allowed the building to be used for purposes other than residential use. The amendments to the rules were to facilitate the retail uses in the building and the potential operation of a hotel business. In that sense, this is a

repetition of the complaint about the QLDC encumbrance and the incorporation of the hair salon and gastro pub.

[151] The vendor was entitled to make revisions to the Body Corporate Rules if it considered these were appropriate for the benefit of the Building.[14] Mr Garrett explained that the receivers understood from the outset that the space occupied by the gastro pub was likely to be used as a food and beverage outlet. He recalls seeing a plan for this before the receivers were appointed. He considered that a food and beverage outlet in this area would be a good "fit" for the space and of benefit to the Building. Mr Garrett says that the concept of having a hair salon on the ground level of the Building was also envisaged from an early stage. I have already concluded that these uses were permitted under the agreements. I accept Mr Garrett's evidence that the vendor considered that the changes to the Body Corporate Rules to facilitate these uses were appropriate for the benefit of the Building.

[152] For the same reasons, there can be no objection to the changes to the Body Corporate Rules enabling unit owners to make their units available for short-term letting as part of the Hilton hotel pool. As noted, Mr Garrett's evidence was that the receivers considered that creating this option was desirable and of benefit to the owners of the units at Lakeside West. It follows that the vendor was entitled to vary the Body Corporate Rules to facilitate this additional use on the basis that such variations were "appropriate for the benefit of the Building".

Was there a contractual obligation in relation to the ability to on-sell the Units?

[153] The plaintiffs claim that Kawarau Village was unable to convey a title that the plaintiffs could sell, assign or transfer to buyers in New Zealand. This is because of the requirement for any new purchaser to become a member of the Precinct Society. The argument is premised on the contention that any such transfer would involve a fresh offer of a security to members of the public in New Zealand and the allotment of this security.

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[14] See definition of Body Corporate Rules quoted at [18(viii)].

[154] The plaintiffs claim that the class of purchasers who can acquire the units in the absence of a prospectus or exemption under the Act is significantly restricted as a consequence and that this restriction on their right to alienate the land is a serious title defect justifying their decision not to settle. They rely on *McDonald v Wake*[15] and *Schollum v Francis*[16] as supporting the proposition that statutory restrictions restricting the class of persons to whom the land may be transferred can amount to a defect in title.

[155] This claim fails as a result of my conclusion that membership of the Precinct Society did not amount to a security. I deal with this issue in [164] to [183] below.

Were any of these obligations breached or repudiated?

[156] For the reasons already given, none of these obligations was breached or repudiated.

Was there a breach of an essential term or a breach having sufficiently serious adverse consequences that entitled the plaintiffs to cancel?

[157] In view of my conclusions on the extent of the vendor's obligations under the agreements, the answer to this question is no.

Were the agreements void because the Securities Act was breached?

[158] The agreements required all purchasers and their successors in title to hold membership in the Precinct Society. The plaintiffs claim that such membership was a participatory security in terms of the Securities Act. They contend that these securities were offered to members of the public in New Zealand and that this was in breach of s 37 of the Act because there was no registered prospectus and other requirements in Part 2 of the Act were not met. As a result, the plaintiffs claim that the agreements are void and that they are entitled to the return of the moneys they have paid together with interest at the rate provided in the Act.

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15 *McDonald v Wake* [1919] GLR 106 (SC).
16 *Schollum v Francis* [1930] NZLR 504 (SC).

[159] Section 37 relevantly provides:

> **37 Void irregular allotments**
>
> (1) No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus relating to the security.
>
> …
>
> (4) Any allotment made in contravention of the provisions of this section shall be invalid and of no effect.
>
> (5) Where subscriptions for securities are received by or on behalf of an issuer, but, by virtue of this section, the securities may not be allotted, or for any reason the securities are not allotted, the issuer shall ensure that –
>
> …
>
> (b) the subscriptions, together with such interest (if any) as has been earned thereon, are repaid to the subscribers as soon as reasonably practicable.
>
> (6) If any subscriptions to which this section applies are not so repaid within 2 months after the date on which the subscriptions were received by or on behalf of the issuer ... the issuer ... shall be ... liable to repay the subscriptions, together with interest at a rate prescribed from time to time by regulations made under this Act from the date on which the subscriptions were received by or on behalf of the issuer .

[160] There was no registered prospectus and other relevant requirements of the Act were not met. However, the defendants say that membership of the Precinct Society is not a security because it does not confer any interest or right to participate in any assets. The Precinct Society did not own or have any other interest in the Precinct land or the associated infrastructure and amenities. It was never intended that the Precinct Society would confer any interest or right to participate in these assets. Instead, they were retained by Kawarau Village and the plaintiffs' rights of access were to be provided by way of easements.

[161] The defendants contend that even if membership of the Precinct Society is a security, the exemption under s 5(1)(b) of the Act applies. This relates to estates or interests in land for which a separate certificate of title can be issued.

[162] In any event, the defendants claim that the securities were not offered to the public in New Zealand. It contends that the offers for units in Lakeside West and Kingston West were made exclusively overseas.

[163] Finally, if there was a breach of the Act, the defendants claim that relief should be granted under s 37AH of the Act.

Did membership of the Precinct Society constitute a participatory security?

[164] It is helpful to commence the analysis by examining the role of the Precinct Society and the rights and obligations associated with membership of it.

[165] Clause 5.2 of the agreements contains an acknowledgement by the purchasers that:

> (a) the Precinct Society will be incorporated prior to Settlement, and owners of property (including the Units) within the Precinct must be members of the Precinct Society;
>
> (b) 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 section of the agreement; and
>
> (c) the Purchaser must become and remain a member of the Precinct Society and fulfil the obligations of a member of the Precinct Society as set out in the Precinct Rules, including paying any levies set by the Precinct Society from time to time and complying with the directions of any Manager engaged by the Precinct Society.

[166] The purchasers covenanted to become members of the Precinct Society upon settlement and remain as members while they owned their units. They also covenanted to comply with the rules of the Precinct Society, the Precinct Rules. Restrictive covenants securing compliance with these obligations were registered against the titles to the units prior to settlement.

[167] The recitals to this encumbrance state:

> The Encumbrancee [the Precinct Society] has been established for the purposes of owning and administering certain infrastructure and amenities within the development.

[168] The infrastructure and amenities are defined in the agreements as "all amenities and infrastructure and associated works from time to time within the Precinct intended for common use by all Owners".

[169] The Precinct Rules define "Precinct Amenities" to mean:

> all amenities including but not limited to landscaping, outdoor furniture, street lighting and, where the context requires, the Infrastructure, within the Development intended for common use by all Members which may be installed, erected or constructed [on specified lots in the Precinct] or otherwise within the Development from time to time.

[170] "Infrastructure" is defined in the Precinct Rules as meaning:

> all roads, outdoor car parking spaces not owned by a Member, footpaths, street lighting, safety handrails and barriers, signage, gas, water supply, stormwater disposal, sewage disposal, power, telecommunication and telephone services provided to the Buildings and other Precinct Amenities at the Development.

[171] "Member" is defined in the Rules as an initial member or other person registered as a proprietor of a unit in any Building in Stage 1 of the Development.

[172] Instead of vesting the roads in the local authority as public roads, ownership of the roads in the Precinct was retained by the developer. Easements were registered on the titles to these private roads in favour of the Queenstown Lakes District Council enabling the public to have access to them. Easements were also granted creating rights of way and rights to convey water, gas and other utilities.

[173] Mr Garrett explained that the reference in the recital to the encumbrance to the Precinct Society being established to own the infrastructure and amenities was an error. He confirmed that the Precinct Society does not own the infrastructure or the amenities, it is merely responsible for administering these assets. This is confirmed by cl 5.5 of the agreements which relevantly provide:

> **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 ...
> (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.

[174] To perform this role, the Precinct Society was to enter into a Precinct Management Agreement with the Precinct Manager. The key terms of this agreement were set out in annexure 1 to each of the agreements. This document records that the Precinct Society was established to perform a role akin to a City Council in managing the assets in the Precinct:

> **2. Nature and purpose of the Precinct Management Agreement**
>
> 2.1 Kawarau Falls Station is a unique location, and is being developed as an integrated world class village resort ("Precinct").
>
> 2.2 The Precinct will comprise a variety of buildings (with different uses) and a significant amount of infrastructure and will in effect function as a village. As such, it is necessary that a body is established to perform a role akin to a City Council in dealing with all aspects of the ongoing development, management, operation and maintenance of the Precinct.
>
> 2.3 The Society will be established as the responsible "Council" body for the Precinct and will enable the Owners to achieve more by collectively sharing a common focus on desired outcomes for the Precinct. The Manager will be engaged by the Society to facilitate the achievement of the objectives of the Society and to provide services for and on behalf of the Society and the Precinct generally.

[175] The services to be provided to the Precinct Society by the Manager included: "civic leadership" in identifying ways to maintain and improve the quality of the Precinct; marketing and promoting the entire development; maintaining the Precinct amenities and infrastructure; and general property management and administration.

[176] I now consider whether membership of the Precinct Society constitutes a security for the purposes of the Act.

[177] "Security" is defined very broadly in s 2D as meaning, unless the context otherwise requires:

> any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person.

[178] A "participatory security" is a residual category, being any security other than an equity security, a debt security, a unit in a unit trust or an interest in a superannuation scheme or a life insurance policy. It is common ground that if membership of the Precinct Society is a security, it would be a participatory security.

[179] The question of whether membership of a society that has no interest in the assets it was formed to administer amounts to a participatory security, has not been specifically addressed in any of the cases I have been referred to.

[180] In *Whisper Cove Ltd v Wright*, Lang J concluded that membership of a society established to allow residents in a property development to hold, use and enjoy communal facilities was a participatory security.[17] The principal contention raised by the defendants in that case was that the developer, Whisper Cove, had not complied with the Securities Act (Residential Property Developments) Exemption Notice 1999. In particular, having represented or agreed that communal facilities would be held by the Society, the developer had not complied with the condition of the exemption requiring the communal facilities to be owned or leased by the Society before settlement. This case is distinguishable because the Society was to own the communal facilities whereas there was no such representation or agreement in the present case.

[181] The reasoning in *Whisper Cove* was followed by Allan J in *Featherstone Park Developments Ltd v Robertson Homes Ltd.*[18] This case also concerned a residential development where purchasers were required to hold membership in an incorporated society that was to hold communal facilities for their benefit. It appears that the Judge considered that membership of a society formed for such a purpose would not

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17 *Whisper Cove Ltd v Wright* HC Aukland CIV-2007-404-7931, 26 May 2008.

18 *Featherstone Park Developments Ltd v Robertson Homes Ltd* (2009) 10 NZCPR 373 (HC).

constitute a security unless and until the developer made a decision to transfer the land to the Society:[19]

> It must be said that the stance adopted by the plaintiff is somewhat disconcerting. No reason has been given for a deferral of the decision as to the ownership of Lot 90. One available inference is that the plaintiff did not wish to make a decision until the present litigation is over because to undertake a transfer now would be to run the risk of difficulty under the Securities Act ...

[182] The Precinct Society was established to administer and maintain the Precinct for the benefit of all unit owners in the development. The plaintiffs accepted an obligation to contribute to the maintenance of the amenities and infrastructure in the Precinct and to be bound by the Precinct Rules, as did the purchasers of units in other buildings in Stage 1. However, the Precinct Society did not own, lease or have any other interest in the amenities or infrastructure, nor did the agreements provide for this. No rights to these assets were to be conferred on the plaintiffs through membership of the Society. Instead, these rights were conferred by way of easements.

[183] Membership imposed the burden of sharing costs but there was no investment element. Membership did not confer any "interest" in the assets nor did it confer any "right to participate" in the assets. It follows that membership of the Precinct Society did not constitute a participatory security.

Was there an offer of securities within New Zealand?

[184] The restrictions in Part 2 of the Act apply only to securities offered to the public in New Zealand. Such an offer is made if the security is received by a person in New Zealand unless the issuer demonstrates that it took all reasonable steps to ensure that members of the public in New Zealand may not accept the offer.[20] The defendants say that even if membership of the Precinct Society is a participatory security, the offers were not made to members of the public in New Zealand.

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19 At [107].
20 Section 7(2) of the Act.

[185] Natasha Cook was responsible for marketing the entire development and the processing of contracts with purchasers, including purchasers of units in the Lakeside West and Kingston West buildings for most of the relevant period, from October 2007 to October 2009. Her evidence, which was admitted by consent, was that Austpac, a real estate agency with offices in Singapore and in a number of other Asian countries, was exclusively responsible for the marketing and sales of Lakeside West and Kingston West units. Ms Cook was unaware of any marketing of these units other than through Austpac and, to the best of her knowledge, no units in Lakeside West or Kingston West were ever offered for sale in New Zealand.

[186] Ms Cook stated that the development was profiled on a Melview website to build awareness of it and provide a point of contact. However, she said that the Lakeside West and Kingston West units were not marketed through this website and she did not receive any enquiries from potential purchasers through it.

[187] Ms Cook also stated that the Melview Group profiled the development at a pavilion in a public car park in central Queenstown during the Queenstown Winter Festival in 2008. This was to attract tourist bookings for the hotels in the development and build relationships with others involved in the Queenstown hospitality and tourism industry and with the media. She stated that there was no sales or marketing of the Lakeside West or the Kingston West units at the pavilion. She was not aware of any person purchasing or attempting to purchase one of these units in New Zealand, through the pavilion or otherwise.

[188] Mr Garrett confirmed that as far as he was aware, Kingston West and Lakeside West units were only ever marketed and sold in Asia. This is consistent with the instructions given by Melview to Bayleys Real Estate Ltd concerning the sales and marketing of buildings in the development. The instructions stipulated that units in Lakeside West and Kingston West could only be marketed and sold in Asia.

[189] The plaintiffs acknowledge that they were outside New Zealand at the time the offers were made. However, they say that memberships in the Precinct Society were nevertheless offered to members of the public in New Zealand by:

(a) advertising on the Melview website;

(b) promoting the development at the pavilion in Queenstown during the Winter Festival in 2008;

(c) a real estate agent, acting on behalf of Global Destinations Fund 1 (GDF), placing an advertisement relating to the Reserve South building in the *Property Style* publication just prior to the Queenstown Winter Festival in 2009;

(d) providing the intended form of the agreements to the plaintiffs' solicitors in New Zealand; and

(e) providing intended variations to the agreements to the plaintiffs' solicitors in about March 2011.

[190] The last of these was not pursued in closing submissions and cannot succeed. Whether or not an allotment of a security is void must be determined by the circumstances existing at the time of the purported allotment. A proposal to vary an agreement entered into years before cannot result in that agreement suddenly becoming void. The agreements were entered into between 2006 and 2009, with one agreement being signed in 2010. Providing intended variations to those agreements in March 2011 cannot affect their validity.

[191] Mr Skelton emphasises that an "offer" in terms of s 2(1) of the Act has a wide meaning and includes any proposal or invitation to make an offer and that an invitation to treat is sufficient. As Fisher J observed in *DFC Financial Services Ltd v Abel*, an offer of securities for subscription will normally be no more than an invitation to treat. The subscription will very often be the offer in a contractual sense with the allotment being the acceptance.[21]

[192] There was no challenge to Ms Cook's evidence that the Lakeside West and Kingston West units were not marketed through the Melview website and no

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[21] *DFC Financial Services Ltd v Abel* [1991] 2 NZLR 619 (HC) at 626.

enquiries by potential purchasers of units in those buildings were ever received as a result. I am not persuaded on the evidence that the website, which profiled the development as a whole, can be regarded as an offer of securities for subscription, even accepting the wide meaning of "offer" in this context.

[193] Ms Cook's uncontested evidence was that no sales or marketing of the Lakeside West and Kingston West units took place at the pavilion during the Winter Festival 2008 and that it was simply designed to promote the development as a holiday destination, attract tourist bookings and build relationships with others in the industry. I do not accept that this constituted an offer of securities for subscription.

[194] GDF purchased 14 units in the Reserve South building intending that these would be on-sold in the local market. In these circumstances, these "securities" fell outside the previously allotted securities exemption in s 6 of the Act. As noted, GDF engaged a local real estate agent in Queenstown to market these units on its behalf. Following this, one advertisement was placed in the *Property Style* publication prior to the Winter Festival in 2009. Although there was no evidence as to the precise date, it appears that this advertisement was placed in June 2009.

[195] For the reasons already given, this advertisement could not have any impact on the agreements that had already been signed. There was only one agreement that was signed after this advertisement was placed. This was the agreement signed on 15 March 2010 by plaintiffs 37 for their purchase of a unit in Kingston West.

[196] Although the advertisement related to GDF's units in the Reserve South building, on the plaintiffs' case the same "security" was offered, namely, membership of the Precinct Society. However, even if the one-off advertisement in *Property Style* in June 2009 constituted an offer of the same security to members of the public in New Zealand at that time, it had ceased to be operative long before the offer was made to plaintiffs 37 some nine months later. There is no evidence that the "security" was offered to any member of the public in New Zealand at the time plaintiffs 37 subscribed.

[197] The fact that draft agreements were sent to the plaintiffs' solicitors in New Zealand does not affect the analysis. The agreements were received by the solicitors as agent for the plaintiffs, all of whom were outside New Zealand.

[198] I conclude that even if membership of the Precinct Society was a security, it was not offered to members of the public in New Zealand at the relevant times.

Should relief be granted?

[199] Section 37AH of the Act empowers the Court to make a relief order. The effect of such an order is that s 37(4) to (6) does not apply to the relevant allotment. The Court may make such an order if it considers that it is just and equitable to do so. In determining whether to make such an order, the Court must have regard to the factors set out in s 37AH(3):

> (a) all of the circumstances relating to the allotment of the security; and
> (b) the nature and seriousness of the contravention of section 37; and
> (c) whether the contravention has materially prejudiced the interests of the subscriber; and
> (d) whether the subscriber has disposed of the security to any other person; and
> (e) any other matters that the court thinks fit.

[200] In the event that the Court determines that the agreements constitute allotments of securities in breach of s 37 of the Act, the defendants seek a relief order under s 37AH. They contend that relief from the application of s 37 is just and equitable having regard to all relevant circumstances, including that the plaintiffs are not within the class of persons intended to be protected by the Act as they received their offers outside New Zealand and that membership of the Precinct Society was not an integral part of the agreements.

[201] Had I found that the agreements constituted allotments of securities in breach of s 37, I would have made a relief order under s 37AH for the reasons that follow.

[202] Part 2 of the Act applies to securities offered to the public in New Zealand and is intended to protect investors in New Zealand. As the plaintiffs were all

outside New Zealand, they do not fit within the class of investors that the Act was designed to protect.

[203] The developer took considerable care to ensure that offers were only made in Asia, through Austpac. The promotion of the development on the website and at the pavilion was not intended to be an offer. To the extent that it was an offer, no investor in New Zealand responded to it. This was a minor and technical breach. No one was affected by it.

[204] The advertisement placed by a real estate agent in *Property Style* in June 2009 at the request of GDF was also inconsequential. There is no evidence that anybody responded to the advertisement. All but one of the plaintiffs' agreements had already been signed and plaintiffs 37 did not sign until nine months after this advertisement was placed. There is no evidence that they saw it and it is most unlikely that they did.

[205] The plaintiffs have not suffered any material prejudice as a result of any breach of the Act. Membership of the Precinct Society was not intended to confer any financial return or benefit. The plaintiffs were therefore not exposed to the risk that the issuer would not provide promised benefits. The purpose and functions of the Precinct Society were fully disclosed in the agreements and the plaintiffs would have understood that membership was compulsory as was compliance with the Precinct Rules, including payment of levies. It is unlikely that further disclosure would have had any material effect on the plaintiffs' decisions to purchase.

[206] I also take into account that membership of societies formed for the purpose of holding and managing communal assets on behalf of owners in developments similar to the present are commonly exempted from the requirements of the Act.

Was Kawarau Village ready, willing and able to settle when it served the settlement and cancellation notices?

[207] It follows from the conclusions I have reached that Kawarau Village was ready, willing and able to settle when it served the settlement and cancellation notices.

Was Kawarau Village entitled to cancel the agreements?

[208] Kawarau Village was therefore entitled to cancel the agreements when the plaintiffs did not comply with the settlement notices. This is the case for all plaintiffs other than plaintiff 94.

[209] Plaintiff 94 died in April 2011. The plaintiffs' solicitors advised the solicitors acting for Kawarau Village of this in a letter dated 30 November 2011. They requested that the agreement be cancelled by consent and the deposit returned. There was no reply to this letter.

[210] Various settlement statements were sent to the plaintiffs' solicitors calling for settlement in November and December 2011. The final settlement statements nominated a settlement date of either 16 or 19 December 2011.

[211] None of the plaintiffs settled. On 19 and 20 December 2011, Kawarau Village's solicitors served settlement notices in respect of all plaintiffs other than plaintiff 94. This omission was an oversight.

[212] On 15 March 2012, Kawarau Village's solicitors sent notices to the plaintiffs' solicitors purporting to cancel the agreements relying on the plaintiffs' failure to settle the agreements following service of the settlement notices. However, no cancellation notice was served in respect of plaintiff 94.

[213] The plaintiffs' solicitors responded that day pointing out that they had not received any cancellation notice on behalf of plaintiff 94. They sought confirmation that this agreement was cancelled in accordance with their earlier request:

> We are in receipt of your letter dated 15 March 2012 enclosing letters purporting to cancel numerous agreements for sale and purchase.
>
> On 30 November 2011, our office wrote to you informing you of [plaintiff 94's] death in April 2011, and attached a death certificate to that letter. We enclose that letter again for your convenience.
>
> In that letter, we also asked that in these circumstances it be acknowledged that the agreement was at an end. We did not receive a response to that letter.

> We note that the late [plaintiff 94's] agreement was not purportedly cancelled as part of the letters received today.
>
> We therefore seek your confirmation that this contract was cancelled by consent pursuant to our letter of 30 November 2011 with the deposit to be returned.

[214] There was no reply to this letter either. This is likely because, the day before this letter was written, new receivers were appointed to Melview and they were also appointed as directors of Kawarau Village. They appointed a new firm of solicitors to act for them.

[215] On 6 July 2012, the plaintiffs' solicitors wrote to the new solicitors in relation to plaintiff 94:

> We are instructed to write to you on behalf of the estate of the late [plaintiff 94] ... who was the purchaser of ... [a unit] in the Kingston West building.
>
> We have previously sent correspondence to Minter Ellison drawing to their attention the fact of the purchaser's death, and seeking confirmation that the agreement is at an end, to which no response has been received.
>
> We have also sent numerous correspondence to Minter Ellison drawing to their attention that when your client purported to cancel the agreements on or about 15 March 2012, it omitted to cancel this agreement, to which no response has been received. This appears to have been an oversight.
>
> Can you please advise as to whether or not your client gives notice that it purports to cancel the agreement for sale and purchase of this unit.

[216] The receiver's solicitors responded on 27 July 2012:

> We refer to your letter dated 6 July 2012.
>
> We refer to the unremedied settlement notice dated 19 December 2011 in respect of the above matter and served on you on that date.
>
> Without prejudice to its rights and remedies under the Agreement or otherwise at law, Kawarau Village Holdings hereby gives notice that the Agreement is cancelled pursuant to clause 12.3.
>
> We confirm that Russell McVeagh will continue to hold the deposit in its trust account pending further order of the Court.

[217] The plaintiffs' solicitors responded that day purporting to cancel the agreement on the basis that the cancellation notice was a repudiation of the agreement:

> We refer to your letter of 27 July 2012 giving purported notice of cancellation of the above Agreement for Sale and Purchase in Kingston West.
>
> We also refer to our previous correspondence. For the reasons stated in that correspondence your client, Kawarau Village Holdings Limited was, at all material times, not ready, willing and able to settle its obligations in terms of the Agreement for Sale and Purchase and was and remains in breach of the Agreement.
>
> Your notice purporting to cancel is therefore a repudiation of the Agreement. The purchaser elects to accept your client's repudiation of the Agreement and to cancel the Agreement.
>
> Acceptance of your client's repudiation is expressly without prejudice to our clients' rights and remedies which are being and will continue to be pursued, including without limitation, its remedies under the Securities Act 1978.
>
> On behalf of our clients we hereby demand repayment of their deposit money and accrued interest.

[218] The question of whether the letter sent by the receivers' solicitors on 27 July 2012 amounted to a repudiation of plaintiff 94's agreement must be determined objectively, in the light of all the circumstances. Both parties were under the misapprehension that a settlement notice in relation to plaintiff 94 had been served on 19 December 2011. It was clear that Kawarau Village intended to bring the agreements to an end in reliance on cl 12.3 because none of the plaintiffs had complied with the terms of the settlement notices. In circumstances where the market price for the units had fallen substantially since the agreements were signed, the plaintiffs must have understood that the receivers desired performance of the agreements. That was obvious from the correspondence over the preceding months calling for settlement.

[219] Far from evincing a clear intention not to be bound by the agreements, the receivers were purporting to invoke a provision in the agreement to enforce the vendor's rights in circumstances where the plaintiffs had made it clear that they would not perform because they considered that the vendor was not ready, willing and able to perform its obligations under the agreements. This was the alleged repudiation by the vendor that all plaintiffs, including plaintiff 94, purported to accept.

[220] In these circumstances, I consider that the letter from the receivers' solicitors dated 27 July 2012 did not amount to a repudiation of the agreement. I note that the English Court of Appeal came to the same conclusion in similar circumstances in *Eminence Property Developments Ltd v Heaney.*[22]

If not, were the plaintiffs entitled to cancel the agreements?

[221] It follows from the conclusions I have reached that the plaintiffs were not entitled to cancel the agreements.

If Kawarau Village succeeds with its counterclaim, what damages should be awarded?

What is the relevant date for assessing damages?

[222] Damages to compensate for a breach of contract are intended to place the innocent party in the same position it would have been in had the contract been performed. These damages are normally assessed at the date of breach. However, this is not an inflexible rule and the Court may fix damages at another date if this is necessary to do justice to the innocent party in the circumstances of a particular case.[23]

[223] Damages will not be reduced as a result of any increase in value of the property after the date of breach. The reason for this was explained by the Privy Council in *Jamal v Moola Dawood, Sons & Co*:[24]

> If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyers the loss below the market price at the date of breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

[224] For this reason, in *Turner v Superannuation & Mutual Savings Ltd*, Smellie J declined to assess the damages to which the vendor was entitled at the date of

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22 *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2014] 2 All ER (Comm) 223.

23 *Johnson v Agnew* [1980] AC 367 (HL); *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC).

24 *Jamal v Moola Dawood, Sons & Co* [1916] 1 AC 175 (PC).

hearing rather than at the date of breach in circumstances where the value of the property had increased significantly.[25]

[225] In my view, the appropriate date to assess damages in the present case is the date the agreements were cancelled by Kawarau Village. I see no reason to depart from the normal rule.

What was the value of the Units at the relevant date?

[226] Kawarau Village seeks damages assessed as the difference between the contract price and the value of the units at the date of cancellation. Credit must be given for the deposits.

[227] The amounts claimed are based on Mr Schellekens' opinion that the units were worth considerably more at the date of cancellation than Mr Humphries considers was the case. Mr Schellekens' evidence is therefore favourable to the plaintiffs on this issue. In the absence of any suggestion that the value of any of the units was higher than the value assessed by Mr Schellekens at the date of cancellation, I accept his evidence.

[228] Mr Schellekens presented three sets of valuations for the units in each building at the date of cancellation. The first of these scenarios, set out in Schedule C for Kingston West and in Schedule F for Lakeside West, was abandoned by Mr Goddard at the hearing. The difference between the other two scenarios, Schedules D and E for Kingston West and Schedules G and H for Lakeside West, depends on whether the valuation should be carried out on the assumption that all of the units would be offered "in one line" on the date of cancellation. This reflects the discount rate or risk adjusted return that an investor purchasing the units in one line would expect, taking into account the time to sell the units and the transaction costs involved, offset by income achieved from the unsold units and any price escalation during the sell down period. If the valuation is carried out on this basis, Mr Schellekens' assessment of the total loss in relation to the Kingston West units increases from approximately $15 million to approximately $17 million and from

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[25] *Turner v Superannuation & Mutual Savings Ltd* [1987] 1 NZLR 218 (HC).

approximately $16.4 million to approximately $18.9 million in relation to Lakeside West.

[229] The market price at the date of the breach must reflect market conditions at that time. In circumstances where multiple plaintiffs have defaulted on their purchases, the consequence is that there is an oversupply of such units adversely affecting the price. I consider that this must be taken into account in calculating the amount of damages required to put the vendor in the position it would have been in had each agreement been performed. I therefore conclude that the damages should be calculated on the basis set out in Schedule E for Kingston West and Schedule H for Lakeside West.

Did Kawarau Village mitigate its loss?

[230] The plaintiffs pleaded three affirmative defences to Kawarau Village's counterclaim. The first was that Kawarau Village has mitigated its loss by entering into the underwriting agreements and that any loss was caused by Austpac's failure to settle, not by the plaintiffs. Mr Skelton did not press this defence strongly in his submissions, correctly so in my view. Kawarau Village has not recovered anything from Austpac or from Mr Yuen and there is no basis to make any deduction from the claim for this.

[231] The plaintiffs' second affirmative defence is that Kawarau Village has failed to take reasonable steps to recover its loss from Austpac and Mr Yuen. Mr Skelton conceded that he was unable to support this defence based on the evidence. This was a proper concession. Kawarau Village has issued proceedings against Mr Yuen. In any event, a plaintiff is free to decide who to sue and is not obliged to seek compensation from other parties who may also be liable. Harman J confirmed this in *Pilkington v Wood* :[26]

> I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The damage to the plaintiff was done once and for all directly the voidable

[26] *Pilkington v Wood* [1953] Ch 770, (Ch D) at 777; followed in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [201].

> conveyance to him was executed. This was the direct result of the negligent advice tendered by his solicitor, the defendant, that a good title had been shown; and, in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness.

[232] The third affirmative defence relates to the fact that the second and fourth defendants both counterclaimed for the same loss. Mr Goddard confirmed at the hearing that only the second defendant, Kawarau Village, is entitled to claim.

Conclusion

[233] For the reasons given in [164] to [183], membership of the Precinct Society did not constitute a participatory security. Accordingly, the Securities Act has no application to the agreements and they did not result in void allotments.

[234] Kawarau Village did not materially breach any of its obligations as vendor under the sale and purchase agreements. My reasons for reaching this conclusion are set out in [64] to [151].

[235] It follows that the plaintiffs were obliged to settle when they were called upon to do so in late 2011. Kawarau Village was entitled to serve settlement notices on the plaintiffs because it was ready, willing and able to settle at the time those notices were given.

[236] The plaintiffs did not comply with the settlement notices. Kawarau Village was accordingly entitled to cancel the agreements and forfeit the deposits.

[237] Plaintiff 94 is in a separate position because no settlement notice was served through oversight. However, plaintiff 94's solicitors made it clear that settlement would not proceed. For the reasons given in [208] to [220], this agreement was also validly cancelled by Kawarau Village.

[238] Kawarau Village is entitled to the deposits together with accrued interest and damages for the balance of the amount represented by the difference between the market value of the units at the date of cancellation and the contract price. Kawarau Village did not fail to take reasonable steps to mitigate this loss. The

calculation of damages to which Kawarau Village is entitled is set out in [228] and [229].

Result

[239] The defendants are entitled to judgment on the plaintiffs' claims.

[240] The second defendant is entitled to judgment on its counterclaim. The damages to which it is entitled are as calculated in Schedules E and H of the counterclaim dated 6 September 2014 together with interest. The second defendant is also entitled to the deposits and accrued interest.

[241] I reserve leave to the parties to apply for any consequential orders that may be needed to give effect to this judgment.

[242] By consent, I direct that this is a category 2 proceeding. If the issue of costs and or interest cannot be resolved, memoranda should be filed.

[243] By consent, the orders made on 13 December 2011 restraining the disbursement of the deposits until further order of the Court are continued. I reserve leave to the parties to apply on notice to vary or discharge this order, or to seek consequential orders, at any time after the 20 working day appeal period has expired.

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M A Gilbert J