IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA653/2020
[2021] NZCA 184

BETWEEN	MELCO PROPERTY HOLDINGS (NZ) 2012 LIMITED Appellant
AND	ANTHONY JOHN HALL Respondent

Hearing: 16 March 2021

Court: Collins, Brewer and Dunningham JJ

Counsel: A C Beck and J M Perry for Appellant
A L Holloway and T A Cunningham for Respondent

Judgment: 14 May 2021 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent is awarded costs on a Band A basis.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] This appeal challenges an Associate Judge's refusal to sustain a caveat.[1]

[1] *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2020] NZHC 2831 [High Court judgment].

[2] By written agreement dated 6 December 2019, the respondent (Mr Hall) agreed to sell the appellant (Melco) a commercial property. The settlement date was 1 February 2020.

[3] There was a due diligence clause. It read:

> 19.0 **Due Diligence**
>
> 19.1 This agreement is subject to and conditional upon the Purchaser being satisfied that the property is suitable for the Purchaser's requirements following the Purchaser carrying out due diligent verification of the property, including by way of example and without limitation;
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> (a) the value and condition of the property;
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> (b) the terms of all encumbrances, rights and interests registered against the property;
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> (c) the terms and implications of the zoning or permitted use related aspects of the property and any statutory protection notices or designations on the property;
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> (d) compliance schedule requirements under the Building Act 2004;
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> (e) the overall financial suitability of the Purchaser's proposed investment in the property, their ability to obtain necessary finance to complete the purchase and financial suitability of the tenant(s).
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> 19.2 The Vendor shall provide the Purchaser upon request with such information (except insofar as the vendor is legally bound to keep such information confidential) which the Vendor has in respect of the property in order to assist the Purchaser to fulfil this condition.
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> 19.3 The date of fulfilment is fifteen (15) working days following execution of this agreement.
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> 19.4 The parties acknowledge that the conditions in clause 19.1 are inserted for the sole benefit of the Purchaser and at any time prior to this agreement being avoided may be waived by the Purchaser giving written notice of waiver to the Vendor.

[4] The date for fulfilment of cl 19 was 9 January 2020.

[5] Melco neither gave notice of fulfilment[2] nor waived the condition before the close of business on 9 January 2020.

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[2] As required by cl 10.8 of the agreement.

[6] At 5.03 pm, on 9 January 2020, by email to Melco's solicitor, Mr Hall's solicitor purported to cancel the agreement on the basis of Melco's failure to fulfil cl 19.

[7] Melco did not accept the cancellation. Its position (we will come to the detail later) was that various actions of Mr Hall put him in breach of the agreement so that he was not entitled to cancel. On 16 January 2020, Melco lodged a caveat against the title to the property to protect its claimed interest in it.

[8] On 24 January 2020, Melco purported to waive the cl 19 condition and sought settlement of the agreement. Mr Hall refused. Subsequently, Melco applied to the High Court for an order under s 143 of the Land Transfer Act 2017 that its caveat not lapse. Associate Judge Paulsen dismissed the application and ordered the caveat to lapse.

Grounds of appeal

[9] We summarise the grounds of appeal as follows:

(a) The Associate Judge's jurisdiction was a summary one. The Associate Judge could not determine whether Mr Hall was in breach of his obligations under the agreement and accordingly he was wrong to dismiss the application.

(b) The Associate Judge was wrong to hold that Mr Hall had no obligations of good faith in relation to the agreement, and failed to apply correctly the law relating to fulfilment of conditions.

The High Court decision

[10] The Associate Judge set out the issues for him to determine as follows:[3]

> [4] At issue is whether Mr Hall was unable to avoid the agreement because Melco's failure to satisfy the due diligence condition was due to Mr Hall's default under the agreement in:

[3] High Court judgment, above n 1.

(a) failing to allow Melco access to the property to complete due diligence; or

(b) failing to advise Melco he did not intend to grant an extension of time for fulfilment of the due diligence condition.

[11] The Judge set out the relevant sequence of events as follows:

> [10] In an email of 12 December 2019, John Ellison, an Operations Manager, wrote to Mr Dee [a real estate agent acting for Melco] on behalf of Melco asking if there was an earthquake report and/or a building report available for the property. Mr Dee forwarded Mr Ellison's email to Mr Hall with his recollection Mr Hall had advised him he did not have these reports. Mr Dee's email to Mr Hall was copied to Mr Ellison.
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> [11] Mr Hall gave Melco access to the property on both 16 and 17 December 2019.
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> [12] During Melco's inspection on 16 December 2019, Mr Hall confirmed he did not have reports on the building. Later that day, Melco engaged Silvester Clark, a structural engineering firm, to do a seismic assessment of the building.
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> [13] Melco's builder and roofer inspected the property on 17 December 2019.
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> [14] On 23 December 2019, Silvester Clark advised Melco that it would not be able to do a physical assessment of the building until the week of 13 January 2020 with a view to completing a report by 17 January 2020. In an email that day, Mr Ellison asked Mr Dee to talk to Mr Hall to see if it would be possible to extend the due diligence deadline to 17 January 2020.
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> [15] On 24 December 2019, Mr Dee sent Mr Hall an email requesting an extension of the due diligence condition to 17 January 2020. On 26 December 2019, Mr Hall responded that he did not see any issues concerning the request but he would discuss any changes to the agreement with his solicitor, Paul May, in the New Year. Mr May was expected to return to work on 9 January 2020.
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> [16] On 6 January 2020, Melco, concerned about the expiry of the due diligence condition, decided to engage a second structural engineer, EQ Struc Ltd (EQSTRUC) to prepare a report on the property.
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> [17] On 7 January 2020, Mr Hall travelled for a camping trip in the Tararua Ranges, where there is apparently limited cellphone coverage. That day, at 8.06 am Melco's Operations Support Coordinator, Jessica Isaacs, sent Mr Hall a text asking for the keys or access to the property.
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> [18] In an email at 1.24 pm on 7 January 2020, Ms Isaacs advised Alden Balili of EQSTRUC that she had spoken to her manager and asked if it would be possible for EQSTRUC to provide their report "prior to 10am on Friday as the deposit is due on Friday – this way he should have enough time to review your findings." The Friday she refers to was 10 January 2020 which was after the due diligence condition expired. Mr Balili responded at 2.04 pm

that: "If we can start tomorrow that is possible." Ms Isaacs emailed Mr Balili again at 3.27 pm and wrote: "Awesome, thank you! Still trying to get through to get an answer on the whereabouts of the key."

[19] During the afternoon of 7 January 2020, Mr Hall spoke to both Mr Dee and Ms Isaacs and said he would get back to them the next day as to whether he could give Melco access to the property. Later that day, Mr Hall sent a text to Ms Isaacs that he would be in Wellington on 9 January 2020 and would speak to Mr May about Melco's request for an extension of the due diligence condition.

[20] Early on 8 January 2020, Mr Hall sent Ms Isaacs a text that he would provide access to the property if Melco's engineer was available. It was arranged that Mr Hall would meet Ms Isaacs and Mr Balili at the property at 12 pm that day. At 10.22 am, Mr Hall sent a text to Ms Isaacs that due to an unforeseen delay he would need to postpone the meeting. Mr Hall says this was because he realised he had told friends he would be returning to his campsite and was unable to contact them to tell them of his changed plans.

[21] Mr Hall says he then received a telephone call from a person who had heard the property was on the market. This caused him to reflect on his decision to sell the property.

[22] At 6.10 am on 9 January 2020, Melco's solicitor sent an email to Mr May requesting an extension of the due diligence condition to 17 January 2020. Mr May forwarded this email to Mr Hall. Mr Hall instructed Mr May he was not to respond to the request and was to cancel the agreement as soon as he was able to do so.

[23] During the morning on 9 January 2020, Melco received a preliminary seismic report on the property prepared by Silvester Clark. It indicated concerns and an inspection of the building was required but Silvester Clark could not carry out an inspection until the following week.

[24] Later that day, Melco's solicitor telephoned the office of Mr May seeking an answer to the request for an extension of the due diligence condition. Mr May did not return the call.

[25] Melco neither confirmed nor waived the due diligence condition.

[26] At 5.03 pm, Mr May sent by email a letter to Melco's solicitor purporting to cancel the agreement on the basis that Melco had failed to confirm the due diligence condition.

[12] The Associate Judge accepted Melco's argument that there is an arguable case for the implication of a term in the agreement requiring Mr Hall to provide Melco with reasonable access to the property to complete its due diligence, including for the purpose of obtaining an engineer's seismic report. Mr Hall does not argue to the contrary.

[13] As to whether Mr Hall had complied with this implied term, the Associate Judge said:

> [51] Here, there is a case that Mr Hall satisfied his obligation to provide Melco with reasonable access. Melco was aware by at least 12 December 2019 (and possibly earlier) that a seismic report was not available for the property. It carried out inspections on 16 and 17 December 2019 and made no request of Mr Hall to inspect again until 7 January 2020; just two days before cl 19 expired and while Mr Hall was away from Wellington. Although Mr Hall initially agreed to a further inspection he says he could not keep that appointment. **Whether Mr Hall was in breach in failing to provide access on 8 January 2020 is a matter about which there can be much argument. It is a trial issue which cannot be determined on this application.**
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> (Our emphasis)

[14] Notwithstanding the above, the Associate Judge took the view that Melco had failed to satisfy him that there is a reasonably arguable case that its failure to confirm the cl 19 condition was due to Mr Hall's default. The Associate Judge held that Melco had not retained an expert who could give it a seismic safety report by 9 January 2020:

> [53] As at 7 January 2020, when Mr Hall was asked for access, Melco had engaged two firms of engineers. Neither engineer was in a position to provide the report it required before the expiry of the due diligence condition.

[15] The Associate Judge recorded that following the hearing, when this issue became apparent, he convened a teleconference with counsel to hear further submissions. Mr Collins for Melco accepted that Melco would not have received a written seismic report before 10 January 2020. His argument was that it cannot be assumed that Melco would not have confirmed or waived the condition on time had Mr Hall given access on 8 January 2020. It might be that Melco could have obtained an oral report and then either confirmed or waived the condition. The Judge said:

> [56] I am unable to accept Mr Collins's submission. His counterfactual analysis requires for its validity upon the acceptance it is arguable that:
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> (a) had Melco been given access to the property on 8 January 2020 it would have requested EQSTRUC to provide an oral report prior to the expiry of the due diligence condition;
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> (b) that EQSTRUC would have been both able and willing to provide such a report knowing it was to be relied upon by Melco;
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> (c) that such a report would have been provided and satisfactory for Melco's purposes; and

(d) that Melco would have acted on such a report and confirmed (or waived) the due diligence condition prior to Mr Hall cancelling the agreement.

> [57] These are matters that are not addressed in Melco's evidence. What is clear, Melco did not ask EQSTRUC to provide an oral report despite knowing its written report would not be available until 10 January 2020. There is no evidence from EQSTRUC that it would have been in a position to provide an oral report and would have done so if requested. Such a suggestion is inconsistent with Mr Balili's email to Ms Isaacs of 7 January 2020 that its report required sign-off from EQSTRUC's directors. There is no evidence about what an oral report would contain. There is no evidence, either, that Melco would upon the basis of an oral report have been prepared to confirm or waive the due diligence condition. There is, however, evidence to suggest otherwise. Ms Isaacs's email to Mr Balili of 1.24 pm on 7 January 2020 notes that her manager would need the report prior to 10 am on 10 January 2020 so that he had time to review the findings.

[16] The Associate Judge noted that Melco was in possession of a report from Silvester Clark indicating issues with the building and chose not to confirm or waive cl 19 despite knowing that no extension of cl 19 had been granted.

[17] The Associate Judge dealt with the submission that Mr Hall was obliged to tell Melco he would not grant an extension as follows:

> [59] Melco submits that Mr Hall's failure to communicate he would not grant an extension of cl 19 deprived Melco of the opportunity to waive the condition. I do not accept this argument.
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> [60] There was no obligation upon Mr Hall to advise Melco he would not extend cl 19. He had no express obligation to do so under the agreement and an obligation to do so cannot be implied. It is not necessary to make the agreement work nor is it so obvious it goes without saying. To imply such a term would require Mr Hall to prefer the commercial interests of Melco in the performance of the agreement to the detriment of his own interests in bringing it to an end and that cannot be correct.

[18] The Associate Judge decided that the default rule does not apply in this situation:

> [61] I do not accept the submission, either, that in deciding not to grant an extension of cl 19 or in failing to communicate that decision Mr Hall was subject to the default rule. Mr Hall was not exercising a unilateral contractual power. Clause 19 could only be extended by agreement of both parties. Even if a default rule applied, it did not require Mr Hall to sacrifice his own commercial interest for those of Melco. An agreement for the sale and purchase of land is not a contract requiring good faith.
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> (footnotes omitted)

Melco's submissions on appeal

[19] Mr Beck for Melco emphasised that the jurisdiction relating to caveats is a summary jurisdiction not suited to the resolution of factual disputes. He cited the decision of this Court in *Philpott v Noble Investments Ltd*:[4]

> (a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;
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> (b) It is enough if the applicants put forward a reasonably arguable case to support the interest they claim;
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> (c) The summary procedures involved in applications of this nature are not suited to the determination of disputed questions of fact. An order for the removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained — either because there is no valid ground for lodging it in the first place, or because such a ground no longer exists; and
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> (d) When an applicant has discharged the burden upon it, the Court retains discretion to remove the caveat which it exercises on a cautious basis. Before it does so the Court must be satisfied that the caveator's legitimate interest would not be prejudiced by removal.
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> (footnotes omitted)

[20] Mr Beck submitted that Melco demonstrated that it has a reasonably arguable case to support the interest it claims. The issue was whether the contract had been validly terminated by Mr Hall. If there was an arguable case that the agreement remained in force then the caveat should not lapse. Mr Beck submitted:

> 27 The case was far from straightforward, and presented the court with several complexities. The court was required to consider:
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> a. Whether terms should be implied in the contract and, if so, what they should be.
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> b. Whether the respondent was in breach of contractual duties, and whether this precluded him from taking action to cancel the contract.
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> c. Whether the contract had come to an end as a result of the non-fulfilment of the condition, and whether the respondent was precluded from asserting that by virtue of his own conduct.

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4 *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26].

> d. Whether the respondent had taken deliberate action to bring about the failure of the contract and was seeking to take advantage of his own wrongful behaviour.

[21] In Mr Beck's submission, these matters could not properly be assessed on the basis of untested affidavit evidence. Indeed, the Associate Judge accepted he was unable to determine whether Mr Hall had breached his obligations to provide access to the property. That conclusion should have led the Associate Judge to sustain the caveat.

[22] The Associate Judge's decision that, essentially, it did not matter whether or not Mr Hall was in breach because under no circumstances could Melco fulfil the condition is contradictory. If Mr Hall was in breach then Melco did not have to comply strictly with cl 19.

[23] Mr Beck's allied submission is that if Mr Hall was in breach of the agreement he was not entitled to cancel it. Mr Beck cited *Noble Investments Ltd v Keenan*:[5]

> A party could be seen as benefiting from its own wrong if it seeks by cancellation to deprive the other party of the benefit of the contract in circumstances where the other party's breach is a direct result of breach committed by the party seeking to cancel the contract. ... A party could also be seen as benefiting from its own wrong where it is unable or unwilling to perform its obligations under the contract and seeks to avoid liability for its own breach by cancelling the contract on the basis of the other party's breach.

[24] In a further submission, Mr Beck raises the well-known principle that if a party to an agreement prevents the other party from fulfilling a condition in the agreement then it is deemed to be fulfilled.

[25] Mr Beck also submits that the Associate Judge was wrong to hold that Mr Hall was not obliged to act in good faith and tell Melco he would not extend the cl 19 period. Or, at least, in the context of this particular agreement, whether Mr Hall had such an obligation was a matter that should be addressed at trial. Mr Beck submits:

> 67 In this case, the evidence was that Mr Hall indicated that he would provide the access required, and that there would not be a problem extending time. He expressly stated that he would get back to the appellant regarding its request. He knew that the appellant was

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5 *Noble Investments Ltd v Keenan* [2006] NZAR 594 (CA) at [47].

relying on that representation. He was deliberately concealing that he had changed his position, and had determined not to grant an extension of time. He instructed his solicitor to conceal the true position.

68 In the situation which arose, it was necessary for Mr Hall to correct the appellant's mistaken assumption that he would be communicating with them before the expiry of the deadline. He was not entitled to remain silent.

69 In addition, the respondent was required to act in good faith once he had decided to change his position.

Mr Hall's submissions

[26] Mr Holloway summarises Mr Hall's case on appeal:

4.1 The High Court was right to find that Melco's failure to fulfil clause 19 was not caused by Mr Hall. Melco's own delay meant that, irrespective of Mr Hall's actions and any problems accessing the Property, Melco was never going to receive an engineer's seismic report by the contractual deadline. Melco also could have waived clause 19 and confirmed the contract before the deadline if it wished — as it ultimately purported to do on 24 January 2020.

4.2 The above finding does not result in Mr Hall 'benefitting from his own wrongful act'. It was not 'wrongful' for Mr Hall to be out of town on 7, 8 and 9 January 2020. Nor did Mr Hall have a duty to tell Melco that he would not extend the due diligence deadline.

4.3 It is also open for the Court to find that Mr Hall did provide Melco with reasonable access to the Property.

[27] Mr Hall's main argument is that even if he had been able to facilitate access on 7, 8 or 9 January 2020, it cannot reasonably be argued that Melco could have confirmed cl 19. It simply would not have had a seismic report by the due date. It was always open for Melco to waive cl 19. Nothing done by Mr Hall prevented Melco from waiving cl 19. This is evidenced by the fact that, on 24 January 2020, Melco purported to waive cl 19.

[28] Mr Holloway submits that the Associate Judge was right not to imply a good faith obligation into a transactional agreement for sale and purchase.

[29] Mr Holloway submits that Mr Hall had no duty to speak:

> 32.1 It would have been unreasonable for Melco to take Mr Hall's 26 December 2019 email or anything subsequent as:
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> (a) assurance than an extension would be granted; or
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> (b) assurance Mr Hall's extension decision would be communicated to Melco in time for it to elect to confirm or waive clause 19.

[30] There is no evidence that Mr Hall knew that Melco was relying on being given an opportunity to confirm cl 19. Further:

> 32.4 Melco did not in fact rely on the 26 December 2019 email. It engaged a second engineer out of concern that no extension would be granted and instructed its solicitors to email a fresh extension request on the morning of 9 January 2020. The solicitors' email shows Melco knew no extension had been granted and it is not consistent with any expectation that either party would forbear exercising their termination rights under clause 10.8(5). Melco could have waived clause 19 at any time until receipt of Mr Hall's notice. Missing is evidence from Melco that it chose not to confirm the contract because something Mr Hall did or did not do caused it to believe that it would be given either an extension or an opportunity to confirm.

[31] Since Mr Hall, it is submitted, did no more than rely upon the terms of the agreement, he was not morally or legally in the wrong. Mr Hall was perfectly entitled to secure a back-up offer to a conditional agreement for sale and purchase of land:

> 34 … The inference that Mr Hall frustrated access to prevent Melco from fulfilling clause 19 is rejected. The evidence is that Mr Hall told Melco he was unable to travel to Wellington on 8 January 2020 *before* he learned of an alternative purchaser. He did not decide about the extension until 9 January 2020.

[32] It is further submitted on behalf of Mr Hall that he did in fact provide reasonable access to the property. The Associate Judge held that he could not resolve that issue but, it is submitted, since appeals are by way of rehearing this Court is not bound to reach the same conclusion. Mr Holloway submits:

> 38 The contract was executed on 6 December 2019 and the due diligence deadline was 9 January 2020. There is no evidence that Mr Hall delayed or declined to facilitate access over the period 6 December 2019 to 7 January 2020. Ms Isaacs sent Mr Hall a text message at 8.06am on 7 January 2020 asking for access. Mr Hall was travelling into the Tararua Range that day and was unable to return. The

> Property was therefore unavailable for only the final three working days of the due diligence period, with Mr Hall having received no prior notice that Melco would need further access. Given this, the Court can find that Mr Hall did provide reasonable access to the Property.

Discussion

[33] We start with the agreement. It was made on 6 December 2019 and the settlement date was 1 February 2020. It was conditional on cl 19, a due diligence clause specified to be for the sole benefit of Melco. The date for fulfilment of the clause was 9 January 2020. Clause 10.8 of the agreement provided that if cl 19 was not fulfilled or waived by the date for fulfilment either party could avoid the agreement by giving notice to the other party.

[34] Clause 19 was not fulfilled by the date for fulfilment and Mr Hall avoided the agreement by giving notice to Melco. If Mr Hall was entitled to do that then Melco's equitable interest in the property arising from the agreement was extinguished because the agreement was no longer in effect. In such a case, Melco had no interest capable of sustaining its caveat. But, if Mr Hall was not entitled to avoid the agreement then it remained in effect; Melco retained its equitable interest in the property, and its caveat could be sustained.

[35] The issue on appeal, broadly, is whether, in the summary context of the application to sustain the caveat, it was open to the Associate Judge to conclude that Mr Hall was entitled to avoid the agreement for non-fulfilment of cl 19.

[36] We accept that the passage in *Philpott v Noble Investments Ltd* quoted at [19] sets out the principles applicable to the summary determination of whether a caveat should be sustained. The onus is on Melco to put forward a reasonably arguable case that Mr Hall was not entitled to avoid the agreement on the basis of non-fulfilment of cl 19.

[37] Since the provisions of the agreement are clear, the onus requires Melco to show a reasonably arguable case that either Mr Hall was in relevant breach of his own obligations under the agreement, or had made some concession or given some binding assurance, such that his purported avoidance of the agreement was ineffective.

[38] In the first category is Melco's contention that Mr Hall failed to provide reasonable access to the property in breach of an implied term that he must do so. The Associate Judge said he could not determine this issue. It would be a matter for trial.

[39] We accept, and it is not disputed, that cl 19 carried with it an implied term that Mr Hall would provide Melco with reasonable access to the property for the purpose of exercising its right to undertake due diligence. Clause 19 is drafted widely. There is no doubt that obtaining a seismic stability report is within its scope.

[40] The period for carrying out due diligence was just over a calendar month, but it contained the Christmas holiday season. Mr Hall gave Melco access to the property on 16 and 17 December 2019. Melco decided it wanted a seismic assessment and, on 16 December 2019, engaged Silvester Clark to do that. But, on 23 December 2019, Silvester Clark advised Melco it could not assess the property until the week of 13 January 2020 with a view to providing the report by 17 January 2020.

[41] To this point there can have been no breach by Mr Hall of his obligation to provide reasonable access.

[42] On 24 December 2019, Mr Dee asked Mr Hall to extend the cl 19 period to 17 January 2020. Mr Hall's reply, on 26 December 2019, was equivocal. But that has nothing to do with his obligation to provide reasonable access.

[43] It is only the events of 7, 8 and 9 January 2020 that can bear on Mr Hall's obligation in this regard.

[44] On 7 January 2020, Melco sent Mr Hall a text message asking for keys or access to the property (the previous day Melco engaged EQSTRUC to provide a seismic stability report). Mr Hall said he would get back to Melco on 8 January 2020 as to whether he could give access to the property.

[45] Early on 8 January 2020, Mr Hall told Melco he would provide access to the property if Melco's engineer was available. Melco told Mr Hall its engineer was

available and it was agreed access would occur at 12 pm that day. At 10.22 am, Mr Hall cancelled the access appointment.

[46] On 9 January 2020, Melco's requests, via its solicitor, for an extension of the cl 19 period went unanswered.

[47] In our view, it is reasonably arguable that in the context of a tight period for due diligence and a looming deadline, Mr Hall's behaviour on 7, 8 and 9 January 2020 breached his obligation to provide Melco with reasonable access to the property. We do not express an opinion. There are obvious arguments both ways. But it is not, in our view, clear that the argument is not reasonably available to Melco.

[48] However, the onus is also on Melco to show a reasonably arguable case that had Mr Hall given access to the property in the period 7, 8 or 9 January 2020, Melco would have fulfilled the cl 19 condition, either by confirming it or waiving it.

[49] On this point we accept the Associate Judge's analysis quoted above at [15]. There is no evidence that access to the property would have generated a seismic stability report, oral or written, before the 9 January 2020 deadline. Indeed, it was conceded that no written report would have been available before 10 January 2020.

[50] The inference to be drawn from the affidavit of Mr Woodrow, filed in support of Melco's application, is that it was important to Melco to have a seismic stability report in order to decide whether to fulfil cl 19. That is why the requests for extension of the cl 19 deadline were made.

[51] Nothing in Mr Hall's actions prevented Melco from waiving the cl 19 condition prior to the deadline. It can be inferred it did not do so because it did not have a seismic stability report.

[52] In our view, in the absence of evidence as to what would likely have happened if Mr Hall had granted access to the property during the 7–9 January 2020 period, all Melco can do is invite speculation. That is not enough to discharge its onus.

[53] It follows that the Associate Judge was correct to find that there was not a reasonably arguable case that Melco's failure to fulfil the cl 19 condition was due to Mr Hall's default.

[54] With that conclusion, three of the other grounds of appeal fall away:

(a) There are no complexities relevant to whether the Associate Judge was correct to exercise his summary jurisdiction;

(b) If Mr Hall was in breach of the agreement, he did not benefit from his wrong by cancelling the agreement; and

(c) Mr Hall did not prevent Melco from fulfilling the cl 19 condition.

[55] Finally, we agree also with the Associate Judge that Mr Hall had no obligation in good faith to tell Melco he would not extend the cl 19 period. Mr Hall never promised to extend the period. He was equivocal as to whether he would. This was a transactional agreement for the sale and purchase of land with clearly defined obligations. In any event, the uncontradicted evidence of Mr Hall is that he did not learn of an alternative purchaser until after he had cancelled the 8 January 2020 appointment. We accept Mr Holloway's submission that the evidence is Mr Hall decided not to extend the cl 19 deadline on 9 January 2020.

Decision

[56] The appeal is dismissed.

[57] Mr Hall is entitled to costs and we award them on a standard appeal, Band A basis.

Solicitors:
Gibson Sheat, Wellington for Appellant
Wotton Kearney, Wellington for Respondent