IN THE SUPREME COURT OF NEW ZEALAND

SC 115/2016
[2017] NZSC 150

BETWEEN	KAWARAU VILLAGE HOLDINGS LIMITED First Appellant
	MELVIEW (KAWARAU FALLS STATION) INVESTMENTS LIMITED (IN RECEIVERSHIP) Second Appellant
AND	HO KOK SUN AND OTHERS First Respondents
	PENINSULA ROAD LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Second Respondent
	RUSSELL McVEAGH Third Respondent

Hearing:	6 and 7 April 2017
Court:	Elias CJ, William Young, Arnold, O'Regan and Ellen France JJ
Counsel:	D J Goddard QC, M G Colson and T B Fitzgerald for Appellants S J Mills QC, A R B Barker and M Singh for First Respondents
Judgment:	6 October 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the first respondents costs of $35,000 plus reasonable disbursements (to be fixed by the Registrar if necessary). We allow for two counsel.

REASONS

	Para No
Elias CJ	[1]
Ellen France J	[3]
Arnold J	[112]
William Young and O'Regan JJ	[184]

ELIAS CJ

[1] The appeal concerns the meaning of agreements for sale and purchase of apartments bought off the plans in the first stage of what was to be a three-stage development on Lake Wakatipu. I have had the advantage of reading in draft the reasons prepared by Arnold, O'Regan and Ellen France JJ. I agree with all other members of the Court that under the agreements the completion of the three stages of the development was a term of the contract. In this conclusion I concur with the reasons given by Arnold and Ellen France JJ. Also in agreement with Arnold and Ellen France JJ and for the reasons they give, I conclude that the completion of the three stages of the development was an essential term of the contract. Because the vendor had put it out of its power to complete the development at the time it called for settlement, the purchasers of the apartments in the first stage were not obliged to settle the purchases. I consider it is unnecessary to determine the cross-appeal.

[2] In accordance with the views of the majority, the appeal is dismissed and the appellants are ordered to pay the first respondents costs of $35,000 together with reasonable disbursements (to be fixed by the Registrar if necessary). We allow for two counsel.

ELLEN FRANCE J

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Introduction

[3] This appeal raises questions about the construction of agreements for sale and purchase for units in two buildings which were to be part of Kawarau Falls Station Development, a planned three-stage development on the shores of Lake Wakatipu, near Queenstown. Stage one of the proposed development was completed. But, by the time the vendor Kawarau Village Holdings Limited (Kawarau Village Holdings) (the first appellant) called on the purchasers (the first respondents) to settle their purchases, it was clear stages two and three of the proposed development could not be completed.

[4] The principal issues on appeal, on which the Courts below have reached different views, are whether there was an obligation to complete stages two and three of the development and, if so, the effect of the vendor's inability to do so. In the High Court, Gilbert J concluded there was no obligation to complete stages two and three.[1] The Court of Appeal considered there was an obligation to complete and that it was an essential term of the agreements.[2] Both Courts rejected the purchasers'

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[1] *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2015] NZHC 126 [*Kawarau* (HC)].

[2] *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2016] NZCA 427 (Randerson, Wild and Brown JJ) [*Kawarau* (CA)].

claim there were three other essential terms relating to, respectively, non-residential uses of one of the buildings, the inclusion of common property and the lease terms at another building. The vendor appeals and the purchasers cross-appeal.

The factual background

[5] There is no dispute about the material facts.[3]

[6] The second respondent, Peninsula Road Limited (in receivership and in liquidation) (Peninsula Road), was the original developer of the project. Peninsula Road obtained resource consent for the project on 28 July 2006. The planned development as reflected in the resource consent would have included three five star hotels with a total of 596 rooms, a Quadrant branded four star plus hotel and three Quadrant branded serviced apartment buildings providing a further 333 units. It was also intended that the completed development would include over 700 square metres of conferencing areas within stage one and a further 3,797 square metres of conferencing in stages two and three.

[7] I attach as an appendix a drawing from the Draft Outline Plans and Specifications for the development showing the placement of the proposed buildings. The appendix also includes a description of the buildings to be completed in each stage.[4]

[8] Over the period from 2006 to 2010 the purchasers entered into sale and purchase agreements to buy units in two buildings in stage one of the proposed development (the agreements). The two buildings were known as Kingston West and Lakeside West. Kingston West was to contain serviced apartments operating as a four star hotel. Lakeside West was advertised as a luxury apartment complex. Most of the purchasers were residents of Singapore or Malaysia. None of the purchasers were New Zealand residents.

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[3] The summary which follows draws on the parties' agreed summary of facts, the agreed chronology and the description in the Court of Appeal judgment: *Kawarau* (CA), above n 2, at [10]–[15].

[4] The description of the buildings is taken from the parties' agreed statement of facts and see also *Kawarau* (HC), above n 1, at [10]; and *Kawarau* (CA), above n 2, at [11].

[9] Part way through construction of Kingston West and Lakeside West, the global financial crisis occurred. The market value of the units fell significantly. In October 2007 the original developer, Peninsula Road, transferred ownership of the assets in stage one of the development to its subsidiary Melview (Kawarau Falls Station) Investments Limited (in receivership) (Melview), the second appellant. Peninsula Road retained ownership of the stage two and three land at that point.

[10] Melview was placed into receivership on 26 May 2009. In March 2010 Peninsula Road was also placed into receivership and then liquidation. In October 2010, Melview transferred ownership of the assets in stage one, including the agreements for sale and purchase, to its subsidiary Kawarau Village Holdings (referred to as "the vendor" in this judgment). The receivers completed stage one of the development. Stages two and three have not been completed. There is no dispute that, by late 2011, the receivers were not in a position to complete any of stages two or three. As explained by Mr Alan Garrett, a receiver from KordaMentha, after Peninsula Road went into receivership and then liquidation, it had not undertaken any construction work on stage two and nor on stage three. Further, the secured creditor had decided not to advance any further funds to progress stage two. Finally, on 27 February 2014, Peninsula Road entered into an agreement for sale and purchase as vendor for sale of the land comprising stages two and three.

[11] In late 2011, by which time the Kingston West and Lakeside West buildings were completed, settlement notices were issued to the purchasers.[5] The purchasers refused to settle. The vendor purported to cancel the agreements for sale and purchase in March 2012 and to forfeit the deposits (a total of about $10 million). The purchasers claimed that the settlement notices issued by the vendor were invalid and the notices of cancellation amounted to a repudiation of the agreements for sale and purchase by the vendor. The purchasers purported to accept this repudiation and cancelled the agreements for sale and purchase. The deposits and accrued interest are held by a stakeholder pending the final outcome of these proceedings.

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5 There was a question in the High Court about failure to serve one purchaser, but that is not in issue in this Court: *Kawarau* (HC), above n 1, at [208]–[220].

[12] The purchasers in proceedings in the High Court sought an order for return of their deposits on the basis that the vendor was not ready, willing and able to settle. That was because the vendor could not deliver its promises under the agreements for sale and purchase including the completion of stages two and three. The purchasers accordingly claimed that the settlement notices were invalid and that the notices of cancellation amounted to a repudiation of the agreements by the vendor. The vendor in turn counterclaimed for damages for loss of bargain. It claimed the difference between the contract price and the market value of the units at the date of cancellation, some $46 million including accrued interest as at the time of the hearing in the High Court.

[13] In the High Court, Gilbert J found against the purchasers on the principal issue concluding there was no obligation on the vendor to complete stages two and three.[6] Gilbert J also found against the purchasers on the three subsidiary issues. In particular, Gilbert J found that the vendor did not breach essential terms as follows: first, that the Lakeside West building would be an entirely residential development;[7] second, that the common property in the Kingston West building would include at a minimum the areas necessary for servicing the purchasers' units and the operation of the hotel;[8] and, finally, leases to the hotel operated by Kingston West would have a maximum term of 30 years.[9] Judgment was entered in favour of the vendor on its counterclaim for the damages sought.[10]

[14] The Court of Appeal allowed the appeal in part. The finding of the High Court that there was no obligation on the vendor to complete stages two and three was set aside.[11] The Court also considered that the obligation to complete was an essential term.[12] Finally, the Court found that there had been an anticipatory breach of the obligation to complete stages two and three.[13] The findings of the

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6 *Kawarau* (HC), above n 1, at [64]–[82].
7 At [139]–[148].
8 At [83]–[90].
9 At [105]–[117].
10 The purchasers were ordered to pay damages totalling $45,473,800.
11 *Kawarau* (CA), above n 2, at [54]–[75].
12 At [76]–[80].
13 At [81]–[98].

High Court in relation to the three subsidiary matters were upheld.[14] Judgment was accordingly entered in favour of the purchasers on their claim for return of their deposits and on the counterclaim.

The agreements for sale and purchase

[15] None of the agreements, neither those for Kingston West nor those for Lakeside West, were in standard form. The main difference between the agreements for Kingston West and those for Lakeside West is that the units in the former were sold on the basis that there would be a lease to a hotel operator in place on settlement. The owner was to receive rental payments under the lease and did not obtain rights to personal occupation. The Lakeside West units were marketed as part of a residential apartment complex so the agreements for these units did not include such provisions. Otherwise, the terms of the sale and purchase agreements for units in these two buildings were materially the same. I focus on the terms of the Kingston West agreements.

[16] The agreements for the units in Kingston West were, for material purposes, uniform.[15] The agreements began with the details of the parties and the particulars of sale. The latter particulars included the price of the relevant unit and the deposit payable. The terms of the agreements appeared under a heading "Further Terms of Sale". Clause 1 contained various definitions to which I will return.

[17] Clause 2 set out a number of conditions. In particular, cl 2.1 provided that the agreement "is subject to and conditional upon" the vendor obtaining the following by 31 December 2008:

> (a) … a minimum level of sales of units in the Building which in the Vendor's sole opinion justifies completion of the Building.

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14 At [100]–[116] in relation to non-residential uses of Lakeside West, at [117]–[141] in relation to the common property in Kingston West, and at [142]–[155] in relation to the lease for the hotel operator at Kingston West.

15 The maximum lease term did vary as between purchasers: see *Kawarau* (CA), above n 2, at [142].

(b) … on terms acceptable to the Vendor acting in its sole discretion, the Consents.[16]

(c) … [confirmation] that the projected construction costs for the Development are acceptable to the Vendor acting in its sole discretion.

Clause 2.1(d) provided that the vendor was to obtain the issue of a certificate of title to the Property "in respect of a stratum estate in freehold".[17]

[18] The "Building" referred to in cl 2.1(a) was defined as the "building erected or to be erected [substantially] in accordance with the Draft Outline Plans and Specifications".[18] The "Draft Outline Plans and Specifications" provided the outline plans and specifications both for the Unit and the Building and was annexed to the agreements for sale and purchase as Annexure 2. The Draft Outline Plans and Specifications set out some general material about Kingston West, information about construction, building services and the like, and also included the draft floor plans for the various levels of the Building.

[19] "The Development" referred to in cl 2.1(c) is also a defined term and means "the development of the Building and immediately adjoining land by way of a curtilage to the Building in accordance with this agreement". It is helpful to note at this point that the meaning of the term Development can be contrasted with the other, important term, namely, the "Precinct". The Precinct meant "the development to be undertaken on the Precinct Land". The "Precinct Land" in turn meant the land described in the specified certificates of title which encompassed the entire 17 acres of the proposed Development.[19] That is, the "Development" related to the building and its immediately surrounding land, while the "Precinct" referred to all three stages of the development, as a whole.

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16 "The Consents" referred to in cl 2.1(b) meant "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 …".

17 "Property" was defined to mean "the Unit (including the Furniture, Fittings and Equipment (if any) and the Carpark (if any)".

18 The word "substantially" in this definition was substituted for the word "generally" by an addendum to the agreements.

19 "Land" meant "that part of the Precinct Land on which the Development is to be undertaken".

[20] Clause 2.2 made it clear that cls 2.1(a)–(c) were included in the agreement for the vendor's sole benefit and could be waived by the vendor. Clause 2.1(d) was included for the benefit of both parties.[20]

[21] It is helpful to set out cl 2.9 dealing with the effect of non-completion of the Precinct Amenities and Infrastructure[21] at Settlement Date in full.[22] The clause provided as follows:

> **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] Clause 4 dealt with the development and issue of title. This clause contained a number of disclosures and acknowledgements. In particular, cl 4.1 recorded a number of matters which the vendor disclosed and that the purchaser "acknowledges and agrees … (subject to any express provision to the contrary herein)". For example, cl 4.1(a) was a disclosure that no separate certificate of title had yet been issued for the Unit (that is, "the unit specified in the Particulars of Sale"). There was a further acknowledgement that the certificate of title for the Unit "will be (and is to remain) subject to the Memorandum of Encumbrance (Precinct)" which secured the levies and contributions payable to the Precinct Society.[23] Clause 4.1(d) dealt with the membership of the Precinct Society and provided that purchasers must be members of the Society and comply with the Precinct Society Rules. The clause read as follows:

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[20] Clause 2.3. The purchaser acknowledged the vendor's ability to give notice to the purchaser that a condition would not be satisfied and cancel the agreement: cl 2.5. The conditions were described as conditions subsequent: cl 2.6.

[21] "Precinct Amenities and Infrastructure" meant "all amenities and infrastructure and associated works from time to time within the Precinct intended for common use by all Owners".

[22] It appears the agreements were amended to include a new cl 2.9 but I could not see any explanation as to why there was no resultant change to the number of the clause I have cited as cl 2.9.

[23] Clause 4.1(c).

> 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;[24]

[23] Clause 4.1(e) acknowledged the vendor's ability to enter into supply agreements for and on behalf of the Body Corporate or the Precinct Society.[25]

[24] The next important acknowledgement was found in cl 4.1(g) which is helpfully considered alongside cl 4.1(h). These clauses provided the ability to defer or suspend completion of the development of, respectively, the Precinct and of the Building. Both clauses are set out below:

> (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.

[25] Clause 4.1(i) required the purchaser to give full co-operation to the vendor and to "support all applications to allow completion of the Development and the development of the Precinct". In cl 4.1(j) it was acknowledged that failure of the purchaser to comply with the obligation to co-operate with the "completion of the Development and the development of the Precinct" was likely to expose the vendor to loss or damage "and that the Purchaser may become liable for all or part of such loss or damage by virtue of any failure" to co-operate with completion.

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24 "The Precinct Society" meant "the Kawarau Falls Station Precinct Society Incorporated (to be formed)". The Precinct Rules were defined to mean "the rules of the Precinct Society in the form required by the Vendor". Clause 4.1(n) was an acknowledgement the vendor is to "procure the Precinct Society to enter into the Precinct Management Agreement" and the Society is obligated to comply with the requirements of that Agreement.

25 The "Body Corporate" was defined as the body to be established under the Unit Titles Act 1972 (the Unit Titles Act 1972 was repealed, as from 20 June 2011, by s 218 of the Unit Titles Act 2010). There was also provision for Body Corporate Rules: cl 1.1.

[26] The vendor's submissions emphasise the terms of cl 4.1(k). That clause provided:

> 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;

[27] Clause 4.2 was a no requisitions clause. It reads as follows:

> **No requisitions:** The Purchaser is not entitled to avoid this Agreement or any of its provisions, raise any objection or make any requisition or delay settlement or claim any compensation, damages, right of set-off or any other right or remedy under this Agreement or otherwise at law or in equity in respect of:
>
> (a) any of the matters referred to in clause 4.1; or
>
> (b) any alteration, variation or cancellation made by the Vendor under any provision in this Agreement.

[28] Clause 4.3 dealt with various requirements on the vendor in relation to the Unit Plan.[26]

[29] Under cl 4.4 the purchaser was not entitled to a transfer of the property or to call for settlement until all conditions precedent set out in cl 2.1 had been satisfied or waived and "Practical Completion" had been achieved. "Practical Completion" was a defined term as follows:

> **"Practical Completion"** means that stage of the Development, when the Property and those parts of the Common Property for the Purchaser's use and enjoyment of the Property are, in the opinion of the Vendor's architect or independent project manager … , complete except for minor omissions and minor defects … .

[30] The vendor's right to grant or receive the benefit of any easements, encumbrances, rights or obligations was set out in cl 4.6.

[31] Clause 4.8 dealt with measurements and areas. All measurements and areas were subject to any variation "which may be found necessary upon checking by the

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[26] The "Unit Plan" meant "the unit plan to be prepared in accordance with the [Unit Titles] Act to be deposited in respect of the Land and which, subject to the provisions of this agreement, will be based upon the content and intent of the Draft Outline Plans and Specifications".

Relevant Authority, the Vendor's surveyor and Land Information New Zealand". The clause continued:

> … 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 (being calculated in accordance with the same method of measurement and by a registered surveyor) 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) [10]%, 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 right or claim 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.[27]

[32] Clause 4.9 addressed variations to the Draft Outline Plans and Specifications. The purchaser acknowledged first in cl 4.9(a) that the Draft Outline Plans and Specifications represented "the Vendor's current intentions" concerning the Development and "will need to be evolved and detailed during the progression of the Development". Secondly, cl 4.9(b) provided for the alteration of the Draft Outline Plans and Specifications in the following terms:

> 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.

[33] Under cl 4.10 the vendor had the right to enter the Building and Precinct to complete any development on the Building or the Precinct.

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[27] Clause 4.8(b) was amended by substituting "10%" for "15%".

[34] Clause 5 contained a number of provisions relating to the Precinct Society. In cl 5.1 the purchaser acknowledged that the Unit is part of the Precinct and that the public had access to the Precinct via "public roads, footpaths and other means" and that "[c]ommercial, retail, restaurant, licensed premises … and other activities may take place within and adjacent to the Precinct". The purchaser was not entitled to object to such uses or to seek to recover any damages or compensation arising from such use. Clause 5.2 contained an acknowledgement by the purchaser that the Precinct Society would be incorporated prior to settlement and that the owners of property, including the Units, subject to the agreements within the Precinct "must be members of the Precinct Society".

[35] Clause 5.3 next contained a number of covenants, for example, the purchaser was required to join the Precinct Society. Further, the purchaser acknowledged that the Memorandum of Encumbrance (Precinct)[28] to be entered into under cl 5.4 was to be registered in priority to other mortgages or charges to be granted by the purchaser. Under cl 5.4, the vendor could prior to the purchaser taking title register restrictive covenants giving effect to the provisions in this section of the agreement (relating to the Precinct Society) and any other provisions reasonably necessary to give effect to the scheme for the Precinct and the Precinct Society. The role of the Precinct Society was dealt with in cl 5.5.[29]

[36] Clause 5.7 is important. It is relied on by the purchasers and was a focus of the decision in the Court of Appeal. I set the provision out in full:

> **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.

[37] Clause 5.8 provided that the vendor would procure that prior to settlement, the Precinct Society would enter into a Precinct Management Agreement to appoint a

28 See above at [22].
29 Clause 5.5 is dealt with in greater detail below at [57].

Precinct Manager, and further clarified the role of the Precinct Manager. Clause 5.9 required that the Precinct Management Agreement incorporate the "key terms" in Annexure 1. Annexure 1 recorded, amongst other matters, that the Development (Kawarau Falls Station) "is being developed as an integrated world class village resort ("Precinct")".

[38] Clause 6.1 provided that the vendor was to ensure that construction of the Development was 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 relevant regulatory requirements.

[39] Clause 6.5 addressed the ability of the vendor and the vendor's architects and contractors and the like to enter on to the Building and the Land.

[40] Under cl 8, the vendor was given a power of attorney in relation to the purchaser to do all things necessary to, amongst other matters, complete the Development and the Precinct.[30]

[41] Clause 12 dealt with default. I note in particular cl 12.1 dealing with the settlement notice. That clause provided:

> **Settlement Notice:** If the sale is not settled on the Settlement Date either party may at any time thereafter (unless the Agreement has first been cancelled or become void) serve on the other party notice in writing ("**Settlement Notice**") to settle in accordance with this clause; but the notice shall be effective only if the party serving it is at the time of service either in all material respects ready, able and willing to proceed to settle in accordance with the notice or is not so ready, able and willing to settle only by reason of the default or omission of the other party to the Agreement. If the Purchaser is in possession a Settlement Notice may incorporate or be given with a notice under Section 50 of the Property Law Act 1952.

[42] Reference should also be made to cl 12.7 which provided that a party who served a Settlement Notice under cl 12 was not in breach "of an essential term by reason only of that party's failure to be ready and able to settle upon the expiry of that notice".

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30 See further discussion of cl 8 below at [61].

[43] Clause 16.8 was an entire agreement clause.

Nature of the vendor's obligation in relation to stages two and three

[44] I turn to consider whether there was an obligation on the vendor to complete stages two and three.

The decision in the High Court

[45] In the High Court, Gilbert J's analysis focussed on cl 5.7 of the agreements which provided that the concept and development of the Precinct could be altered or varied.[31] The purchasers had submitted that cl 5.7 of the agreements constituted a covenant by the vendor to complete all three stages of the development in a manner consistent with the Draft Outline Plans and Specifications,[32] while the vendor submitted that cl 5.7 was not an express term requiring the vendor to complete the entire development.[33]

[46] Gilbert J said that while there was force in the purchasers' submission, ultimately he considered that cl 5.7 related to how the Precinct might be developed. In other words, it was a negative covenant which prevented the vendor from undertaking works in the Precinct unless the works conformed to the Draft Outline Plans and Specifications or variations did not materially adversely affect the value of the Unit.[34] The Judge said there were five matters supporting this interpretation. Those matters were as follows:

(a) cl 4.1(k), which recorded that the purchaser was not purchasing the Unit in reliance on completion of the development of the Precinct,[35] made it clear the purchaser was not purchasing in reliance on completion;[36]

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31 See above at [36].
32 *Kawarau* (HC), above n 1, at [67].
33 At [70].
34 At [72].
35 See above at [26].
36 *Kawarau* (HC), above n 1, at [73].

(b) the lack of definition of the buildings and amenities to be constructed in stages two and three;[37]

(c) cl 5.1, which acknowledged that commercial activity could take place within the Precinct,[38] would not be necessary if the vendor was obliged to complete;[39]

(d) the ability to defer completion in cl 4.1(g)[40] was difficult to reconcile with an obligation to complete;[41]

(e) the purchasers' acknowledgement in cl 2.9 that the vendor could alter, vary, add to or omit amenities or facilities proposed to be in the Precinct[42] could not be reconciled with an obligation to complete;[43] and

(f) the fact the vendor's commitment to complete the buildings in stage one was conditional on achieving a minimum level of sales (cl 2.1[44]) was inconsistent with an obligation to complete.[45]

[47] On this basis, Gilbert J held that while the vendor intended to complete the Precinct, the purchasers must have understood completion would be dependent on the viability of the later stages of the project. The purchasers had acknowledged the possibility of non-completion in confirming they were not purchasing the Units in reliance on the completion of the Precinct or any wider part of the development. It followed that there was no obligation on the vendor to complete stages two and three.[46]

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37 At [74]–[75].
38 See above at [34].
39 *Kawarau* (HC), above n 1, at [76].
40 See above at [24].
41 *Kawarau* (HC), above n 1, at [77]–[78].
42 See above at [21].
43 *Kawarau* (HC), above n 1, at [78].
44 See above at [17].
45 *Kawarau* (HC), above n 1, at [79].
46 At [80].

The Court of Appeal judgment

[48] The Court of Appeal took as its starting point that cl 5.7 on its face imposed a positive obligation on the vendor to complete, albeit subject to qualifications.[47] The Court considered that the natural meaning of the text was supported by other terms such as cl 4.1(g)[48] and the provisions relating to the Precinct Society.[49] The Court said that the latter provisions were "premised" on completion of all three stages.[50] In addition, the Court drew support from the application for resource consent and the terms upon which consent was granted. The Court noted, for example, that "three separate stages and the total of 13 buildings proposed were specified" in the resource consent.[51]

[49] The Court then addressed the reasons given by Gilbert J for the Judge's conclusion there was no obligation to complete. The Court of Appeal stated that the strongest argument to support that view was cl 4.1(k).[52] However, the Court considered that the wording of cl 4.1(k) made clear that it had to be read as subject to the express terms requiring completion of the Precinct.[53] To construe the clause otherwise would have been to negate the effect of those positive obligations in a manner "not permitted by the terms of the contract".[54] Further, cl 4.1(k) was seen as "more likely" a reflection of the parties' intention that the purchasers must complete regardless of whether or not the Precinct was completed at the time settlement was due.[55] This interpretation was seen as consistent with the purchasers' acknowledgment in cl 2.9 that they would have no remedy if the Precinct Amenities and Infrastructure were not completed at settlement date[56] as well as the vendor's ability to defer or suspend development of the Precinct under cl 4.1(g).[57]

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47 *Kawarau* (CA), above n 2, at [55] and [63].
48 See above at [24].
49 See above at [22]–[23], [34]–[35] and [37].
50 *Kawarau* (CA), above n 2, at [58].
51 At [61].
52 At [65]. Clause 4.1(k) is set out above at [26].
53 At [68].
54 At [68].
55 At [69].
56 See above at [21].
57 *Kawarau* (CA), above n 2, at [70]. Clause 4.1(g) is set out above at [24].

[50] Next, the Court said the flexibility for the vendor in terms of timing and design meant the vendor did not assume an obligation lacking in commercial sense.[58] That flexibility also provided the answer to the Judge's view about the effect of the condition in cl 2.1(a)[59] of the need for the vendor to be satisfied as to the economic viability of the building.[60] Finally, the Court saw cl 5.1[61] as a "belt and braces" clause, "designed to protect the vendors from any later complaint" about the inclusion of activities of a commercial nature in the Precinct.[62]

[51] For these reasons, the Court of Appeal concluded that cl 5.7 and the other provisions to which the Court drew attention supported the conclusion that the vendor had an obligation to complete or procure completion of stages two and three.[63]

Discussion

[52] For the following reasons, I consider there was an obligation on the vendor to complete stages two and three.[64]

[53] First, on the face of it, the agreements state that stages two and three will be completed. Clause 5.7 is in the form of a covenant by the vendor "that it will (or will procure that) the Precinct shall be developed (albeit in stages)".[65] The text of cl 5.7 accordingly supports the view there is an obligation, albeit with a number of qualifications. The qualifications include the proviso in cl 5.7 that variations are acceptable so long as they do not materially adversely affect value. As this Court said in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, in the interpretation of a contract "context is a necessary element" but "the text remains centrally important".[66] The placement of the clause within the agreements is odd[67] but, given

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58 At [73].
59 See above at [17].
60 *Kawarau* (CA), above n 2, at [74].
61 See above at [34].
62 *Kawarau* (CA), above n 2, at [75].
63 At [63].
64 On the facts, I see this description as interchangeable with the formulation used by Arnold J, that is, to complete the Precinct.
65 See above at [36].
66 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [63] per Arnold J delivering the judgment of McGrath, Glazebrook and Arnold JJ.

there are a number of infelicities in the agreements, I do not place much weight on that.[68]

[54] Second, there is no stated ability to abandon the Precinct. Instead, the agreements allow the vendor to "alter, vary, add to or omit" Precinct amenities and facilities (cl 2.9),[69] to "alter" or "vary" aspects of the Draft Outline Plans and Specifications (cl 4.9(b))[70] and for the completion or development of the Precinct to be deferred or suspended (cl 4.1(g)).[71] The words "alter", "vary" and "add" suggest changes to the Precinct which leave the overall concept in place. Read in that context, the word "omit" also suggests some detraction from the whole but not abandonment. Neither "deferred" nor "suspended", in the ordinary and natural meaning of those words, encompasses abandonment.[72]

[55] There may have been room for debate about the scope of the vendor's obligation if, for example, the vendor had completed one building in stage two and, for the sake of argument, three buildings in stage three. In particular, in that situation there may have been issues about whether what occurred came within the ability to vary or to omit. But that is not the case here. Here the vendor disabled itself from completing anything more than stage one. It was common ground between the parties that it was clear by the time that settlement was called for that the vendor was not going to be able to develop stages two and three of the Precinct.[73] Accordingly, while it is the case that the purchasers did not establish any materially adverse effect on value as at the date of cancellation, disabling completion of any of stages two or three cannot be treated as a "variation".[74]

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67 Clause 5.7 appears in a section of the agreement relating to the Precinct Society and the clause is headed "Disclosure".

68 This was the approach taken by the Court of Appeal: *Kawarau* (CA), above n 2, at [56].

69 See above at [21].

70 See above at [32].

71 See above at [24].

72 The meaning of "defer" includes "[t]o put off (action, …) to some later time; to delay, postpone": *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1991) vol IV at 379. The definition of "suspend" includes "[t]o put a stop to, usually for a time; *esp*. to bring to a (temporary) stop": vol XVII at 318.

73 See above at [10].

74 The vendor sought and was awarded damages on the basis of the difference between the contract price and the value of the units at the date of cancellation: *Kawarau* (HC), above n 1, at [226]–[229].

[56] Third, there is a whole structure in the agreements built up around completion of stages two and three. This framework suggests the agreements are founded on an assumption of an obligation to complete.

[57] The provisions relating to the Precinct Society and the Precinct Society Rules provide a good illustration of this framework and its premise.[75] The best explanation for some of the detail about the Precinct Society is that there was to be a Precinct requiring a level of management that would not be necessary if, as the appellants contended, all the vendor had to do was complete the Building. For example, in cl 5.5 there is an acknowledgement by both the vendor and purchasers that the Precinct Society has a "key" role in management of the Precinct, in particular to:

> (a) … manage the Precinct and maintain the amenity represented by the Precinct so that it achieves and maintains a quality brand in the market by reference to its unique location through:
>
> (i) upholding the Precinct standards;
>
> (ii) enforcing the Rules; and
>
> (iii) achieving integrated management of the Precinct.
>
> (b) … maintain the level and quality of services provided so that the quality and standard of the Precinct is maintained over time.
>
> (c) … 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.

[58] The Precinct Society Rules include a number of provisions based on the notion of a completed development. The Objects clause, for example, records as follows:

> 3.1 Kawarau Falls Station is being developed to create an integrated world class village resort.
>
> 3.2 [The Station] will comprise a variety of Buildings[76] (with different uses), Precinct Amenities[77] and a significant amount of Infrastructure[78] and will in effect function as a village. The Society

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75 See above at [22]–[23], [34]–[35] and [37].

76 "Building" meant "a building erected at Kawarau Falls Station".

77 "Precinct Amenities" meant "all amenities and, where the context requires, the Infrastructure, within [the] Station intended for common use by all Members".

78 "Infrastructure" meant "all roads, footpaths, gas, water supply … [et cetera] provided to the Buildings and other Precinct Amenities at [the] Station".

> has been established to deal with all aspects of the ongoing development, management, operation and maintenance of [the Station].

[59] Reference can also be made to the description in the Precinct Society Rules of the role of the Precinct Manager who is to be engaged to provide various services. Pursuant to the Precinct Society Rules, these services include "exhibiting active leadership in the promotion of the Objects" and "managing the upkeep and repair of the Precinct Amenities and Infrastructure to a standard necessary to establish and maintain the quality brand represented by [the Station]". Clause 5.8 of the agreements is also relevant as it is an acknowledgement a Precinct Manager will be appointed to, amongst other things, "regulate the use and operation of the Precinct as a whole".[79]

[60] William Young and O'Regan JJ accept the vendor's submission that the provisions relating to the Precinct Society are also explicable by the need for some management, for example, of facilities such as roading regardless of whether or not the Development proceeded as initially intended.[80] However, a much less complicated arrangement could have been put in place if that were the case, but was not. The wording adopted in the Rules envisages completion of the "whole" Precinct.

[61] There are other examples of provisions within the agreements which reflect a structure premised on an obligation to complete stages two and three. I mention two. First, the provision in relation to a power of attorney in cl 8 similarly contemplates completion. Clause 8.1 provides as follows:[81]

> **Power of Attorney:** In consideration of the Vendor entering into this Agreement the Purchaser irrevocably and unconditionally nominates, constitutes and appoints the Vendor or any nominee of the Vendor to be the true and lawful attorney of the Purchaser for the purposes of executing all documents and plans and Consents and to perform all acts matters and things as may be necessary to:
>
> (a) complete the Development (including any stage of the Development);

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79 See above at [37].

80 Below at [187].

81 Emphasis added. Clause 8.2 provides that the power of attorney continues "and shall be irrevocable until such time as the Vendor or its assignee resigns as the attorney".

(b) *complete the Precinct* (including any stage of the Precinct);

…

(j) better manage the Building and *the Precinct*; and … .

[62] Another illustration is found in the provision for car parks in cl 4.12. The purchasers acknowledge in that clause that the car parks will be either part of the Building or in an adjoining building "within the Precinct".

[63] The overall framework of the agreements provides an answer to the vendor's submission, relying on the Supreme Court of the United Kingdom's decision in *Re Sigma Finance Corp (in admin rec)*,[82] that the Court of Appeal in this case put too much weight on the ordinary meaning of the words in cl 5.7[83] and ignored the context. Mr Goddard QC says that, as in *Re Sigma*, a "subsidiary provision" (cl 5.7) has been given "a level of pre-dominance" which it was not meant to have,[84] especially given cl 2.1[85] and the need for the vendor to be satisfied as to the Building's economic viability. It is the case that infelicities in the agreement would normally be read against the vendor.[86] More importantly, the contextual factors in this case, discussed above at [53]–[62], make it clear cl 5.7 means what it says.

[64] The vendor responds that the framework on which I rely is explained by the need to allow works to continue on in the meantime and so ensure the purchasers' ongoing co-operation. That is no doubt part of the explanation but that does not derogate from the proposition that the need for those works is predicated on completion.

[65] The resource consent also requires consideration. The vendor says that the Court of Appeal was wrong to rely on the consent. However, the consent is expressly referred to in the agreements. I have noted that the agreement is subject to the vendor obtaining "the Consents" by the stated date.[87] In addition, cl 1.2

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82 *Re Sigma Finance Corp (in admin rec)* [2009] UKSC 2, [2010] 1 All ER 571.
83 See above at [36].
84 At [12].
85 See above at [17].
86 By reason of the contra proferentem rule. See *Firm PI*, above n 66, at [66], with reference at n 49 to *DA Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23 at [69] which provides further discussion of the contra proferentem rule.
87 See cl 2.1(b) above at [17].

addresses the position where there is a conflict between the Unit Plan and the terms and conditions of the Consents, in which case the terms and conditions of the Consents take priority. Reference is also made in cl 4.1(i) to the purchaser not delaying the Consents.[88] Further, in the context of the provisions of cl 4.3 relating to the Unit Plan, the vendor is required to submit the plans for the Development to obtain the Consents and to implement the Consents.[89] Further, cl 4.6(a) provides that the vendor reserves the right to grant or receive the benefit of any easements "in order to satisfy any conditions of the Consent".[90] Finally, the power of attorney clause also relates to execution of the Consents.[91] It follows that the Consent must be "background that a reasonable person would regard as relevant".[92]

[66] Both the application for the resource consent and the consent obtained provide a level of detail about the proposed development, for example, as to what each of the 13 buildings in the Precinct would comprise.[93] Both documents also reflect the notion this was to be an "integrated" development, albeit there was provision for the development to occur in stages. The vendor submits that the consent simply supports the view it was the vendor's intention to complete stages two and three but reveal nothing about whether or not there was a promise to do so. In my view, given the way the consent is so closely linked to the agreements, its terms support the view there was a promise.

[67] On the analysis I undertake, it is unnecessary to rely on the marketing material, because from the terms of the agreement and the consent it is apparent that the purchasers were buying access to the Precinct with all of the characteristics set out in the agreement.

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88 See above at [25].

89 See above at [28]. The purchasers accepted at trial that the requirement in cl 4.3(b), to "implement the Consents" did not comprise an obligation to build all of the things included in the resource consent.

90 See above at [30].

91 See cl 8.1 above at [61].

92 *Firm PI*, above n 66, at [60]. In addition, there is force in the analysis undertaken by Arnold J at [147]–[148] below as to the effect of cl 16.8, the "entire agreement" clause. Compare the approach of William Young and O'Regan JJ below at [233]. I add that I agree with Arnold J for the reasons he gives that no issue as to "reasonable availability" arises here: see below at [144] and [148].

93 The relevant provisions in the consent and the associated decision document are set out in detail in the judgment of Arnold J below at [140]–[142].

[68] The vendor relies on cls 4.1(g)[94] and 4.1(k)[95] for the proposition that there was expressly no requirement for completion. In terms of cl 4.1(g), two points can be made. First, the clause is premised on completion. The clause begins "completion of the development of the Precinct … may be deferred" and states that "the development of the Precinct will be completed", albeit in stages. Second, the same approach is taken in cl 4.1(h) which deals with the completion and development of the Building.[96] That clause begins by noting "completion of the development of the Building … may be deferred". It cannot be suggested there was no obligation to complete the Building. It is telling then that the only difference between cls 4.1(g) and 4.1(h) is that completion of the Precinct will be in stages. I add that cl 4.1(i) requires the purchaser to give its "full co-operation to the Vendor … to allow completion of the Development and the development of the Precinct". Clause 4.1(k), in my view, simply makes it plain that delay in completion of the other stages at the time of settlement is not a basis for refusing to settle.

[69] The vendor also points to the lack of specificity as to what was to be built. It is the case that there is a deal of flexibility, but in this respect there is no difference from other contracts where work is to be done at some future time. Further, the description of what was to be completed was not so nebulous as to tell against the existence of an obligation. As an illustration of a level of specificity, the Draft Outline Plans and Specifications include a statement in relation to the Kingston West Precinct Draft Outline, that "[t]he names of all the buildings are indicative only and some or all of the buildings may be renamed by the Vendor in due course". The diagram with this notation also notes that landscaping "is indicative only". That suggests that other aspects of the Draft are not indicative only.

[70] Further, cl 1.2 of the Draft Outline Plans and Specifications states that the Kingston West building is found in the central northern quarter of the site and provides that the building:

> … is part of a 17 acre Masterplanned development comprising a variety of individual buildings set amongst landscaped parks, squares, plazas, avenues

94 See above at [24].
95 See above at [26].
96 See above at [24].

> and roads. The building is bound by tree lined boulevards to the south, west and north and the Square to the east.

[71] It is relevant also that the agreements provided for the parties to record additional conditions of sale. There was an associated warning on the same page to the effect that any variations to the Draft Outline Plans and Specifications not recorded in the agreement had to be noted on this page "or they will be deemed not to bind the Vendor".[97] That suggests the Draft Outline Plans and Specifications were not treated as lacking in specificity.

[72] Finally, the flexibility given to the vendor does provide an answer to the vendor's argument that the Court of Appeal's approach is commercially unsound.[98] For these reasons, I consider there was an obligation to complete stages two and three.[99]

Is the term essential?

[73] At the time the case was argued, s 7 of the Contractual Remedies Act 1979 operated as a code in relation to the circumstances in which a contract may be cancelled for breach, misrepresentation or repudiation. That Act has now been replaced by the Contract and Commercial Law Act 2017.[100] The latter Act applies to the agreements in this case.[101] Sections 36–40 of the Contract and Commercial Law Act replace s 7. Section 37 deals with a party's right to cancel a contract for misrepresentation or breach (including anticipated breach) as follows:

> (1) A party to a contract may cancel it if—
>
> (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
>
> (b) a term in the contract is breached by another party to the contract; or

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97 In terms of cl 16.8(b), the purchaser acknowledges it has read and understood these warnings.

98 The vendor emphasises cl 2.1, the condition as to the achievement of a minimum level of sales and as to a level of construction costs acceptable to the vendor: see above at [17].

99 It was clear by the time that settlement was called for that stages two and three were not going to be developed: see above at [10] and [55].

100 Contract and Commercial Law Act 2017, s 345(1).

101 The Contract and Commercial Law Act came into force on 1 September 2017: s 2. It is a revision Act for the purposes of s 35 of the Legislation Act 2012, and the provisions relating to contractual remedies apply to all contracts made on or after 1 April 1980: s 6 and sch 1, cl 4.

> (c) it is clear that a term in the contract will be breached by another party to the contract.
>
> (2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—
>
> (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
>
> (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—
>
> (i) substantially to reduce the benefit of the contract to the cancelling party; or
>
> (ii) substantially to increase the burden of the cancelling party under the contract; or
>
> (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[74] Therefore, pursuant to s 37(1) and (2)(a), a party will be entitled to cancel a contract where an essential term is or will be breached. The relevant question in this case is whether the vendor's obligation to complete stages two and three of the Precinct was an essential term of the agreements, entitling the purchasers to cancel the agreements if that term was breached (including an anticipated breach).

[75] Gilbert J did not need to consider whether the term was essential because the Judge found there was no obligation to complete stages two and three.[102] The Court of Appeal concluded that the term was essential.[103]

The approach in the Court of Appeal

[76] The reasoning of the Court of Appeal is set out in the following passage:

> [77] Viewed objectively, we are satisfied that, from the point of view of [the purchasers], the obligation on the [vendor] to complete Stages 2 and 3 of the development in due course must be treated as an essential term of the [agreements]. We consider it unlikely a purchaser would have proceeded to purchase a unit in a stand-alone building in the absence of an obligation to complete the overall development. In that respect, there was valuation

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[102] *Kawarau* (HC), above n 1, at [157]. Note that both the High Court and the Court of Appeal were determining the question of essentiality pursuant to s 7 of the Contractual Remedies Act 1979.

[103] *Kawarau* (CA), above n 2, at [76]–[80].

> evidence supporting the conclusion that the prices paid for the units would have included a resort premium in the range of 10 to 25 per cent to reflect the place of the building in the overall development.
>
> [78] The centrality of the completion of the overall project is amply demonstrated in the marketing materials, the terms of the resource consent and in the provisions of the [agreements] themselves as already discussed in detail. The purchasers were entitled to expect the [vendor] would live up to their promise that the units they were purchasing would ultimately be included as part of an integrated development which would maintain and enhance the amenities of their units and improve their value.

[77] The Court considered the provisions concerning the Precinct Society supported this view. The Court relied in this respect on what it saw as the centrality of the role of the Society in the development.[104]

Evaluation

[78] The test for determining when a contractual term is an "essential term" is set out in *Mana Property Trustee Ltd v James Developments Ltd*.[105] A term in a contract will be essential either because the parties have expressly agreed that it is essential, either to the cancelling party or to both parties, or must be taken to have impliedly so agreed.[106] There will be little difficulty in determining the point where the term is expressly nominated as essential. In the situation of an implied agreement, which may be more difficult, this Court in *Mana Property* described the test to be applied as follows:

> [25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[79] The vendor says that the Court of Appeal misapplied this test by focusing on whether the purchasers would have refused to enter into the agreements had completion of the Precinct not been an obligation in the agreements, rather than focussing on whether they would have declined to enter into the agreements if such an obligation was not essential. This submission is directed primarily to the Court's

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104 At [79].

105 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [24].

106 At [24].

conclusion the probability was that "the purchasers would have declined to enter into the [agreements] if there were no positive obligation to complete Stages 2 and 3".[107]

[80] I agree that this iteration of the test obscured the need to focus on the impact of essentiality. That said, essentiality to the contracting party is important albeit the matter is to be assessed on an objective basis.[108] But in any event, I consider the term was essential. The key point is that, absent an essential term requiring completion of stages two and three, the arrangements being entered into by the purchasers would be a completely different proposition. The level of amenities is considerably reduced and the nature of the investment is different. There are some similarities in this respect between the present case and this Court's decision in *Kumar v Station Properties Ltd*.[109] There, side agreements as to management and furnishing were held to be essential to the contract for sale of units intended to be let as serviced apartments in a managed complex.

[81] The majority in *Kumar* considered that the two terms had to be considered together, as both related to the possibility that the complex would be operated as serviced apartments.[110] The furniture package enabled the vendor to ensure uniform furnishing of a sufficient standard to be attractive to a potential purchaser of the development or to an operator under the management agreement.[111] The management agreement would be required for the apartments to be run as serviced apartments if the vendor could not on-sell the whole development.[112]

[82] In considering whether the term to complete stages two and three is essential, it is also relevant that the purchase price included a "resort premium".[113] That is, that the purchase prices in the agreements were higher than what would have been agreed upon for units in a stand-alone building which were not part of a wider resort

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107 *Kawarau* (CA), above n 2, at [80]. The submission also relates to the Court's earlier observation that the Court considered "it unlikely a purchaser would have proceeded to purchase a unit in a stand-alone building in the absence of an obligation to complete the overall development": at [77].

108 *Mana Property*, above n 105, at [23]; and *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [60].

109 *Kumar*, above n 108.

110 At [78].

111 At [78] and [88].

112 At [88].

113 The Court of Appeal also concluded that a resort premium was paid for the units in Lakeside West and Kingston West: see above at [76].

development. The relevant evidence for the purchasers came from Mr Dean Humphries, a registered property valuer with experience in the hotel and leisure sectors. Mr Humphries accepted there was no specific reference to a resort premium in the 2007 valuations for Kingston West and Lakeside West.[114] However, he said it could be inferred a premium would have been included in these valuations and, accordingly, part of the price paid. Mr Humphries relied on four factors for this conclusion.

[83] First, Mr Humphries said that the contract prices for the units in Kingston West and Lakeside West were "above, or at the upper end" of other comparable apartments and hotel investment units in Queenstown at the time. Second, the valuations of Kingston West and Lakeside West of 17 April 2007, carried out by valuation firm CBRE Limited, reflected, amongst other things, the results of a development study of the entire master planned development by resort and hospitality consultants HVS International.[115]

[84] Third, Mr Humphries relied on the explicit reference to a 20 per cent "integrated resort premium" in the 2007 valuation reports for the three other buildings in stage one, carried out by valuation firm Fright Aubrey.[116] I interpolate here that one of the stated assumptions on which the Fright Aubrey valuations were made was that Kawarau Falls Station would be completed "as per the overview detailed in this report", that is, including stages two and three.

[85] In the Fright Aubrey valuation for the Reserve South building the author "determined that a premium is applicable to the individual values of the components within an elite proposal such as the Kawarau Falls Station". It was said that a 20 per cent premium was added "to reflect if the complex was in a resort environment similar to Kawarau Falls precinct".[117] Finally, Mr Humphries explained

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[114] These valuations were undertaken at around the time many of the purchasers' agreements were entered into and the values attributed to the individual units in the valuations were largely consistent with the agreement sale prices.

[115] Mr Humphries stated that the specific reference by the valuer to the "master plan" demonstrated that the valuer was operating on the view that the entire development would be completed.

[116] Reserve North, Reserve South and Reserve Central.

[117] The valuation report also discussed the premium further when identifying the goodwill or positive value effect of Kawarau Falls Station containing top-end hotel brands under a heading "Resort Premiums".

that the adoption of a resort premium was also in line with research at the time relating to premiums associated with resort developments and that he was aware of premiums being achieved for other integrated resort developments in the Pacific region.

[86] Mr Humphries also gave evidence on the effect of non-completion of the development of the Precinct on the value of the units in Kingston West and Lakeside West. He considered that non-completion had had a "significant and material impact on the underlying market values of the [purchasers'] units in the partially completed development".

[87] There was no direct challenge to Mr Humphries' evidence that the prices paid by the purchasers were "premised on delivery of the entire [Kawarau Falls Station] master planned development". The figures set out in the Fright Aubrey valuation make it difficult to determine quite how the resort premium has been reflected in the price. But the notion that additional value has been included to reflect completion of the resort is a stated assumption of the valuation.

[88] The relevant evidence for the vendor came from Mr John Schellekens, a registered valuer and National Director of Professional Services at CBRE Limited. However, Mr Schellekens' evidence focused on the question of whether there had been any diminution in the value of the units as a result of the non-completion of stages two and three as at March 2012, when the vendor purported to cancel.

[89] Although Mr Schellekens accepted completion of stages two and three would have led to an increase in value,[118] he said that increase would have been offset by the increase in supply. On his approach, as at March 2012, there was no material

[118] He estimated a 42.5 per cent increase for the units in Kingston West and a 10 per cent increase for the Lakeside West units. The difference between these two figures was said to be attributable to the fact that the Lakeside West building was physically more removed from stages two and three and therefore, the value of the units would not be affected to the same extent by completion of the Precinct.

negative impact on the value of the units in either building as a result of the non-completion of stages two and three.[119]

[90] Mr Schellekens was critical of the qualifications of the author of the Fright Aubrey valuations relied on by Mr Humphries. But that was the extent of any challenge to Mr Humphries' evidence as to the position concerning resort premiums as at the time of sale. Contrary to the vendor's submission, there was sufficient basis to infer from the factors on which Mr Humphries relied that, as the Court of Appeal said, a resort premium was paid.[120]

[91] The vendor also submits that performance cannot be essential where the purchasers have assumed the risk of settling without knowing whether or not other buildings will be completed. The submission is that this must be so in circumstances where the agreements allow for substantial variation. However, as Mr Mills QC for the purchasers submits, the obligation to complete cannot be suspended and nor could completion be delayed indefinitely. The agreements did not provide for that contingency. A term of completion within a reasonable time would be implied.[121]

[92] The fact the vendor has disabled itself from completion distinguishes this case from *Narayan v Arranmore Developments Ltd* which also related to the essentiality of terms that concerned promises to be completed post-settlement.[122] Mr Narayan bought a vacant lot in a subdivision surrounded by largely vacant land. Development had started, but no new houses had been built and the planned town centre and schools had not yet been developed. The agreement for sale and purchase provided for settlement any time after 1 October 2008. Mr Narayan failed to settle when settlement was called for in May 2009 and subsequently cancelled the contract

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119 Mr Schellekens' evidence was that non-completion had a positive but immaterial effect on the value of the Kingston West units (his analysis suggested that the values of the units would have been 2.5 per cent higher than if the Precinct had been completed) and a slight negative impact on the value of the Lakeside West units (the values of which would have been 7.5 per cent higher if the Precinct had been completed, but given the complexity of the exercise and the margin of error this was also arguably not material).

120 The Court of Appeal refers to a resort premium in the range of 10 to 25 per cent: *Kawarau* (CA), above n 2, at [77]. The figure adopted by Mr Humphries is 20 per cent.

121 *Kawarau* (CA), above n 2, at [57], citing *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 268 and *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [61] per Tipping J with whom Blanchard and Anderson JJ agreed. See also *Kawarau* (CA) at [72].

122 *Narayan v Arranmore Developments Ltd* [2011] NZCA 681, (2011) 13 NZCPR 123.

on the basis of misrepresentations. Those misrepresentations included, relevantly, that construction of the town centre would commence in 2009.

[93] The Court of Appeal concluded this was not an essential term. Mr Narayan could have been called upon to settle prior to the end of 2009 "at a time when he would not know whether or not the construction of the town centre had commenced".[123] The Court of Appeal continued:

> [47] We acknowledge that the breach of an essential term may become apparent only during or after performance of a contract and that the [Contractual Remedies Act] caters for this by providing for the cancellation of partly or wholly performed contracts. But the present case does not fall into that category. The representation concerns the existence of an intention at the time the contract was entered into. The question is whether that accuracy of the representation as to intention was essential. The difficulty for Mr Narayan is that had the representation been accurate, the intention would not necessarily have been fulfilled – indeed, some delay was foreseeable. Yet it was this delay that Mr Narayan gave as a reason for cancelling the contract.
>
> (footnote omitted)

[94] The complaint in that case was of delay not, as here, the inability to act at all.

[95] Finally, the vendor says it is necessary to assess the question of essentiality by reference to the minimum performance required by the term in question. As to that, the vendor relies on cl 2.9,[124] cl 4.1(g)[125] and (k)[126] and cl 4.9,[127] all of which it is submitted tell against an essential term of the nature contended for. It is submitted that because these terms allow a large degree of flexibility for the vendor in terms of how and when the Precinct is developed, the parties were unlikely to have intended that performance of any residual obligation to complete the Precinct would be essential to the contract.

[96] In assessing this submission, it is necessary to proceed on the basis there is an obligation to complete. It follows that cl 4.1(k), for example, which states that the purchaser is not purchasing in reliance on completion of the development of the

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123 At [46].
124 See above at [21].
125 See above at [24].
126 See above at [26].
127 See above at [32].

Precinct simply makes it plain the purchasers cannot rely on the Precinct not being completed by the date of settlement as, in itself, a basis for refusing to settle. The fact that the vendor was given a great deal of flexibility in how and when the Precinct was completed is not inconsistent with the existence of an essential term to complete some time after settlement. Where it was clear at the time of settlement that the vendor had disabled itself from achieving this, the breach will be established.

Were the purchasers entitled to refuse to settle?

[97] This issue arises from the vendor's submissions about the effect of the fact that, prior to the expiry date in the settlement notices, the purchasers had not cancelled the agreements.[128]

The factual narrative

[98] The essential features of the chronology are as follows. In November and December 2011 settlement statements were served, with the final settlement statements nominating settlement dates in mid-December. The purchasers' solicitors responded drawing attention to alleged misrepresentations made by the vendor. The first of the misrepresentations identified related to the non-completion of stages two and three.[129] The correspondence recorded that the purchasers:

> reserve all the rights to cancel and/or claim damages in respect of the misrepresentations under the Contractual Remedies Act 1979, and/or misleading and deceptive conduct under the Fair Trading Act 1986 … , which, for the avoidance of doubt, the truth of the representations made were essential to the purchasers, and/or the representations being false have a substantial effect on the benefits and burdens under the agreements.

[99] On 8 December 2011 the purchasers' solicitors wrote to the vendor's solicitors advising that they considered the vendor was not able "to call for settlement as they are not ready willing and able to settle, having failed to remedy the matters identified in the correspondence exchanged to date". The stated reasons

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[128] Mr Mills QC for the purchasers confirmed at the hearing that it was common ground that the purchasers had not cancelled by this point.

[129] The first of the alleged representations listed in the letter was as follows: "It was represented to the purchasers prior to entering into the agreements that the whole of the Kawarau Village (i.e. all three stages) would be developed, and that they would therefore own a unit within a large completed development having use of all common facilities, not just the use of stage 1 facilities. (This representation was further reinforced by the specification annexed to the agreements, which represented that the development as being, "part of a 17 acre master plan development").

for the inability to call for settlement included, relevantly, the failure to remedy the misrepresentations. The vendor's solicitors responded rejecting the allegations of misrepresentation and stating that they did not consider there was any basis for the purchasers to cancel or to seek damages.

[100] The next point I need note is that on 13 December 2011 the purchasers filed proceedings seeking orders that the agreements were void under the Fair Trading Act 1986 and the Securities Act 1978.[130]

[101] None of the purchasers settled in accordance with the settlement statements or with the vendor's subsequent settlement notices. On 15 March 2012 the vendor gave notice to cancel on the basis of the "unremedied" settlement notices. The letters from the purchasers' solicitors in response reiterated that the vendor was not ready, willing and able to settle, that the notices purporting to cancel the agreements were therefore in repudiation and that the purchasers elected to accept the vendor's repudiation of the agreements and cancel the agreements.

The vendor's submissions

[102] The vendor's submissions focus on cls 12.1 and 12.3 of the agreements. Clause 12.1 provides that a settlement notice shall be effective only if the party serving it is at the time of service in all material respects ready, willing and able to proceed to settle "in accordance with the notice".[131] Clause 12.3 provides that if the purchaser does not comply with the terms of the settlement notice served by the vendor then, the vendor may, inter alia, cancel the agreement.

[103] Against this background, the vendor submits that it was entitled to call for settlement when it did because it was in all material respects ready, willing and able to proceed to settle *in accordance with the settlement notice*. It is submitted that there was no obligation for the vendor at the time of settlement to be ready, willing and able to complete stages two and three because any obligation to complete, even if it was essential, was not interdependent with the purchasers' obligation to settle.

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130 The purchasers obtained without notice orders restraining the release of their deposits: *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* HC Auckland CIV-2011-404-7991, 13 December 2011.

131 See above at [41].

Rather, it is submitted that the two obligations are independent, that is, not conditional on one another.

[104] The submission is that, although breach of such an independent obligation may give rise to a claim in damages and may entitle the innocent party to cancel, while the contract remains on foot, there is a requirement to perform. Accordingly, the purchasers' attempt to cancel after the settlement date was ineffective because they did not cancel before the expiry date of the settlement notice. The vendor submits that, having refrained from cancelling the agreements, it was not open to the purchasers to "sit on their hands and fail to settle". As a result, when the purchasers failed to settle, the vendor was entitled to cancel the agreements in accordance with cl 12.3.

[105] Finally, the vendor submits that this position is consistent with settled legal principle. It is submitted that that there is no basis to add on to the right to cancel in the statute a requirement to be ready, willing and able to settle which is not expressly required by its text.[132]

Discussion

[106] I accept the purchasers' submission that the obligations were interdependent where at settlement it was known that the vendor would not be able to perform an essential obligation. The purchase of the Unit encompassed obligations which would, in a reasonable time, result in the ownership of a Unit that was part of a Precinct.[133] The vendor in this case was required to be ready, willing and able to settle before cancelling.[134]

[107] The common law to that effect continues to apply under the Contractual Remedies Act (and its restatement in the Contract and Commercial Law Act),[135] as

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132 Contract and Commercial Law Act, ss 36–37.

133 *Kumar*, above n 108, at [94] per Arnold J; and see Francis Dawson "Essential Terms and Condition Precedent" (2017) 133 LQR 183 at 187–188. See also Arnold J below at [153] as to the way in which the existence of the Precinct affects the purchasers' title.

134 It is not disputed that if there was an essential term, the vendor was not in a position to perform: see above at [10] and [55]. As to the effect of breach of an essential term see also *Kumar*, above n 108, at [94].

135 See above at [73].

this Court confirmed in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*[136] and *Ingram v Patcroft Properties Ltd*.[137]

[108] On the basis that completion of the Precinct was an essential term, the vendor was not in a position to cancel the contract when it purported to do so on 15 March 2012. The vendor's actions were a repudiation of the contract.[138] In not settling, the purchasers were therefore not in breach. I do not consider cl 12 of the agreements alters this position because the vendor was not in a position to issue an effective settlement notice within cl 12.1 of the agreements meaning the right to cancel under cl 12.3 did not arise.

[109] That leaves the vendor's argument, based on the judgments of Tipping J in *Holmes v Booth*[139] and in *Regalwood* that "[w]hen the time for settlement arrived, the purchaser was faced with the fork in the road".[140] That is, the purchasers "could choose either the cancellation route or the performance route. … there was no third route available".[141]

[110] On this point, I agree with the submissions for the purchasers, namely, the focus of these observations is on election and on whether or not a party has affirmed.[142] Applying the description of the position used in *Regalwood*, in not having cancelled, the purchasers "risk[ed] being taken to have affirmed the contract but defaulted in performance".[143] That was the risk they took but here, where there is no suggestion that the purchasers have affirmed the contracts, the question of their

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136 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [82]. See also Francis Dawson "Readiness and Willingness Under the Contractual Remedies Act" (2017) 23 NZBLQ 61 at 75.

137 *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433 at [39]–[40].

138 Contract and Commercial Law Act, s 36. There is no question here that the vendor's letters of 15 March 2012 come within the category of communications making it clear the vendor did not intend to perform its obligations.

139 *Holmes v Booth* (1993) 2 NZConvC ¶95-209 (CA) at 191,647–191,650.

140 *Regalwood*, above n 136, at [96].

141 At [96].

142 That is the context of the observations in *Kumar*, above n 108, at [101] that the purchasers in that case had reached a "fork in the road". In that case, the purchasers had not formally cancelled the agreements, but they had made it clear that they did not intend to perform them.

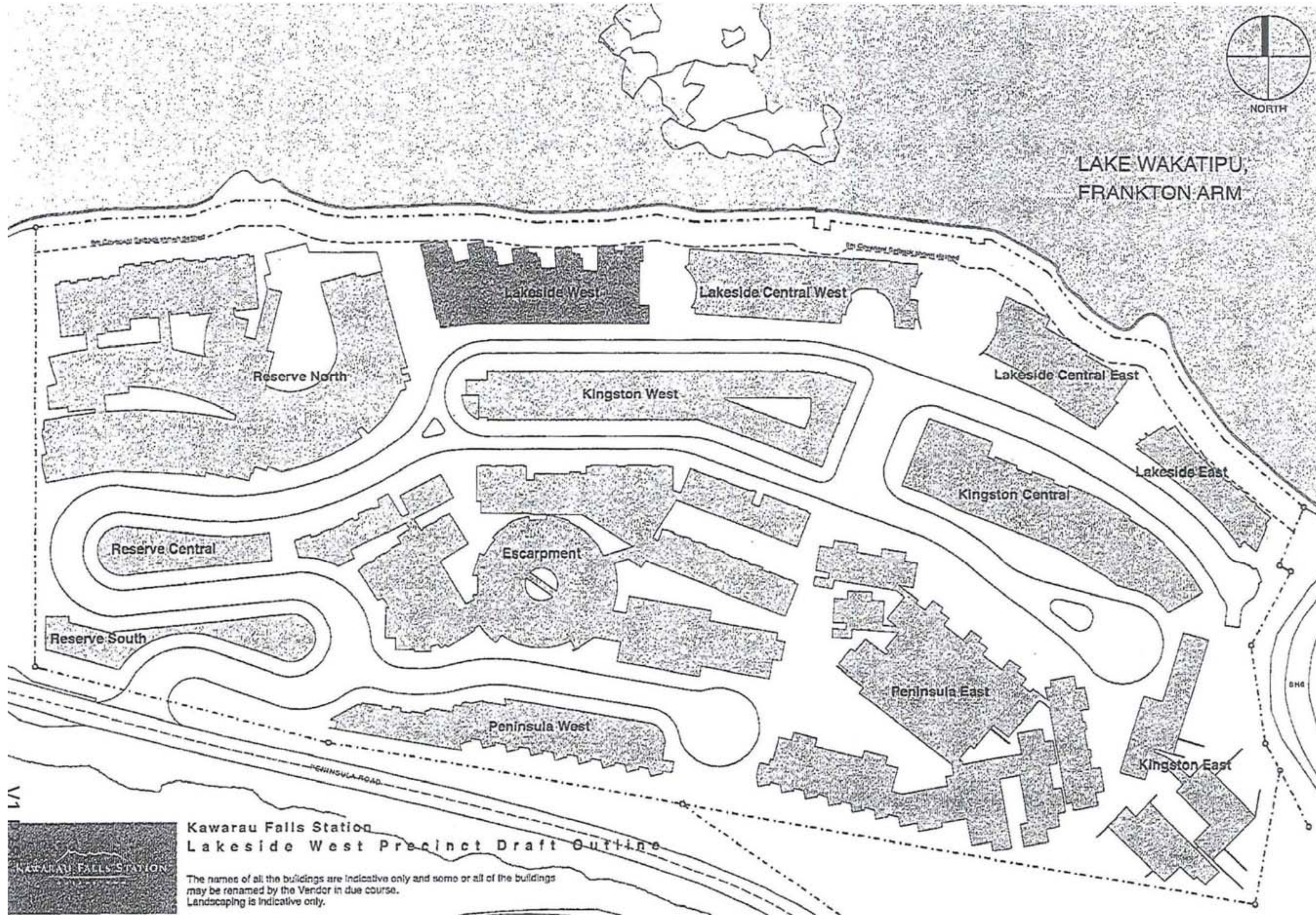
143 *Regalwood*, above n 136, at [72] per Blanchard J on behalf of himself, McGrath and Wilson JJ. See also DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [8.22](b) and [12.28](c); Peter Blanchard *A Handbook on Agreements for Sale and Purchase of Land* (4th ed, Handbook Press, Auckland, 1988) at [1141]; and Francis Dawson and David W McLauchlan *The Contractual Remedies Act 1979* (Sweet and Maxwell, Auckland, 1981) at 58.

election does not arise. From the time the first settlement statements were issued the purchasers made it clear they challenged the vendor's right to call for settlement. They also explained that they did not intend to settle until the issues they were concerned about were resolved.

Conclusion

[111] I would dismiss the appeal and agree with the orders made by Elias CJ. In my view, it is not necessary to address the cross-appeal.

APPENDIX



The three stages of the project would have comprised the following buildings:

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 – a luxury boutique lodge (18 apartments).

(k) Kingston East – 88 one-bedroom serviced apartments.

(l) Kingston Central – a four star 109-bedroom hotel.

(m) Peninsula East – a 13-level five star hotel with 195 suites to be operated as a Quay West.

ARNOLD J

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Introduction

[112] I agree that, under the agreements for sale and purchase at issue in the appeal, the vendor had an obligation to complete the Precinct, albeit that there was flexibility as to how that obligation was performed. Unlike William Young and O'Regan JJ, however, I agree with Ellen France J and the Court of Appeal that the vendor's obligation was an essential one which, if breached, entitled the purchasers to cancel their agreements. At the time the vendor called for settlement it was clear that stages two and three of the Precinct would not be undertaken – in fact, the land on which those stages of the Precinct were to be developed was ultimately sold off. Accordingly, the vendor was in breach of an essential term of the sale and purchase agreements. I would therefore dismiss the appeal.

[113] Although my focus is on the issue of essentiality, I will begin by explaining why I consider that the agreements imposed an obligation on the vendor to complete the Precinct and what I consider the content of that obligation to be, although in light of the judgments of the other members of the Court, I will do this relatively briefly. Although I agree with Ellen France J's reasoning on this issue, I think it is necessary to indicate why I consider that the vendor had a contractual obligation to complete the Precinct, and what the scope of that obligation was, because in this particular case those determinations seem to me to lead almost inevitably to the conclusion that the vendor's obligation to complete is properly viewed as essential.

[114] Before I begin, there are three preliminary points to be made. First, the agreements for sale and purchase were described by Mr Goddard QC as "bespoke agreements prepared to meet the needs of the developers of the [Kawarau Falls Station] Precinct". They are, however, cumbersome and not well drafted, as the Courts below have noted.[144] In particular, the agreements contain obvious errors;[145] drafting infelicities;[146] and some provisions that are unnecessarily repetitive of, or difficult to reconcile with, other provisions. These features create real difficulties in interpreting the agreement.

[115] Second, the two buildings at issue in the proceeding are Kingston West and Lakeside West. The units in Kingston West were sold on the basis that a lease to a hotel operator would be in place on settlement. A purchaser would receive rental payments under the lease but would not have any right of personal occupation. By contrast, Lakeside West was sold as a residential apartment building. As a consequence, the terms of the agreements relating to the two buildings differed in some respects. Despite that, there does not seem to be any material distinction between them for the purposes of the present dispute. Accordingly, for ease of reference, I will discuss the terms of the sale and purchase agreement relating to Lakeside West,[147] which I will refer to as "the agreement".

[116] Finally, the units in the two buildings were marketed either exclusively or substantially to Asian investors residing mainly in Malaysia and Singapore through an overseas-based underwriter, all of whom purchased "off the plans".[148]

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144 *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2015] NZHC 126 (Gilbert J) [*Kawarau* (HC)] at [71]; and *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2016] NZCA 427 (Randerson, Wild and Brown JJ) [*Kawarau* (CA)] at [41].

145 For example, capitalised defined words such as "Consents" and "Development" are used in circumstances where the context makes it plain that the defined meanings are not intended: see, for example cl 4.1(k), below at [150].

146 For example, cl 5.7 does not make sense grammatically: see William Young and O'Regan JJ below at [189] and [191].

147 Apart from the fact that the units in Kingston West were sold on the basis that there would be a lease to a hotel operator in place on settlement, the terms of the sale and purchase agreements for the units in the two buildings were materially the same: see Ellen France J above at [15].

148 *Kawarau* (HC), above n 144, at [1].

Contractual obligation to complete Precinct?

[117] Mr Goddard argued that although the developer intended to construct the Precinct and actively promoted it as a concept, it did not make a contractually binding promise to do so. The only contractual commitment it undertook to a purchaser was that, once pre-sales and development costs were satisfactorily determined so that the agreement became unconditional, it would develop the building in which the purchaser's unit was to be located, together with its curtilage (defined in the agreement as the "Development").

[118] Thus, although the focus of the case has been on whether the vendor had an obligation to complete stages two and three of the Precinct (stage one having been completed prior to the vendor's call for settlement), the issue of contractual interpretation between the parties is whether the vendor was contractually obliged to develop the Precinct as a whole, as the first respondents argue, or to develop simply the building in which the purchaser's unit was situated (and its curtilage), as the vendor argues. This is important because the questions whether the vendor had a contractual obligation to build the Precinct and, if so, whether that obligation was essential must be determined as at the time the contract was made. The fact that stage one of the Precinct was ultimately developed has no relevance to the analysis.[149]

[119] I will not set out again all the arguably relevant terms of the agreement, as they are set out or summarised in the judgment Ellen France J.[150] Rather, I will focus on explaining why I have concluded that the agreement did impose an obligation on the vendor to complete the Precinct, and what the nature of that obligation was. In the process, I will attempt to respond to some of the arguments advanced by Mr Goddard for the vendor.

[120] The starting point is cl 5.7. This clause appears in section 5 of the sale and purchase agreement, which contains a series of clauses dealing with the

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149 As it might have been had there been an argument that completion of stage one was sufficient fulfilment of the vendor's contractual obligation to develop the Precinct (assuming there was such an obligation).

150 See above [15]–[43].

Precinct Society.[151] To understand cl 5.7, it is necessary first to put it in the context of section 5 as a whole.

[121] Section 5 is headed "PRECINCT SOCIETY". Clause 5.1 contains an acknowledgement by the Purchaser, as follows:

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

Obviously, the italicised words are a positive affirmation of the position, effectively by both parties, not an expression of intention or possibility.

[122] It is clear from the remaining clauses in section 5 that this acknowledgement by the purchaser that the unit he or she was purchasing "is part of the Precinct" was important to the vendor as a number of important consequences flowed from it. So:

(a) Under cl 5.2, the purchaser acknowledges that there will be a Precinct Society (to be incorporated prior to settlement) and accepts that he or she will be required to join it, to remain a member and to fulfil the obligations in the Precinct Rules.

(b) Under cl 5.3 the purchaser covenants to join the Precinct Society on settlement, to remain a member while owning the unit, to fulfil the obligations in the Precinct Rules and, as a member of the Lakeside West Body Corporate, to do anything necessary to ensure that the Body Corporate meets its obligations to the Precinct Society.

(c) Under cl 5.4, the purchaser agrees that restrictive covenants giving effect to the provisions in section 5 and "any other provisions that the

[151] "Precinct Society" means the Kawarau Falls Station Precinct Society Incorporated.

Vendor may reasonably require to give effect to the scheme for the Precinct and the Precinct Society" will be registered against the title to the unit and the "Land"[152] and agrees to grant the Precinct Society a memorandum of encumbrance securing his or her obligations to the Precinct Society, which is to be registered in priority to any mortgage or charge granted by the purchaser over the unit.

[123] Clause 5.5 sets out the role of the Precinct Society. The parties acknowledge that the Precinct Society has a "key role" in: (a) the management of the Precinct; (b) maintaining the level and quality of services provided; and (c) "value enhancement", that is:

> 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.

[124] Under cl 5.6, the vendor has the right to amend the Precinct Rules prior to settlement, provided that any amendments do not materially detract from the value of the unit. Under cl 5.8, the purchaser acknowledges that the vendor "will procure that prior to Settlement the Precinct Society will enter into the Precinct Management Agreement to appoint the Precinct Manager" to perform four specified functions, including to "enhance the amenity the Precinct represents for each of the owners and occupiers of the Precinct (including the Units)" and to "enhance the value of each Owner's asset within the Precinct".[153] Like other provisions dealing with the Precinct, cl 5.8 underscores the value (both amenity value and monetary value) that was attributed to the units being part of the Precinct.

[125] Clause 5.9 provides that the Precinct Management Agreement will be on terms and conditions to be agreed but "incorporating the key terms set out in Annexure 1". Annexure 1 explains the nature and purpose of the Precinct Management Agreement as follows:

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[152] Defined to mean "that part of the Precinct Land on which the Development is to be undertaken".

[153] Clause 4.1(n) of the agreement imposes the same obligation on the vendor, albeit in different terms: "[O]n or before Settlement, the Vendor shall procure the Precinct Society to enter into the Precinct Management Agreement and the Precinct Society shall be obliged to comply with all obligations contained therein. The Purchaser shall pay all levies demanded by the Precinct Society including, without limitation, all levies required to enable the Precinct Society to pay the Precinct Manager all amounts due under the Precinct Management Agreement".

> **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 of 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 the [sic] 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 the 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.

Again, this is the language of positive affirmation rather than intention or possibility. The way in which cl 2.3 is expressed again emphasises that value was attributed to the units being part of the Precinct.

[126] The Annexure then goes on to deal with a number of matters, including the Precinct objectives, which are stated in the same terms as appear in cl 5.5 of the agreement.

[127] This brings me to cl 5.7 of the agreement, which I repeat for ease of reference:

> **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 effect [sic] the value of the Unit.
>
> (emphasis added)

On its face, cl 5.7 supports the purchasers' contention that the vendor had a contractual obligation to develop the Precinct, albeit in stages and over time. The clause says that the vendor "will" develop the Precinct, and the vendor "covenants"

that the Precinct will be developed consistently with the Draft Outline Plans and Specifications, although there may be alterations or variations of a type that will not materially adversely affect the value of the units.

[128] The Draft Outline Plans and Specifications are Annexure 2 to the agreement and consist of a written description and a number of drawings. The following appears at the outset of the Draft Outline Plans and Specifications:

> **1.0 GENERAL**
>
> **1.1 General description**
>
> Lakeside West is intended to be a luxury lakefront residential apartment building between 40 to 45 residential units that will have the option of benefitting from the amenities and services provided by the adjacent hotel. A lounge, spa pool, sauna and gym are provided within the building for the residents.
>
> **1.2 Location**
>
> The building is located on the lakefront in the north west quarter of the site and is part of a 17 acre Masterplanned development comprising a variety of individual buildings set amongst landscaped parks, squares, plazas, tree-lined avenues and roads. The building is bound by Lake Wakatipu to the north, a tree lined boulevard to the south, Kawarau Park to the east and the Wakatipu Steps to the west.

[129] Amongst the diagrams attached to the written specification is a "Draft Outline" of the Precinct with a note reading:[154]

> The names of all the buildings are indicative only and some or all of the buildings may be renamed by the Vendor in due course.
>
> Landscaping is indicative only.

There is no note to the effect that the Precinct might not be developed.

[130] I pause at this point to address an argument made by Mr Goddard, namely that a clause headed "Disclosure" would be an odd place to find an obligation to complete the Precinct. He submitted that cl 5.7 is a subsidiary provision, which should not be treated as predominant. There are four responses to this submission.

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154 The Draft Outline is attached as an appendix to Ellen France J's judgment.

[131] First, as I have already noted, the agreement is not well drafted, so there are limits on how far arguments based on the location or description of clauses within the agreement can be taken.

[132] Second, the language of "acknowledgement" and/or "disclosure" appears at various places throughout the agreement. So, clause 4.1 is headed "Disclosure and Acknowledgements" and begins: "The Vendor discloses and the Purchaser acknowledges and agrees that …". The clause then goes on to list 14 sub-clauses, one of which Mr Goddard says is particularly important to the resolution of the case.[155] Other provisions simply use the language of acknowledgement, such as cl 2.9 which begins: "The Purchaser acknowledges and accepts" and cl 5.1 which begins: "The Purchaser acknowledges that the Unit is part of the Precinct", after which are set out a number of acknowledgements and covenants.

[133] Third, and perhaps most importantly, the major point of cl 5.7 is that the vendor discloses to purchasers that the Precinct is an evolving concept which the vendor will develop in stages and over time and which may be altered or varied.[156] But having disclosed that, the vendor sets out what are provisos or qualifications of obvious importance to any purchaser: the first is that the vendor "covenants" that it will develop the Precinct consistently with the Draft Outline Plans and Specifications and the second is that any alterations or variations will not have a materially adverse effect on the value of the purchaser's unit.

[134] There seems little doubt that the word "covenants" in cl 5.7 was intended to convey a binding commitment of some sort: the same word is used in cl 5.3 in circumstances where it is obviously intended to convey a binding commitment.[157] Gilbert J interpreted the vendor's covenant as dealing simply with how the vendor would develop the Precinct *if it ultimately decided to do so*.[158] All it meant, then, was that, if the vendor decided to complete the Precinct, it had to do so consistently

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155 Clause 4.1(k), which is discussed below at [150] and [152] and [169]–[173].

156 The point about flexibility is made elsewhere in the agreement: see cl 2.9, discussed below at [138]; cl 4.1(g), discussed below at [150]–[151]; and cl 4.9(b), set out in the judgment of Ellen France J above at [32].

157 See above at [122](b).

158 *Kawarau* (HC), above n 144, at [72]. In essence, then, the point of difference between Gilbert J and the Court of Appeal relates to when the vendor's obligation to complete kicks in.

with the Draft Outline Plans and Specifications, although it could make variations or alterations which did not materially adversely affect the value of the unit. Mr Goddard supported this interpretation in argument.

[135] I make two points about this interpretation:

(a) First, it involves an acceptance that the Draft Outline Plans and Specifications provided sufficient detail of the Precinct to support a contractual obligation on the vendor to complete the Precinct consistently with them if the vendor did decide to complete it.[159] Accordingly, it undermines a significant plank of the vendor's argument that there could be no obligation to complete the Precinct because the agreement did not provide the necessary detail, an argument to which I will return.

(b) Second, in my view, that interpretation is not consistent with either the language or purpose of cl 5.7. The meaning of the language used seems to me to be straightforward.[160] As to purpose, I consider that an important part of cl 5.7's purpose was to provide some reassurance to purchasers, given that the Precinct was a staged development which would take time to complete and so would not be completed when they were called upon to settle. The reassurance was that, despite the time lag and the possibility of variations or alterations to the plans, the Precinct: (a) would be completed; and (b) in a way that would not materially adversely affect the value of their units. If the true position was that the vendor gave no contractual undertaking to develop the Precinct but only an undertaking that, if it did choose to complete the Precinct, it would do so consistently with the Draft Outline Plans and Specifications, one might have expected a clause headed "Disclosure" to make that clear; but, of course, the plain meaning of the clause goes the other way.

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159 Subject to the qualification that changes could be made provided they did not materially affect the value of the units.

160 See above at [127].

[136] Finally, the reference to any alterations or variations to the Precinct not having a material adverse effect on the value of the purchaser's unit is, I think, important. It is an explicit recognition that the value of units in a particular building, in this instance Lakeside West, may be affected by the way in which the Precinct is finally developed. It is consistent with other provisions in the agreement, which state that units are part of the Precinct (cl 5.1) and indicate that units were seen as deriving value from being part of the Precinct (which, as will by now be apparent, was one of the premises underlying the requirements for the Precinct Society, the Precinct Management Agreement and the Precinct Manager).[161]

[137] Moreover, other provisions are consistent with a contractual obligation to complete the Precinct. For example, cl 2.9 deals with "Precinct Amenities and Infrastructure", which are defined as "all amenities and infrastructure and associated works from time to time within the Precinct intended for common use by all Owners".[162] In the clause, the purchasers acknowledge that "not all" of the amenities and infrastructure in the Precinct intended for common use will be completed at the time of settlement. Implicit in this is that some of the relevant infrastructure and amenities will be completed.

[138] Clause 2.9 also contains an acknowledgement by the purchaser that the vendor may "prior to completion of the Precinct Amenities and Infrastructure, alter, vary, add to or omit any amenities or facilities". Mr Goddard suggested that this meant that the vendor was free not to develop any Precinct amenities or infrastructure at all, that is, to omit everything. I do not agree. Read in context, the power to "alter, add, vary or omit any amenities or facilities" cannot bear the meaning "omit all Precinct Amenities and Infrastructure". I consider that cl 2.9 reinforces the notion that amenities and infrastructure for the Precinct will be completed, although not necessarily in the form planned at the time. And, of course, the Precinct Amenities and Infrastructure only make sense in the context of a Precinct.

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[161] William Young and O'Regan JJ state that the focus in cl 5.7 was on the financial value of a unit rather than on its amenity value: see William Young and O'Regan JJ below at [239]. Given the emphasis in the agreement on both forms of value, I query that conclusion but need not reach a final view on it.

[162] The text of the clause is set out in Ellen France J's judgment: see above at [21].

[139] Like the Court of Appeal and Ellen France J, I consider that the resource consent obtained for the development of the Precinct is important.[163] The agreement was conditional upon a number of things, one of which was that the vendor obtained "the Consents" by 31 December 2009.[164] Clause 1.1 defines "Consents" as meaning, relevantly:

> [T]he 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 … .
>
> (emphasis added)

[140] The relevant consent was granted on 28 July 2006 ("the consent"). The letter from the Queenstown Lakes District Council notifying the decision records that the application relates to development of Kawarau Falls Station, that is, to the development of the entire Precinct. The decision itself begins:

> Consent is granted pursuant to Section 104 of the [Resource Management Act 1991], subject to the following conditions imposed pursuant to Section 108 of the Act.
>
> General
>
> 1 That the development be carried out in accordance with: the application and supporting documentation submitted with the application; all additional documentation submitted subsequent to lodging of the application; plans submitted with the application and revised plans submitted subsequent to the lodging of the application, and stamped as 'Approved Plans' dated 28 July 2006, with the exception of any amendment required by the following conditions of consent;

The decision goes on to identify relevant supporting documentation, before stating what are the "Approved Plans". It identifies the Approved Plans by reference to the "Masterplan" (that is, for the whole development), to each of the 13 buildings planned for the development and to landscaping and traffic design. Taking the Masterplan, Lakeside West and Kingston West as examples, the Approved Plans are stated to be:

> **MASTERPLAN** **Studio Pacific Architecture, Mario Madayag Architecture, Isthmus Group**

163 See *Kawarau* (CA), above n 144, at [54] and [60]–[62]; and Ellen France J above at [65]–[66].
164 Clause 2.1(b).

	PLAN: P-135, P-131, P-132, and P137
…	
LAKESIDE WEST	**ASC Architects**
	LAKESIDE WEST building – plans LKS/WEST-200–211, 400, 500, 600, 601
…	
KINGSTON WEST	**Clark Brown Architects**
	KINGSTON WEST building – plans KSTN/WEST–201, 210–217, 222, 401–402, 501, 601

[141] As noted, there is similar detail in respect of the other buildings in the Precinct. The Approved Plans cover some 350 pages. They include drawings, plans, elevations and depictions relating to the Precinct as a whole, to particular areas of the Precinct, to the individual buildings within the Precinct, to the roofs, floor layouts for each level and parking areas of the buildings and to the types of units within the buildings. They state the use to which each building will be put – either visitor or residential accommodation.[165] They also include roading and landscaping plans, including the identification of protected trees. The "Draft Outline" of the Precinct that is in the Draft Outline Plans and Specifications which are Annexure 2 to the agreement depicts the Precinct in the same way as appears in the Masterplan Approved Plans. Similarly in relation to Lakeside West: the plans annexed to the agreement are drafts of what became the Approved Plans in relation to Lakeside West, except that the Approved Plans include elevations, sections and perspective drawings which do not appear to have been annexed to the agreement.[166] In some respects, the Approved Plans are more detailed than those annexed to the agreement, for example, in identifying what is to go in areas of the building that appear empty in the drawings in the Draft Outline Plans and Specifications.

[142] Three more conditions of the consent are noteworthy. First, condition 4 provided that that the development could be constructed in stages and set out the three stages of the development by reference to the particular buildings to be

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165 In some instances the plans give details of the cladding and roofing materials to be used.

166 I should note that the marketing materials utilise some of the plans which were eventually approved as part of the consenting process, for example, materials in relation to Lakeside West.

constructed in each stage, albeit that the vendor was free to commence work on a subsequent stage while still working on an earlier one. Second, the land on which the Precinct was to be built was on four titles. Condition 5 required that the vendor have the titles amalgamated before the construction of any building.[167] Finally, under condition 50, the consent was to expire on 28 July 2016, ten years from the date on which it was granted.

[143] Mr Goddard argued that nothing could be made of the consent, first because there was no evidence that this material was reasonably available to the purchasers and second because the consent was in any event irrelevant as it simply showed the vendor's intentions in relation to the Precinct – it said nothing about whether the vendor had entered a contractual obligation to complete it.

[144] As to the first point, I do not accept that any issue of "reasonable availability" arises in this case. Lord Hoffmann famously said in *Investors Compensation Scheme Ltd v West Bromwich Building Society* that when interpreting a contract, the court should ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[168] The approach is an objective one.

[145] In the present case, the agreement was expressed to be conditional on the vendor obtaining the "Consents" by a certain date (although it appears that all or virtually all of the purchasers' agreements were entered into after the consent was granted).[169] The word "Consents" is defined in the agreement to mean the necessary approvals in relation to the building, the Development (that is, Lakeside West and its curtilage) and the Precinct (that is, the development as a whole). The term

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167 It may be that this condition was subsequently withdrawn or varied.

168 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912.

169 A schedule annexed to the respondents' submissions identifies all but four of the agreements at issue as having been entered into after 28 July 2006, when the consent was granted. The other four agreements were undated, so it is not clear when they were entered into.

"Consent" or "Consents" is then used at various places in the agreement. To take four instances:[170]

(a) under cl 1.2 in the event of conflict between the provisions of the Unit Plan[171] and the terms of "the Consent", the terms of "the Consent" take priority over the Unit Plan;

(b) under cl 4.1(i), the purchaser is required to give full co-operation to the vendor and to support "all applications to allow completion of the Development and the development of the Precinct". The sub-clause then provides:

> The Purchaser hereby agrees that it shall not lodge or permit to be lodged with any Relevant Authority any objection to the Consents or any other consents required or applied for by the Vendor … in connection with the development of the Precinct.

(c) under cl 4.6(a), the vendor reserves the right to grant "any easements, building line restrictions, consent notices, covenants or other encumbrances, rights or obligations" which may be required to satisfy any conditions of "the Consent", provided that they do not adversely affect the value of the unit; and

(d) under cl 8.1, the purchaser agrees to make the vendor (or its nominee) the purchaser's attorney:

> … for the purposes of executing all documents and plans and Consents and to perform all acts matters and things as may be necessary to:
>
> 1. complete the Development (including any stage of the Development);

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[170] As will be apparent, the clauses mentioned relate to the pre-consent period, or to the post-consent period, or to both.

[171] Defined to mean "the unit plan to be prepared in accordance with the [Unit Titles Act 1972] to be deposited in respect of the Land and which, subject to the provisions of this agreement, will be based upon the content and intent of the Draft Outline Plans and Specifications".

> 2. complete the Precinct (including any stage of the Precinct);
>
> …

[146] Accordingly, the consent is integral to the agreement, in the sense that: (a) it determines certain priorities within the agreement (as in cl 1.2); and (b) various of the parties' contractual rights and obligations either relate to it (as in cl 4.1(i)) or are defined in terms of it (as in cl 8.1(a) and (b)). The Queenstown Lakes District Council granted it subject to a condition that the Precinct be developed in accordance with the plans which it approved. The Approved Plans are effectively, then, integral to the consent.

[147] In this context, I think the language of the "entire agreement" provision in cl 16.8 is important. Relevantly, it provides:

> The parties acknowledge that this Agreement, and the Annexures and attachments to this Agreement, *together with any approvals and consents in writing provided for in this Agreement and given prior to the execution of this agreement* [sic], contain the entire agreement between the parties, and notwithstanding anything contained in any brochure, report or other document.
>
> (emphasis added)

I make two points about the italicised words in this clause:[172]

(a) First, they indicate that the parties contemplated that certain documents referred to in the agreement, including approvals and consents, would be treated as part of the agreement.

(b) Second, it is not immediately clear whether they include the consent. The agreement was expressed to be conditional on the "Consents" being granted, but because all or virtually all of the purchasers' agreements were entered into after the consent was granted in July 2006, the consent was in existence prior to their execution. In principle, there seems to be no reason why the italicised words should not include the consent as it is not apparent why some approvals and

[172] The word "Agreement" is not a defined term, and the agreement is referred to both with and without a capital "A" at different points, on an apparently random basis.

consents provided for in the agreement are to be treated as part of the agreement but the consent is not. To the contrary, given its important role in the agreement, there are strong reasons to conclude that the consent was to be treated as part of the agreement.

[148] The consequence of this analysis is, in my view, that the consent is not background material subject to a test of reasonable availability; rather, it is a component or element of the agreement. Accordingly, it is necessarily relevant to an objective assessment of the agreement's meaning once unconditional. But if I am wrong about that, I have no doubt that the consent was reasonably available in the sense meant by Lord Hoffmann – it was a publicly available document which was incorporated into the agreement.

[149] As to the second point,[173] Mr Goddard is, of course, right – the consent does not, of itself, establish that the vendor agreed contractually to complete the Precinct. It does, however, significantly undermine counsel's contention that the detail that would have been necessary if the vendor had an obligation to develop the Precinct was missing from the agreement. This is because:

(a) Mr Goddard accepted that the vendor had a contractual obligation to complete Lakeside West, despite the flexibility which the vendor has under the agreement as to the way in which that is done. This is well illustrated by the terms of cl 4.1(h)[174] and cl 4.9.[175] Even the Outline Specification for Lakeside West (which is part of the Draft Outline Plans and Specifications annexed to the agreement) gives the vendor considerable flexibility as to how Lakeside West is to be developed. While there are commitments to complying with the building code and fire and other regulatory requirements, some of the specifications

173 See above at [143].
174 Set out by Ellen France J above at [24].
175 Set out by Ellen France J above at [32].

simply refer to a range of possible alternatives[176] or give a general description of what will be provided.[177]

(b) Taking Lakeside West as an example, the Approved Plans which are a condition of the consent are *more* detailed than the drawings which were part of the Draft Outline Plans and Specifications (although they do not contain an equivalent of the written Outline Specification just referred to).

Because the consent is an element of the agreement, it is legitimate to have regard to it. It provides sufficient detail as to the development of the Precinct to give substance to a contractual obligation to complete it (if there was one).[178]

[150] Mr Goddard placed particular reliance on cls 4.1(g) and (k) and 4.2 of the agreement for the proposition that there was expressly no requirement for completion. I set out cls 4.1(g) and (k) for ease of reference:

> **4.1** **Disclosure and Acknowledgements:** The Vendor discloses and the Purchaser acknowledges and agrees that (subject to any express provision to the contrary herein):
>
> …
>
> (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.
>
> …
>
> (k) save as expressly stated otherwise in this Agreement the Purchaser is not purchasing the Unit in reliance upon

176 For example, cl 2.2 headed "Structure" provides: "The structure will typically comprise pre-cast concrete floors with reinforced topping on pre-cast concrete or steel beams and columns and/or reinforced concrete or blockwork walls, founded on a combination of piles and/or mass concrete, strip foundations and ground beams as required".

177 For example, cl 4.1.2 provides: "A gas fired fireplace will be provided to each unit with a feature surround wall in schist stone or similar with polished concrete or similar hearth, mantle feature and discrete feature lighting".

178 The Court of Appeal relied on the marketing materials as well as the consents in this respect: see *Kawarau* (CA), above n 144, at [54] and [72]. I see no need to rely on the marketing materials so do not address Mr Goddard's argument that the Court of Appeal was wrong to rely on them. I do note, however, that the marketing materials contain many of the same plans as were ultimately approved by the Queenstown Lakes District Council.

> completion of the development of the Precinct or any part of that Development [sic] 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.

Clause 4.2 is the "No requisitions" clause. Its text is set out in Ellen France J's judgment and I need not repeat it.[179]

[151] Like Ellen France J, I make two points about cl 4.1(g):[180]

(a) First, it is premised on completion of the Precinct – "completion of the development of the Precinct or parts of it may be deferred or suspended". "Defer" means to "put off to a later time" or "postpone";[181] "suspend" means to "halt temporarily" or to "defer or delay".[182] The sub-clause says nothing about the development of the Precinct being abandoned (or never commenced).[183] The same is true of other clauses in the agreement which envisage that the Precinct will be completed in stages and that there may be alterations or variations, for example, cl 2.9 in relation to the Precinct Amenities and Infrastructure.[184]

(b) Second, subject to the omission of the reference to completion in stages, there is an identically worded sub-clause in relation to the building (cl 4.1(h)), which the vendor does accept it was contractually obliged to complete. Accordingly, the flexibility accorded to the vendor by the language of cl 4.1(g) and (h) is not, of itself, inconsistent with a contractual obligation to complete.

[152] Turning to cl 4.1(k), the first point is to reiterate that it is poorly drafted – it misuses a defined term and repeats the qualification that it is subject to other terms

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179 See above at [27].
180 See above at [68].
181 *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2004) at 375.
182 At 1451.
183 The logical consequence of the vendor's argument that its only obligation was to build the building is that it was never obliged to undertake *any* development of the wider Precinct.
184 See above at [137]–[138].

of the agreement three times.[185] The second point is that the agreement does contain an explicit undertaking in cl 5.7 by the vendor to complete the Precinct.[186] Moreover, this explicit undertaking is supported by other provisions which can only be sensibly explained on the basis that there was such an undertaking.[187] Clause 4.1(k) is therefore subject to that explicit undertaking. The consequence of this is that if cl 4.1(k) were to be given an interpretation favourable to the vendor, it would be relevant to the issue of essentiality rather than to the existence of an obligation to complete the Precinct. But I would not interpret cl 4.1(k) in the manner suggested by Mr Goddard. I agree with Ellen France J[188] and the Court of Appeal[189] that cl 4.1(k), when read in the context of the whole agreement, simply recognises that the Precinct will be developed in stages and over time, that settlement will be called for before the Precinct is completed and that non-completion of the Precinct at that point is not a ground for a purchaser refusing to settle. I return to this below, in my discussion of essentiality.

[153] For these reasons, I consider that the agreement did impose an obligation on the vendor to complete the Precinct. That cl 5.7 imposes such an obligation is supported not only by its wording, which is clear, but also by its purpose of providing reassurance for purchasers. It is also supported by the agreement as a whole. In the agreement, the vendor has incorporated numerous provisions that are predicated on there being a Precinct. They are explicit in linking the units' presence within the Precinct to providing lifestyle and other amenity values to owners, as well as financial value. Indeed, it is fair to say that, in terms of the agreement (which includes the consent), the Precinct is the raison d'être for the units. Moreover, the vendor has required purchasers to accept significant contractual obligations predicated on the existence of the Precinct, some of which are supported by a burden on purchasers' titles in the form of an encumbrance. Looking at the agreement overall, I cannot accept that the vendor's obligation to the purchaser of a unit in Lakeside West was only to complete the building: there was also an obligation to complete the Precinct.

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185 Once in the opening words of cl 4.1 and twice in cl 4.1(k) itself. See above at [150].

186 See above at [127].

187 Such as the provisions dealing with the Precinct Society and the Precinct Management Agreement: see above at [121]–[126].

188 Ellen France J above at [68].

189 *Kawarau* (CA), above n 144, at [69].

[154] At this point, it is worth reiterating that the Court must construe the agreement (and determine essentiality) as at the time the agreement was made. The fact that the Precinct was partially completed by the time settlement was called for is irrelevant to the analysis. The Precinct Society, the Precinct Management Agreement and the Precinct Manager have, as events have transpired, had a real role to perform as a result of the completion of stage one, but that is beside the point. The limited, building-related obligation contended for by the vendor seems to me inconsistent with the vendor's contractual obligations to establish the Precinct Society to perform the functions identified in the agreement, to procure the Precinct Society to enter into the Precinct Management Agreement (the key terms of which were annexed to and were part of the agreement), and to appoint a Precinct Manager to undertake objectives set out in the agreement for the overall benefit of the Precinct and each of the unit owners, all of which are based on the existence of the Precinct.

[155] Mr Goddard argued that an obligation to complete the Precinct made no sense from a commercial perspective. But that is by no means self-evident. What is at issue is who, under the agreement, bears the risk of non-completion of the Precinct – the vendor or the purchasers. The Lakeside West and Kingston West units were marketed "off the plans" primarily (or, perhaps, exclusively) to overseas purchasers. Given the nature of a development like Kawarau Falls Station, a vendor could well see it as necessary or desirable in marketing terms that it carry the risk of non-completion. Its ability to do so would depend on a range of matters, including its financial strength, its access to long-term finance and its willingness to accept risk. Looking at it from a purchaser's perspective (in this instance, an overseas purchaser), there is little commercial sense in buying into a substantial 13 building development in the form of a "village" on the basis that the vendor's only contractual obligation is to build the individual building in which the purchaser has agreed to purchase a unit, especially in circumstances where purchasers paid a "resort premium".[190]

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[190] See the discussion of payment of a resort premium in Ellen France J's judgment, above at [82]–[90], with which I agree. William Young and O'Regan JJ appears to suggest that in light of the evidence, it cannot be concluded that the purchasers paid a resort premium: see William Young and O'Regan JJ below at [235]–[236]. Given the marketing of the development, I think it implausible to suggest that the purchase price did not include a resort premium.

[156] As I have already said, under the agreement the vendor's obligation to complete the Precinct has flexibility built into it, in the same way as its obligation to complete the building does. Just as there may be time delays and variations and alterations to the building, so may there be time delays and alterations and variations to the Precinct. But as in the case of the building,[191] purchasers have the protection that any variations and alterations to the Precinct must not be such as to materially adversely affect the value of the units.[192] Like the Court of Appeal, I regard the fact that the agreement was conditional upon the vendor satisfying itself as to finance and sufficient sales as providing the vendor with some flexibility – not flexibility as to whether it ultimately completed the Precinct, but flexibility as to the timing and sequence of buildings.[193]

[157] I turn now to the question of essentiality.

Was the term "essential"?

[158] In addressing this aspect of the case I will first explain why I consider that the vendor's obligation to complete was an essential term of the contract. I will then address William Young and O'Regan JJ's reasons for concluding that it was not.

Why I consider that the term was essential

[159] This Court addressed the issue of essentiality in *Mana Property Trustee Ltd v James Developments Ltd*.[194] Where, as here, there is no express agreement as to the essentiality of a particular term, the question is whether the parties to the contract must be taken to have impliedly agreed that the term was essential. That depends on the interpretation of the contract, which the Court described as:[195]

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191 See cl 4.9, discussed above at [149](a) and set out in part by Ellen France J above at [32].
192 See cl 5.7, set out above at [127].
193 *Kawarau* (CA), above n 144, at [74].
194 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805. For the relevant provisions of the Contract and Commercial Law Act 2017, see Ellen France J's judgment above at [73].
195 *Mana Property*, above n 194, at [24].

> … ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole contract *and the surrounding circumstances when the contract was made*.
>
> (emphasis added)

The Court described the "preferable approach" to assessing essentiality as being:[196]

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

[160] Four points require emphasis – first, essentiality is to be assessed as at the time the contract was entered into; second, it is essentiality to the cancelling party that is important; third, the approach is an objective one; and fourth, the surrounding circumstances at the time the contract was made are relevant to the assessment of what the parties will be taken to have intended.

[161] Applying this approach, I consider that the vendor's obligation to complete the Precinct was essential. Indeed, once a conclusion is reached that the vendor had a contractual obligation to complete, it seems to me difficult to argue that the obligation was not, on an objective appraisal, essential to purchasers at the time of contracting, including overseas purchasers as in this case.

[162] Putting cl 4.1(k) to one side for the moment, the agreement is, as I have said, predicated on the development of the Precinct. The Precinct's development is not expressed in the agreement to be simply a possibility or a likelihood; rather, it is expressed to be something that will happen, albeit in stages and subject to the possibility of changes or variations (but not such as to materially adversely affect the value of the units). As noted earlier, under the agreement, the vendor requires purchasers to accept various contractual obligations that are designed to facilitate both the development of the Precinct and its operation once developed. Some of these obligations are protected by an encumbrance in favour of the vendor to be entered on the purchaser's title. So the existence of the Precinct is woven into the fabric of the agreement, to the point of affecting the purchaser's title.

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196 At [25].

[163] Moreover, as the material previously quoted shows, the Precinct was described in the contractual documents as an "integrated world class village resort".[197] It was to function as a "village" under the control of the equivalent of a local body (the Precinct Society), whose general purpose was to "enable the Owners to achieve more by collectively sharing a common focus on the desired outcomes for the Precinct".[198] This and other features of the agreement make it clear that the presence of the unit in the Precinct was seen by the parties as enhancing the value, both amenity and financial, available to purchasers. The evidence indicates that the price paid for the units included a resort premium, as is to be expected.[199] But a monetary sum will not necessarily capture all of the amenity value available to owners from membership of the Precinct, given that amenity value will include intangible features such as the physical attractiveness of an area, the type of lifestyle it offers, the opportunities for social interaction with others and so on. Although such intangible features may not be readily quantifiable in money terms, they were, as is reflected in the agreement, part of what the vendor was selling at Kawarau Falls Station. Owning a unit in a stand-alone building, or even in a building that is one of several buildings, seems to me to be a radically different concept from what is provided for in the agreement.

[164] There are a number of arguments against a finding of essentiality however, which I should address. I will attempt to do so in the context of addressing the issues raised by William Young and O'Regan JJ.

My response to William Young and O'Regan JJ's reasoning

[165] There are five principal steps in William Young and O'Regan JJ's reasoning in support of their conclusion that the vendor's obligation to complete the Precinct was not essential:

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197 See cl 2.1 of Annexure 1 (key terms of the Precinct Management Agreement), set out above at [125].

198 See cls 2.2 and 2.3 of Annexure 1 (key terms of the Precinct Management Agreement), set out above at [125].

199 See above at [155] and n 190.

(a) The Court of Appeal misstated the test for essentiality and accordingly asked itself the wrong question.[200]

(b) The terms of cl 4.1(k) constituted an acknowledgement by the purchasers that the obligation was not essential.[201]

(c) The contrast between the specificity of the agreement's requirements in relation to the Building and the lack of specificity in relation to the Precinct.[202]

(d) The evidence does not establish that a resort premium was paid.[203]

(e) A finding of essentiality has difficult or unworkable consequences in terms of remedy.[204]

I will address each in turn.

Test misstated?

[166] The Court of Appeal opened its discussion of essentiality by referring to the approach to essentiality set out in *Mana Property* by reference to the second of the two extracts set out above.[205] The Court of Appeal then said:[206]

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

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200 William Young and O'Regan JJ below at [220]–[223].
201 William Young and O'Regan JJ below at [225]–[227].
202 William Young and O'Regan JJ below at [229]–[233].
203 William Young and O'Regan JJ below at [235]–[236].
204 William Young and O'Regan JJ below at [237]–[239].
205 Above at [159].
206 *Kawarau* (CA), above n 144.

> [78] The centrality of the completion of the overall project is amply demonstrated in the marketing materials, the terms of the resource consent and in the provisions of the [agreements] themselves as already discussed in detail. The purchasers were entitled to expect the [vendor] would live up to their promise that the units they were purchasing would ultimately be included as part of an integrated development which would maintain and enhance the amenities of their units and improve their value.
>
> [79] Apart from anything else, the provisions relating to the Precinct Society strongly support this conclusion. The central role of the Society in the development is demonstrated by the terms of the [agreements]. The vendors were required to form the Society for the purposes we have already outlined prior to settlement of the [agreements]. The purchasers bound themselves to becoming members of the Society and to meeting any levies associated with the Society.
>
> [80] *In all the circumstances, we consider it is more probable than not that the purchasers would have declined to enter into the ASPs if there were no positive obligation to complete Stages 2 and 3.*
>
> (emphasis added)

[167] William Young and O'Regan JJ state that the italicised statements misstate the test set out in *Mana Property* and that the Court of Appeal treated the finding that there was an agreed term relating to the completion of the Precinct as an agreement that it was an essential term.[207] I do not accept that this is a fair criticism.

[168] In the previous section of its judgment, the Court of Appeal had discussed at some length its reasons for finding that the vendor had a contractual obligation to complete the Precinct.[208] The Court then turned to discuss whether that obligation was essential.[209] It correctly stated the approach to be applied on the basis of *Mana Property*. It seems to me plain that the second sentence in [77] of the Court's judgment (that is, the italicised sentence) follows on from the first sentence. The first sentence says that the vendor's obligation to complete the Precinct must be treated as essential; the second sentence explains why – because it was unlikely that the purchaser would have entered into the contract without that obligation. The third sentence highlights the point by referring to the payment of a resort premium. The Court then goes on to discuss in [78] of its reasons the centrality of that obligation and in [79] the central role of the Precinct Society, both of which go to essentiality. The conclusion in [80] could, I acknowledge, have been stated more precisely (by

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207 See William Young and O'Regan JJ below at [222].
208 *Kawarau* (CA), above n 144, at [54]–[75].
209 At [76]–[80].

replacing the words "positive obligation" with "essential obligation", for example), but I do not accept that the Court of Appeal was confused about what it was doing. I suspect that the explanation for the Court's relatively brief discussion of essentiality is the point made earlier, namely that once it is determined that the vendor had a contractual obligation to complete the Precinct, it seems to me to follow almost inevitably that it was, on an objective appraisal, essential.

Clause 4.1(k)

[169] Mr Goddard argued that, if the vendor had a contractual obligation to complete the Precinct, cl 4.1(k)[210] showed that the vendor did not regard the obligation as essential, an argument which William Young and O'Regan JJ accept.[211] As I have already indicated, I do not agree that cl 4.1(k) is an acknowledgement by the purchaser of the non-essentiality of the vendor's obligation to complete. Rather, I agree with Ellen France J and the Court of Appeal that, read in the context of the agreement as a whole, cl 4.1(k) is simply an acknowledgment by the purchaser that the Precinct would be developed over time, that it may undergo some variation or alteration and that it would not be completed when the purchaser was required to settle. The fact that the Precinct was not completed would not entitle the vendor to refuse to settle.

[170] As already noted, cl 4.1(k) is, like other aspects of the agreement, poorly drafted. The use of the defined term "Development" appears to be an error and the clause is expressed in to be subject to other provisions of the agreement in three places – in the opening words of cl 4.1 and twice in cl 4.1(k) itself.[212]

[171] The effect of the vendor's interpretation of cl 4.1(k) is that purchasers of units in Lakeside West accepted that they relied only on the completion of Lakeside West and did not rely on any other part of the Precinct being completed (or even commenced). That interpretation seems to me to be in conflict with the fundamental importance which the agreement assigns to the unit being part of the Precinct. As already discussed, under cl 5.1 the vendor requires the purchaser to

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[210] See above at [150].
[211] See William Young and O'Regan JJ below at [225]–[227].
[212] See above at [150] and [152].

acknowledge that "the Unit is part of the Precinct" and to enter into a range of obligations prior to settlement as a consequence. That the requirements of the Precinct (in terms of both its development and subsequent operation) drive a number of significant obligations which the agreement places on purchasers is graphically illustrated by the requirement that purchasers accept a burden on their titles in the form of the Precinct encumbrance, which is designed to ensure the performance by purchasers of their Precinct obligations.[213] One of the purposes of cl 5.7 was, in my view, to provide reassurance to purchasers that, although the Precinct would be developed in stages and over time, and might be altered or varied, it: (a) would be developed; and (b) in a way that did not adversely affect the value of their units. The vendor's interpretation of cl 4.1(k) runs counter to that important purpose.

[172] In this context the approach articulated by Lord Bingham delivering the advice of the Privy Council in *Dairy Containers Ltd v Tasman Orient Line CV* has some relevance.[214] At issue in that case was the meaning of a damage limitation clause in a contract for the transport of goods by sea. Lord Bingham described the approach to be adopted as follows:[215]

> This clause must be construed in the context of the contract as a whole. The general rule should be applied that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party: *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2003] 2 WLR 711, para [144], per Lord Hobhouse of Woodborough.

[173] As this extract indicates, the case was one where the party's liability had been established and what was at issue was a meaning of a clause purporting to limit liability. In the present case, the vendor's liability has been established and the issue is whether the obligation breached was essential or not. The vendor advances an interpretation of cl 4.1(k) which means, in effect, that the purchasers accepted that the completion of the Precinct was not essential to them. Read in the context of the whole agreement, cl 4.1(k) does not, in my view, bear the meaning contended for. If the vendor had wished its "bespoke" agreement to have had that effect, it could have

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213 See cl 5.4, discussed above at [122](c).
214 *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 NZLR 433.
215 At [12].

expressed matters in a much clearer and more coherent way. To that extent, the "general rule" referred to by Lord Bingham supports the view I have reached.

Specificity contrast

[174] William Young and O'Regan JJ consider that the contrast between the specificity of the requirements in relation to the building and the lack of specificity in relation to the requirements for the Precinct support the view that the covenant in cl 5.7 in relation to the Precinct is not an essential term.[216] As will be apparent from what I have already said, I do not accept that there is any such significant contrast. The type of flexibility as to timing and detail that the vendor has under the agreement in relation to the development of the Precinct it also has in relation to the development of the building. This flexibility in relation to the building is well illustrated by the vendor's change of plans in relation to Lakeside West, when it replaced what had been intended to be a residents' lounge and spa with a gastro-pub and a hairdressing salon. In relation to the Precinct and the buildings in it, the Approved Plans for which the consent was granted are more detailed than those attached to the Draft Outline Plans and Specifications.[217]

[175] William Young and O'Regan JJ point out that cl 6.1 requires that the construction of the Development be undertaken in a proper and workmanlike manner and substantially in accordance with the Draft Outline Plans and Specifications and relevant legal requirements. There is no equivalent written specification in relation to the Precinct.[218] But as previously noted, on analysis those written specifications are framed so as to accord considerable flexibility to the vendor,[219] quite apart from the flexibility accorded by cls 4.1(h)[220] and 4.9 of the agreement.[221] And it is worth reiterating that the interpretation of cl 5.7 adopted by Gilbert J and urged by Mr Goddard before us involves an acceptance that the agreement, and the Draft Outline Plans and Specifications in particular, contained sufficient detail to support a

216 See William Young and O'Regan JJ below at [231].
217 See above at [141].
218 See William Young and O'Regan JJ below at [231].
219 See above at [149](a).
220 Set out by Ellen France J above at [24].
221 Set out by Ellen France J above at [32].

contractual obligation on the part of the vendor to complete the Precinct in a way that did not adversely affect the value of the units.[222]

Resort premium

[176] I have already referred to the resort premium aspect.[223] In brief, I agree with Ellen France J's analysis and there is nothing I can usefully add to it.

Difficult or unworkable consequences?

[177] William Young and O'Regan JJ note that it is possible that any default by the vendor might not become apparent for many years after settlement and say that consequently there are obvious difficulties with a right of automatic cancellation for a failure to complete, which indicates that cancellation was not seen as the primary remedy.[224]

[178] I make the preliminary point that no practical problem of this type arises in the present case because it was clear at settlement that the vendor would not be able to complete stages two and three of the Precinct.[225] However, that does not answer William Young and O'Regan JJ's point because, assessing the position at the time the agreement was made, it is possible that a breach by the vendor of its obligation to complete the Precinct could occur some time after settlement.

[179] I make two points in response. First, as a matter of principle, cancellation after a contract has been partly performed is not problematic as it is specifically contemplated by the Contract and Commercial Law Act 2017 (which has replaced the Contractual Remedies Act 1979).[226] Moreover, where a contract has been cancelled, the court has wide powers under ss 43–49 of the Act with respect to the granting of relief. In exercising its powers under the Act, the court is required to have regard to (among other things) the value of any works or services by a party in

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222 See above at [134] and [135](a). As already noted, the essential difference between Gilbert J and the Court of Appeal in relation to cl 5.7 was the point at which the vendor's obligation to complete kicked in.
223 See above at [155] and n 190.
224 See William Young and O'Regan JJ below at [238].
225 See Ellen France J above at [10].
226 See for example the Contract and Commercial Law Act, s 36(1)(b).

the performance of the contract[227] and the advantage that a party has obtained as a result of the other party's performance of the contract.[228] If a purchaser who had settled well before the vendor breached its obligation cancelled the agreement, the vendor would be entitled to seek relief under the Act.[229] Such relief could, for example, take the form of a payment by the purchaser to the vendor by way of a rental payment for the period that the unit was in the purchaser's possession.[230] Accordingly, I do not see the difficulty raised by William Young and O'Regan JJ as insurmountable.

[180] Second, the agreement itself contemplates the possibility that cancellation may occur some time after settlement. In cl 5.7, the vendor covenants that the Precinct will be developed consistently with the Draft Outline Plans and Specifications and that any alteration or variation will not materially adversely affect the value of the unit. If, after purchasers of units in a building had settled, the vendor was to breach its contractual obligation by making changes to the Precinct that did have a material adverse effect on the value of purchasers' units, the purchasers would be entitled to cancel if the effect of the breach was substantially to reduce the benefit of the agreement to them in accordance with s 37(2)(b)(i) of the Contract and Commercial Law Act. One example of a situation where there may be a substantial reduction of benefit is where the vendor's changes to the Precinct had the effect of limiting or blocking unit owners' views over Lake Wakatipu.

[181] Accordingly, the fact that cancellation may occur some time after settlement is not, in my view, a reason against a finding of essentiality.

Conclusion

[182] For these reasons I conclude that the vendor had a contractual obligation to complete the Precinct, which it breached. The obligation was essential, so that, for

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227 Section 45(d).
228 Section 45(e).
229 Section 45(e).
230 In British Columbia there is legislation governing the development of condominiums. Among other things, that legislation imposes disclosure obligations on developers. Failure to disclose may entitle a purchaser to rescind a contract for sale and purchase even after settlement. Where that occurs, the court has the power to order the purchaser to pay market rent for the period he or she occupied the unit. See Real Estate Development Marketing Act SBC 2004 c 41, ss 14–17 and 21.

the reasons given by Ellen France J, the purchasers were entitled to cancel.[231] Given this conclusion, I need not address the other grounds raised by the purchasers.

[183] I would accordingly dismiss the appeal and agree with the orders made by Elias CJ.

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231 See Ellen France J above at [97]–[110].

WILLIAM YOUNG AND O'REGAN JJ

Agreement and disagreement

[184] We agree with the majority that cl 5.7 must be considered to create a contractual commitment by the vendor in relation to the completion of stages two and three. However, we see that issue as much more finely balanced than the majority does and we also see the actual obligation as more equivocal than the majority does. More importantly, we do not agree that the commitment in cl 5.7 was an essential term.

[185] Like Ellen France J, we will refer to the parties as vendor and purchaser and use the Kingston West standard form agreement as our reference point. The relevant provisions are set out in the judgment of Ellen France J.[232]

Preliminary points

[186] Before addressing the differences between our approach and that of the majority, we think it is important to record that counsel for the vendor, Mr Goddard QC, made it clear that, at the time the agreements were entered into, the vendor had every intention of developing the whole Precinct. That intention would have been on the assumption that the demand for the proposed buildings justified the cost of erecting them and that project finance could be obtained on reasonable terms (in respect of which, significant pre-sales of the units in each building would presumably be required). The vendor had the necessary resource consent and its marketing material indicated that its intention was to realise the whole concept, as and when it could. The evidence was that the vendor had marketed some elements of stages two and three and had effected a number of sales. Ultimately, when it was decided that stages two and three could not proceed, the agreements relating to the stage two and three buildings were cancelled and the deposits that had been paid in respect of those sales had to be paid back.

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[232] See above at [15]–[43].

[187] We think this is important because it means that the agreements for sale and purchase in the present case needed to contain provisions to ensure that the selling of the Units in Kingston West and Lakeside West did not create an impediment to the completion of the Precinct and allowed for the Precinct to operate effectively as it grew from the first building until, if all had gone well, the Precinct had been completed. This means that we do not see the provisions relating to the Precinct Society and the Precinct Society Rules in cl 5 of the agreement, or the provision in cl 8 under which the purchaser appointed the vendor as his or her attorney for various purposes including the completion of the Precinct, as explicable only by the fact that there was a commitment by the vendor to complete stages two and three.[233] We see them as equally explicable by the fact that the vendor intended to do this and needed to ensure that a purchaser could not impede this.

[188] The same can be said in relation to the consent. It was, of course, detailed and comprehensive, as Arnold J points out.[234] It is true that it supports the proposition that the vendor intended that the Precinct as a whole would be developed. But we disagree with the majority that this supports the view that the vendor entered into a contractual commitment with the purchasers of every Unit in the Building that it would develop stages two and three.[235] It is consistent with such a commitment, but equally consistent with a mere intention. We do not agree with Arnold J that the consent is part of the agreement for sale and purchase or "an element of the agreement".[236]

Was there a term relating to completion of the Precinct?

[189] Clause 5.7 is awkwardly worded. For convenience, we set it out again:

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233 Compare to the approach of Ellen France J above at [56]–[61]. Ellen France J suggests at [60] that a much less complicated arrangement could have been put in place if there was no obligation to complete stages two and three. It is not clear to us why that would be the case, given the intention to complete the Precinct and, presumably, the intention to have the same provisions in agreements relating to other buildings intended to be in the Precinct. We see the language as consistent with that intention, contrary to the view of Arnold J above at [125].

234 See above at [141].

235 Compare Ellen France J above at [65]–[66] and Arnold J above at [145]–[149].

236 See above at [147]–[148]. The purchasers did not suggest this in argument. Their argument was that the consents were part of the factual background that was reasonably available to the parties: see at [233] below. The fact that a document is referred to in an agreement does not make it part of the agreement.

> **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 effect [sic] the value of the Unit.

[190] The Precinct was defined in cl 1 as "the development to be undertaken on the Precinct Land". There was no specification of what that development entailed. It was not, for example, defined by reference to the concept plan in the marketing materials. The "Precinct Land" was the Kawarau Falls site described by reference to the relevant certificate of title numbers.

[191] The crucial words on which the finding of a contractual commitment is made set out an exception to the statement that the concept and development of the Precinct could be altered or varied as the vendor determined. That statement absolved the vendor of the need to consult with, or even give notice to, the purchaser of any such alteration or variation. The crucial words can be read as a qualification of the vendor's freedom to alter or vary the concept and development of the Precinct without consultation with, or notice to the purchasers. The crucial part of cl 5.7 is also oddly worded. If the parenthetical reference to procuring is omitted, the crucial words are "except that the Vendor covenants that it will … the Precinct shall be developed". The missing verb would, if included, have assisted the interpretation.

[192] On the interpretation of cl 5.7 favoured by the Court of Appeal and by the majority in this Court, the clause required the vendor, upon declaring the contract unconditional (that is, being satisfied that pre-sales were adequate and that construction costs were acceptable, as well as obtaining the required consents and a certificate of title to the relevant Unit) to build not just the Development as defined (the Building and curtilage) but the entire Precinct, comprising 13 buildings.[237] Mr Goddard argued it would be odd if the satisfaction of a condition focused on pre-sales and construction costs of "the Building" led to the vendor being obliged to

[237] See cl 2.1 of the agreement, set out by Ellen France J above at [17].

build the entire Precinct. We agree that is an oddity in the agreement, but it is not determinative of the meaning of cl 5.7.

[193] Mr Goddard also highlighted the oddity that a commitment of such significance appeared as an exception to a provision allowing for alterations and variations to the Precinct and appeared in a subclause headed "Disclosure" in a clause headed "PRECINCT SOCIETY". He referred us to the decision of the Supreme Court of the United Kingdom in *Re Sigma Finance Corp (in admin rec)*.[238] In that case, Lord Mance warned against elevating a subsidiary provision to a level of predominance which it was not designed to have in a context where, if given that predominance, it conflicts with the basic scheme of the agreement.[239]

[194] Counsel for the purchasers, Mr Mills QC, argued that the placement of the clause was not odd. He said cl 5's purpose was to tie the purchasers into the Precinct development through the Precinct Society. It was submitted that while this could imply the Precinct had to be completed by settlement, cl 5.7 made it clear that that was not so: the Precinct would be developed, but with flexibility. That does not seem to us to explain why a commitment requiring the vendor to construct 13 buildings and associated facilities and infrastructure, as an essential obligation, on Mr Mills' argument, appeared as it did in cl 5.7.

[195] We agree with the submission of the vendors that the odd placement of cl 5.7 calls for caution before applying a meaning that reads the clause as imposing such a significant obligation on the vendor.[240]

[196] We think there is much force in the points made by Gilbert J in his judgment justifying his conclusion as to the limited interpretation of cl 5.7.[241] We will not set these out again: Ellen France J summarises them in her judgment.[242] On Gilbert J's

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238 *Re Sigma Finance Corp (in admin rec)* [2009] UKSC 2, [2010] 1 All ER 571.

239 At [12].

240 So we do not agree with the approach of Ellen France J above at [53], Arnold J above at [131], or that of the Court of Appeal at [56], which minimises the significance of the odd placement of the covenant by attributing this to the poor drafting of the agreement: *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2016] NZCA 427 (Randerson, Wild and Brown JJ) [*Kawarau* (CA)].

241 *Ho Kok Sun v Peninsula Road Ltd (in rec and in liq)* [2015] NZHC 126 [*Kawarau* (HC)] at [72]–[80].

242 See above at [46].

interpretation, cl 5.7 simply provided for how the Precinct may be developed. It limited the vendor's options in relation to alterations or variations by requiring the development of the Precinct to be consistent with the Draft Outline Plans and Specifications or, if different, not in a manner that materially adversely affected the value of the Unit being purchased by the purchaser.

[197] The Draft Outline Plans and Specifications with which the development of the Precinct had to be consistent were those relating to the Building and the Unit. The defined term in cl 1 of the agreement for sale and purchase provided:

> **"Draft Outline Plans and Specifications"** mean the outline plans and specifications of *the Unit and the Building* a copy of which is annexed to this agreement as Annexure 2.
>
> (emphasis added)

[198] The focus of the Draft Outline Plans and Specifications on the Development (the Building and curtilage) is emphasised by cl 6.1, which required construction of the Development to be completed substantially in accordance with the content and intent of the Draft Outline Plans and Specifications. Clause 4.9(b) allowed for variation of the Draft Outline Plans and Specifications, as long as the variation did not materially adversely affect the value of the purchaser's Unit.

[199] The Draft Outline Plans and Specifications contained a specification relating to the Building and to each Unit within it, and the plans that were attached are floor plans of each level of the Building. The specification said nothing about the Precinct, other than recording the location of the Building in the "17 acre Masterplanned development" which, although it does not use the term, must be a reference to the Precinct.

[200] The plans in Annexure 2 appeared after a heading "KAWARAU FALLS STATION Kingston West: Outline Specification" and comprise nine pages. The first seven are floor plans of levels one–seven of the Building and the ninth is a plan of the layout of a "typical guest room" (being a Unit in the Building). The eighth page is a plan of the Precinct showing where the Building would appear in the Precinct and captioned "Kingston West Precinct Draft Outline". It identified where

Kingston West appears in the Precinct and showed an outline of where the other proposed buildings in the Precinct were intended to appear.[243]

[201] Thus the covenant in cl 5.7, as it relates to Kingston West, required that the vendor made sure that there was no inconsistency with the plans and specifications for Kingston West, including the plan showing the location of Kingston West within the Precinct. That plan of the Precinct gave no detail at all about the Precinct, other than the shapes of the intended footprints of the 13 buildings without detail about their height or style or their purpose and functions. The requirement for consistency with the Draft Outline Plans and Specifications therefore had little practical meaning. And it was further qualified by allowing inconsistencies so long as they did not detract from the value of the purchaser's Unit.

[202] We acknowledge that cl 4.1(g), which talks of the Precinct being deferred though it "will be completed in stages" provides support for the Court of Appeal's and the majority's interpretation of cl 5.7.[244] However, that provision allowed for deferral or suspension of the development of the Precinct. The entitlement to defer or suspend was not qualified by cl 5.7 so the vendor could defer or suspend even if that detracted from the value of the purchaser's Unit.

[203] We also acknowledge that the interpretation favoured by Gilbert J would mean that the principal obligation of the vendor, (the obligation to build the Building) would be a very limited one. Taken at its most extreme, it would mean the vendor could build only Kingston West and nothing else, and leave the rest of the Precinct Land entirely undeveloped, but the purchaser would be required to settle and accept the Unit he or she had purchased and would have no claim for breach of contract. It seems unlikely that the parties would have intended that.

[204] It cannot be denied that cl 5.7 is ambiguous, as the contrasting interpretations in the High Court and Court of Appeal demonstrate. Both have plausible reasons supporting them. In those circumstances, the fact that the contract was the vendor's contract brings into play the contra proferentem rule as described in *D A Constable*

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[243] A copy of the eighth page appears in the appendix to the judgment of Ellen France J. (The detail that follows in that appendix did not appear in Annexure 2 to the agreement).

[244] Clause 4.1(g) is set out by Ellen France J above at [24].

Syndicate 386 v Auckland District Law Society Inc: "What is clear is that in the case of genuine ambiguity, a court will resolve the ambiguity against the party who proffered the phrase".[245]

[205] We consider this is a case of genuine ambiguity. So we would construe the clause against the vendor.

Extent of obligation

[206] Having concluded that cl 5.7 did impose a positive obligation on the vendor, the next question is: what was that obligation?

[207] The Court of Appeal found that the vendor had a positive obligation to complete stages two and three or to procure the completion of those stages.[246] Immediately after making that finding, it added:[247]

> In doing so, [the vendor] had a substantial degree of flexibility as to the time by which the Precinct had to be completed as demonstrated particularly by their ability in terms of cl 4.1(g) to suspend or defer completion.
>
> The [vendor was] also permitted to vary the form of the development of the wider Precinct. Their ability to do so is expressed in apparently wide terms in cl 4.1(g), but this provision must be read subject to any express term to the contrary. We consider the apparently broad discretion under cl 4.1(g) must be subject to and qualified by cl 5.7. Although there are some imperfections in the drafting of cl 5.7, we consider the parties intended it to mean that any alteration or variation of the plan for the development of the Precinct must not be such as to materially adversely affect the value of the units under the [agreements for sale and purchase].[248] The ability of the [vendor] to vary the design of the Precinct was also constrained by the terms of the resource consent unless the [Queenstown Lakes District Council] agreed to amend them.

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245 *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237, [2010] 3 NZLR 23 at [69].

246 *Kawarau* (CA), above n 240, at [63].

247 At [63]–[64].

248 This statement also appears to assume that the reference to the Draft Outline Plans and Specifications in cl 5.7 refers to the plans for the Precinct, when, in fact, it refers to the plans and specifications for the Building.

[208] Earlier, the Court of Appeal had acknowledged that there was nothing in the agreements for sale and purchase specifying a time for completion of stages two and three.[249] The Court added:[250]

> However, the Court would, if necessary, impose a duty to complete the project within a reasonable time. What is a reasonable time is a question of fact. In the present case it would likely be measured in years and would reflect the discretions available to the developers under the [agreements for sale and purchase].

[209] Drawing all of those threads together, the obligation as defined by the Court of Appeal was an obligation to complete stages two and three, but with flexibility to suspend and defer (subject to such suspension or deferral not causing the completion to be delayed beyond a reasonable time) and subject to alterations or variations as long as they did not materially adversely affect the value of the Units.[251]

[210] Arnold J finds the obligation was to complete the Precinct, emphasising the flexibility highlighted by the Court of Appeal.[252]

[211] We would also find the obligation was to complete the Precinct (that is, stages one, two and three), rather than an obligation to complete stages two and three. At the time the agreements were entered into, completion of the Precinct included, in the case of Kingston West, the completion of Lakeside West (and vice versa) and the other three buildings in stage one as well as the completion of stages two and three.[253]

[212] The obligation was to complete the Precinct subject to:

(a) The right in cl 4.1(g) to make changes from time to time as the vendor deemed necessary. We accept that this provision, appearing as it did in cl 4.1, was "subject to any express provision to the contrary herein", given the appearance of those words in the introductory

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249 *Kawarau* (CA), above n 240, at [57].
250 At [57].
251 At [63]–[64].
252 Above at [153] and [156]. Ellen France J refers to the completion of stages two and three (above at [52] and [72]) but says at n 64 that she sees that as interchangeable, on the facts of this case, with the formulation used by Arnold J.
253 As noted earlier, stage one was, in fact, completed.

wording to cl 4.1. So cl 4.1(g) was subject to anything to the contrary in cl 5.7. However, we do not think that cl 5.7 was much of a qualification on the right to change the Precinct in whatever manner and for whatever reason the vendor deemed necessary, because cl 5.7 allowed any variations or alterations as long as they were not inconsistent with the Draft Outline Plans and Specifications which, for the reasons given above, provided very little constraint on the alteration and variation power. To the extent it did provide constraint, it had the exception which allowed even alterations and variations that were inconsistent with the Draft Outline Plans and Specifications to go ahead as long as they did not materially adversely affect the value of the Unit. The net effect of cls 4.1(g) and 5.7 was that the vendor had very broad powers to alter the Precinct.[254]

(b) The right to defer or suspend in cl 4.1(g). No limitation was placed on this power and there was no provision to the contrary elsewhere in the agreement. Even if the Court of Appeal is right that a Court would require completion of the Precinct within a reasonable time, it is clear that this would be a number of years. It is likely that the reason for suspension or deferral would affect the reasonableness of the period of deferral. If, for example, there was a global financial crisis that depressed demand for resort properties and therefore prices for units in such properties, it is hard to see why it would not be reasonable for a developer to continue the deferral of the construction of units when the predicted return at current market prices was lower than the construction cost.

(c) The right in cl 2.9 to alter, vary, add to or omit any amenities or facilities from the Precinct Amenities and Infrastructure (including

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254 It is true, as Ellen France J points out above at [68], and Arnold J above at [151](b), that cl 4.1(h) is a similar provision to cl 4.1(g) but relating to the Building. Obviously, completion of the Building was an essential term. But cl 4.1(h) has to be read subject to the clear requirement in cl 6.1 that the Building must be completed and the requirement in cl 4.4 that settlement cannot occur until practical completion has been achieved.

"all the amenities and infrastructure and associated works … within the Precinct intended for common use by all the owners").

(d) The entitlement in cl 4.9 to alter or vary the Draft Outline Plans and Specifications. As already noted, these plans and specifications said little about the Precinct but it could be argued this allowed a change to the footprints of the buildings in the plan of the Precinct or omission of one or more of the buildings shown on that plan.

[213] The obligation of the vendor was, therefore, nebulous and highly qualified. The power to alter or vary, the power to add to or omit amenities or facilities and the power to suspend or defer were all significant qualifications on the commitment to complete the Precinct.

Was the vendor's obligation in relation to the Precinct an essential term?

[214] The next issue is whether the obligation was an essential term. The significance of the inquiry as to whether the obligation of the vendor was an essential term is best explained by reference to s 37 of the Contract and Commercial Law Act 2017,[255] which relevantly provides:[256]

> (1) A party to a contract may cancel it if—
>
> (a) …
>
> (b) a term in the contract is breached by another party to the contract; or
>
> (c) it is clear that a term in the contract will be breached by another party to the contract.
>
> (2) If subsection (1)(a),(b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—
>
> (a) the parties have expressly or impliedly agreed that … the performance of the term is essential to the cancelling party; or

[255] Sections 36–40 of the Contract and Commercial Law Act 2017 replaced s 7 of the Contractual Remedies Act 1979, which applied at the time this case was argued. The agreements in this case are now governed by the Contract and Commercial Law Act: see Ellen France J at [73] and n 101 above.

[256] References to misrepresentations are omitted as the sole issue in this case relates to the terms of the agreement itself.

> (b) the effect of the … breach of the contract is, or, in the case of an anticipated breach, will be,—
>
> > (i) substantially to reduce the benefit of the contract to the cancelling party; or
> >
> > (ii) substantially to increase the burden of the cancelling party under the contract; or
> >
> > (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[215] The case for the purchasers is that they were entitled to cancel because it was clear at the time the vendor required settlement that the contract would be breached by the vendor in that it could not comply with the obligation relating to the completion of the Precinct. They say that this cancellation right arose because the parties impliedly agreed that the performance of that obligation was essential to the purchaser. They do not suggest that there was any express agreement to that effect, so the question for determination is whether there was an implied agreement to that effect.

[216] If the obligation in relation to the completion of the Precinct was not an essential term, the purchasers would have had the right to cancel if the effect of the anticipated breach would be to substantially reduce the benefit of the contract to the purchaser in terms of s 37(2)(b)(i). That would be the case, for example, if the non-compliance with the obligation relating to the completion of the Precinct had a material adverse effect on the value of the Unit. The purchasers claimed that there was such a material adverse effect on the value of their Units, but that claim failed in the High Court and that aspect of the claim was not pursued in the Court of Appeal.[257]

[217] The case for the purchasers therefore stands or falls on their argument that the parties have impliedly agreed that the performance of the obligation relating to the completion of the Precinct was essential to the purchaser.

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[257] *Kawarau* (HC), above n 241, at [157].

[218] It was common ground that the approach to determining that is that set out in *Mana Property Trustee Ltd v James Developments Ltd*.[258]

[219] Ellen France J has set out the key paragraph from *Mana Property* in her judgment.[259] But we think it is worth also reproducing the immediately preceding paragraph as well:

> [24] Subsection (4)(a)[[260]] contemplates that the parties *either* have expressly agreed that a particular term in their contract is to be regarded as essential (to the cancelling party or to both of them) *or* must be taken to have impliedly so agreed. In both cases it is a matter of interpretation of the contract. The use of words such as "performance being essential" or "strict performance being required" would plainly fall within the former category, but no special form of words is necessary provided that it can be seen that the parties have indeed agreed that adherence to the provision in question is being treated by them as essential. The latter category, of implied agreement on the essentiality of a term which appears in the contract, may sometimes be more difficult to establish.[261] But, again, it will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made. Of particular importance will be what must then have been in the contemplation of the parties concerning the likely effect of a breach of the term. It will include whether a term of the same kind has customarily been treated as a condition or as an essential term under the Act, such as, in relation to a land sale agreement, a requirement for payment of a deposit within a particular time.[262] It will also include a consideration of the type of contract and whether it is one, like a mercantile contract, which normally requires strict performance.[263] The court must ask itself whether, without expressly stating that the term is essential – that is, using a form of words equivalent to the expressions of which we have given instances – the parties can be seen, in context, to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied.
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> [25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

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[258] *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25].

[259] Above at [78].

[260] Section 7(4)(a) of the Contractual Remedies Act, now s 37(2)(a) of the Contract and Commercial Law Act.

[261] Although the task of doing so is not likely to be as burdensome as persuading a court to imply an additional term which the parties have not mentioned.

[262] *Otago Station Estates Ltd v Parker* [2005] NZSC 16, [2005] 2 NZLR 734 at [21].

[263] *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL).

[220] The Court of Appeal cited *Mana Property*, but seemed to diverge from the key element of that case. It said: "We consider it unlikely a purchaser would have proceeded to purchase a unit in a stand-alone building in the absence of an obligation to complete the overall development".[264]

[221] Then it concluded:

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

[222] Both of those statements misstate the test set out in *Mana Property* ("whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract"). We see this as significant because, in effect, the Court of Appeal treated the finding that there was an agreed term relating to completion of the Precinct as an agreement that that term was an essential term.[265]

[223] There is a reference to the "centrality" of the completion of the Precinct, which could be seen as a reference to essentiality.[266] But that is followed by a statement that the purchasers were entitled to expect the vendor to live up to its promise relating to the Precinct, which alludes to the existence of the promise, not its essentiality.

[224] As noted in this Court's judgment in *Mana Property*, determining whether there is an implied agreement on the essentiality of a term will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made.[267] In our view there

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264 *Kawarau* (CA), above n 240, at [77].

265 Above at [168] Arnold J suggests that while the conclusion set out above at [221] could have been stated "more precisely", the sentence quoted at [220] above is not in error because it is the reason for the conclusion on essentiality in the sentence appearing immediately before it. That does not seem to us to alter our analysis above, because it is not a valid reason for a conclusion on essentiality.

266 *Kawarau* (CA), above n 240, at [78].

267 *Mana Property*, above n 258, at [24].

are a number of indicators in the agreement that the parties did not intend that the covenant in relation to the completion of the Precinct would be essential.

[225] Clause 4.1(k) is an indication to the contrary.[268] That clause specifically states that the purchaser "is not purchasing the Unit in reliance upon the completion of the development of the Precinct or of any part of that Development proceeding". The capitalisation of the initial letter of "Development" in the phrase "that Development" is confusing. It could be that the capitalisation of the "D" is an error. Alternatively, it could also be that the reference should be to "the Development", which would refer to the defined term "the Development", that is, the Building and curtilage. Mr Mills suggested the latter is the more likely, but it seems clear to us that the reference should be to "that development" (with a lower case "d"). The use of the term "that" indicates that the intention is to refer back to the earlier phrase "the development of the Precinct", a phrase that appears in a number of places in cl 4. Thus, cl 4.1(k) contains an acknowledgement by the purchaser that the purchaser is not relying on completion of the Precinct itself or of any part of the Precinct. That is a strong indicator that the covenant in relation to the completion of the Precinct is not essential.

[226] The majority says that cl 4.1(k) simply confirms that delay in completion of the other stages at the time of the settlement is not a basis for refusing to settle.[269] There is nothing in cl 4.1(k) itself suggesting that it is limited to settlement. It is quite clear from the other provisions of cl 4.1 that there is no intention of completing the Precinct before settlement.

[227] It is true that cl 4.1(k) is expressed to be "save as expressly stated otherwise in this Agreement" and "subject to any other term of this Agreement" and it appears in a clause which is prefaced by the words "subject to any express provision to the contrary herein". That means that, in interpreting cl 4.1(k), it must be read subject to cl 5.7 (although requiring this to be done three times does not seem to add anything to requiring it to be done once). However, there is nothing in cl 5.7 contradicting the statement in cl 4.1(k) that the purchaser is not purchasing the Unit in reliance upon

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268 Clause 4.1(k) is quoted in the judgment of Ellen France J above at [26].
269 Ellen France J above at [68] and Arnold J above at [152] and [169]–[173].

the completion of the Precinct. The fact that cl 5.7 contains an obligation on the vendor in relation to completion of the Precinct does not qualify the "no reliance" aspect of cl 4.1(k), which for present purposes means cl 4.1(k) can fairly be read as indicating the obligation of the vendor in relation to completion of the Precinct was not essential to the purchaser.

[228] When coming to the view that cl 5.7 contained a covenant relating to the completion of the Precinct, we were strongly influenced by the contra proferentem rule.[270] However, we do not see that rule as applying to the determination of essentiality, which is, in the present case, a matter of determining whether a provision as to essentiality should be implied into the agreement. The contra proferentem rule construes express terms that are ambiguous against the party that proposed the term. It has no relevance to determining whether a term should be implied into an agreement.

[229] It is instructive to compare the vague and nebulous nature of the commitment relating to the completion of the Precinct to other terms in the contract where there is greater detail and specification.

[230] We do not agree with Ellen France J that there is specificity as to what was to be built in relation to the Precinct in the Draft Outline Plans and Specifications, for the reasons given earlier.[271] We see the specificity highlighted by Ellen France J in her judgment as in fact emphasising how lacking in specificity the Draft Outline Plans and Specifications are in relation to the Precinct as opposed to the Building.

[231] The contrast between the specificity of the requirements in relation to the Building and the lack of specificity in relation to the requirements as to the Precinct supports the view that the covenant in relation to the latter was not an essential term. Obviously the covenant to complete the Building was an essential term. In that regard cl 6.1 specifically required that construction of the Development (that is, the building and curtilage) be undertaken in a proper and workmanlike manner and substantially in accordance with the Draft Outline Plans and Specifications and in

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270 Above at [204]–[205].
271 Above at [196]–[201]. Compare to Ellen France J above at [69]–[71].

accordance with relevant legal requirements. The specificity of that clause, and the detail provided in the Draft Outline Plans and Specifications in relation to the Building can be contrasted with the absence of such detail in cl 5.7 and the absence of any detail at all in relation to the Precinct in the Draft Outline Plans and Specifications.

[232] The vagueness of the obligation in relation to the Precinct can also be contrasted with the detail included in the agreement in relation to the lease of the Unit (in the Kingston West development). A clause (inserted into the agreement by an addendum) specifically provides that the Property is sold subject to a Lease, and the form of the lease is then appended. We do not think there is any doubt that the requirement that the Units be subject to a Lease was an essential term, albeit that the precise duration of the lease was not, in itself, essential.

[233] Mr Mills argued that the consent and marketing materials, which included detailed plans for the Precinct, could be referred to as a guide in determining the scope of the obligation under cl 5.7 in relation to the Precinct. We disagree. If the parties had intended that such materials should be used to define the scope of the obligation, it would have been simple to say so in the agreement. The purchasers have never claimed there was a commitment in the agreement to give effect to the marketing materials, or, for that matter, the consents.

[234] In *Mana Property*, this Court noted that a matter of importance in determining whether to imply an agreement as to essentiality is whether a term of the same kind has customarily been treated as a condition or an essential term.[272] The Court gave an example of the requirement for payment of a deposit within a particular time. There was nothing in the evidence to indicate whether, in contracts relating to the purchase of a property in a development intended to comprise a number of buildings such as a subdivision, a commitment as to completion of the development or subdivision could be customarily included in the contract and be regarded as essential.

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272 *Mana Property,* above n 258, at [24].

[235] Ellen France J places some weight (as the Court of Appeal did) on the fact that a resort premium was incorporated into the price of the units of Kingston West and Lakeside West.[273] The evidence on this was problematic. As acknowledged by Ellen France J, there was no reference to a resort premium in the 2007 valuations for Kingston West and Lakeside West. Rather, the evidence given by the expert property valuer called by the purchasers, Mr Humphries, was extrapolated from a valuation completed by a valuation consultancy unrelated to Mr Humphries, Fright Aubrey, in relation to three other buildings in stage one: Reserve North, Reserve South and Reserve Central.

[236] The valuation prepared by Fright Aubrey for the Reserve South building for example specifically assumed completion of the Precinct. The fact that a valuer *assumed* completion of the Precinct and, on that assumption, included a resort premium in his valuation of a particular building in the Precinct does not give any assistance in determining whether a commitment in another contract is an essential term. If, for example, the remainder of the Precinct was owned by an unrelated party but was intended to go ahead at the same time as the construction of the Reserve South building, no doubt the valuation prepared by Fright Aubrey would have been the same if Fright Aubrey had made the stated assumption that the unrelated party would complete its part of the Precinct. Such a valuation does not say anything about the obligations of the parties or their essentiality to the contract.

[237] It is also made clear in *Mana Property* that an important factor in determining whether to imply an agreement as to essentiality of a term is what must have been in the contemplation of the parties concerning the likely breach of the term.[274] If the contemplated remedy is cancellation, regardless of the seriousness or otherwise of the breach, that would indicate essentiality. If the contemplated remedy is cancellation only for a serious breach and/or damages, that indicates the term is not essential. In our view this factor supports the proposition that the obligation in relation to the completion of the Precinct was not essential.

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[273] See above at [82]–[90]; and Arnold J concurring at [155] and n 190. See also *Kawarau* (CA), above n 240, at [77].

[274] *Mana Property,* above n 258, at [24].

[238] It was clear that settlement would occur before the Precinct could be completed. On the Court of Appeal's "reasonable time" approach to the requirement to complete the Precinct[275] (and having regard to the entitlement of the vendor to defer or suspend development of the Precinct) it was quite possible that any default in the completion of the development of the Precinct would not become apparent for many years after settlement of the sale and purchase of the Units and entry into the Lease. In those circumstances, there are obvious difficulties with a right of automatic cancellation for a failure to complete the development of the Precinct, which indicate that cancellation was not seen as the primary remedy. While, as Arnold J notes, the Court has powers to grant relief where cancellation occurs after a contract has been partly performed,[276] that deals with the practical consequences of cancellation rather than the question of whether the parties agreed that cancellation was the primary remedy for the breach of a provision of the agreement. In the present case, the apartment purchased by the purchaser could well have been occupied for a number of years or have been sold and onsold a number of times before the breach occurred. If cancellation was intended to be the primary remedy for a breach which the parties knew would not, in all likelihood, become apparent for 10 or more years, one would expect the contract to address the issue.

[239] Clause 5.7 refers to the development of the Precinct being consistent with the Draft Outline Plans and Specifications, but then has a proviso that any alteration or variation must not materially adversely affect the value of the Unit. That indicates that the focus of the clause was on the financial value of the Unit, rather than the amenity value of the Unit. That suggests that the focus of the clause was on the substantiality of any breach, so that cancellation would occur only if s 37(2)(b) applied and, in other events, damages would be the remedy.

[240] If the parties had agreed that the covenant in relation to the completion of the Precinct was essential to the purchaser, it could have been expected that the clause would have been expressed more clearly (perhaps along the lines of cl 6.1 in relation to completion of the Development) with specific timelines for completion of the various components of the Precinct, including the Precinct Amenities and

275 See above at [208].
276 See above at [179].

Infrastructure. It could also have been expected that there would be an annexure setting out the requirements for the completion of the Precinct, in similar form to the Draft Outline Plans and Specifications in relation to the Building, with some detail in the plans and lengthy specifications. None of this appears in the agreement.

[241] For these reasons we consider that there is no proper basis to imply an agreement that the covenant in relation to the completion of the Precinct was an essential term.

[242] We mentioned earlier that it was unlikely the parties intended that the vendor's only obligation was to build the single building referred to in the agreement, and nothing more.[277] That was a factor in our concluding the vendor did have an obligation relating to the completion of the Precinct. But we do not see that as a reason for concluding that covenant was essential to the purchaser.

[243] The finding that the covenant was not essential does not mean that the purchasers would have had no remedy if the Building in which they purchased a Unit had been the sole building actually completed and they were left with a Unit in a building sitting in isolation on an otherwise empty site. If that had occurred, it would be expected that the outcome would have been a substantial adverse impact on the value of their Units. That would have meant the purchasers could have cancelled under s 37(2)(b)(i) on the basis that the breach or anticipated breach of the covenant relating to completion of the Precinct substantially reduced the benefit of the contract to the purchaser. As mentioned earlier, the purchasers did make such a claim in the present case but they were unsuccessful in the High Court and they did not pursue this argument on appeal.[278]

[244] On our analysis, the purchasers were not excused from performance of the obligation to settle in response to the settlement notices issued by the vendor and were not entitled to cancel the agreements.

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[277] Above at [203].
[278] See above at [216].

Result

[245] We would therefore allow the appeal. The dismissal of the appeal in accordance with the views of the majority resolves the case. The majority judgments do not address the cross-appeal and we will not do so either.

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