IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 64/2021
[2022] NZSC 101

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

Court:	Glazebrook, O'Regan, Ellen France, Williams, and William Young JJ
Counsel:	A C Beck and F B Collins for Appellant A L Holloway and T A Cunningham for Respondent
Judgment:	24 August 2022

JUDGMENT OF THE COURT

A **The respondent must pay the appellant costs in this Court of $22,500 plus usual disbursements.**

B **The costs award made in the Court of Appeal is quashed. The appellant is awarded costs in that Court on a band A basis together with usual disbursements.**

C **The appellant is awarded costs in the High Court on a 2B basis together with reasonable disbursements, to be fixed by the Registrar if necessary.**

REASONS
(Given by Ellen France J)

Introduction

[1] In a judgment delivered on 6 May 2022, the Court allowed an appeal brought

by Melco Property Holdings (NZ) 2012 Ltd (Melco).[1] The Court subsequently gave its reasons for allowing the appeal.[2] The judgment determined Melco's caveat over land owned by Mr Hall should not lapse. We reserved costs and sought submissions from the parties if agreement could not be reached. The parties did not reach agreement and we now determine the question of costs on the basis of the parties' written submissions. We address, in turn, the question of costs in this Court and then costs in the Courts below.

Costs in this Court

[2] The Court has recently confirmed our general approach to costs is to "make awards of costs which are a reasonable contribution to the costs actually incurred although retaining a discretion to make a higher award if that is considered just".[3] The Court has from time to time used a daily rate as a way of assessing what constitutes a reasonable contribution.

[3] Melco says that applying a daily rate would not comprise a reasonable contribution here. Melco's argument is that, for a number of reasons, we should instead adopt as a starting point a sum reflecting two-thirds of Melco's actual costs plus disbursements. That would give rise to an award of $60,000 costs plus disbursements of $2,887.13.

[4] In developing this submission, Melco relies on a number of factors: the commercial significance of the case to Melco; complexity; the late disclosure of evidence from Mr Hall which meant Melco had to respond to an application to adduce further evidence and address the implications of the new evidence; urgency; the effect on the litigation of the further evidence; and Mr Hall's pursuit of an argument that had no merit.

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1 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 56.
2 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60 [SC judgment].
3 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2022] NZSC 63 at [9].

[5] If the Court does not accept this approach and a daily rate is adopted, Melco's submission is that the appropriate rate in accordance with *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* is $3,800.[4] Melco submits that an appropriate time allocation is 10 days comprising two days in relation to the leave application; one day for preparation of the electronic casebook; three days for the preparation for the hearing; two days in respect of Mr Hall's application to adduce further evidence; and two days for the hearing (one day with two counsel).

[6] In response, Mr Hall says there is no reason to depart from the usual approach which would comprise a daily rate of $3,800 over a four and a half day period. The new evidence was advanced to correct a misunderstanding. Further, Mr Hall submits that where Melco had already established that it was reasonably arguable that he was in breach of contract, the new evidence was something of a "side-show".

[7] In making the submission that the relevant period would be four and a half days, Mr Hall refers to this Court's judgment in *Prebble v Awatere Huata (No 2)*.[5] The Court in that case said that a reasonable time allowance was one day for seeking leave; three days for preparation; and the time occupied by the hearing, here less than half a day, with the possibility of an allowance for second counsel.[6]

Our assessment

[8] We accept Melco's submission that there is a basis for an increase in costs in this Court, as we now explain.

[9] We deal first with the factors relied on by Melco stemming from the application to adduce further evidence and the effect of that evidence. To do so, it is necessary to explain in short form how this aspect arose.

[10] The dispute between the parties arose in the context of an agreement for the sale of Mr Hall's commercial property to Melco. The agreement for sale and purchase contained a due diligence clause. In order to exercise its due diligence, Melco required

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4 *Trans-Tasman Resources*, above n 3, at [9].
5 *Prebble v Awatere Huata (No 2)* [2005] NZSC 18, [2005] 2 NZLR 467.
6 At [12].

access to the property so that a seismic report could be prepared. Late in the piece, the site visit to enable Melco's engineer to prepare the seismic report was cancelled by Mr Hall. He subsequently purported to avoid the contract on the basis that, by the date specified in the agreement for fulfilment of the due diligence condition, Melco had neither confirmed nor waived the condition. Melco lodged a caveat on the property to protect its claimed interest. Mr Hall entered into an agreement with a third party to sell the property at a higher price. That agreement ended as it was conditional on Melco removing its caveat. After Mr Hall refused to settle on the purchase, Melco applied to the High Court for an order that its caveat not lapse. Whether the caveat lapsed turned on whether Mr Hall had validly terminated the agreement.

[11] The High Court made an order that the caveat lapse[7] and that decision was upheld in the Court of Appeal.[8] Leave to appeal to this Court was granted.[9] Mr Hall then made the application to adduce further evidence. That evidence, relevantly, included mobile telephone records which indicated that, prior to cancelling the site visit, Mr Hall had spoken to the potential third party buyer. The evidence before the Courts below to the opposite effect was not correct. Melco agreed the evidence was admissible and it was admitted by consent.

[12] Both the Courts below took the view it was reasonably arguable Mr Hall breached the contract by not facilitating access.[10] The matter proceeded in this Court on the same basis.[11] Melco failed in the lower Courts because it did not discharge its onus to show there was a reasonably arguable case that, if given access, Melco would have fulfilled the due diligence condition.[12] The focus in this Court was accordingly on "the effect of the failure to facilitate access and as to the nexus required between Mr Hall's actions and the ability to comply with the condition".[13]

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7 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2020] NZHC 2831 (Associate Judge Paulsen) [HC judgment].

8 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2021] NZCA 184, (2021) 22 NZCPR 186 (Collins, Brewer and Dunningham JJ) [CA judgment].

9 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2021] NZSC 108 [SC leave judgment].

10 HC judgment, above n 7, at [51], noting that resolution of this issue was a matter for trial; and CA judgment, above n 8, at [47].

11 SC judgment, above n 2, at [4].

12 HC judgment, above n 7, at [52] and [65]; and CA judgment, above n 8, at [49]–[53].

13 SC judgment, above n 2, at [4]; and see SC leave judgment, above n 9.

[13] That said, the emergence of the new evidence cast a different light on Mr Hall's intentions and was relevant in assessing the inferences that could be drawn about those intentions.[14] Further, in considering the impact on costs, it is relevant that the emergence of the telephone records prior to the hearing in this Court set Melco off down the track of working out what had happened. This led Melco to incur costs that otherwise would not have been incurred. We consider that some increase in costs in this Court is appropriate to reflect those additional efforts.

[14] We add that we do not see the other factors relied on by Melco as warranting an increase in costs. The criteria for leave to appeal to this Court under s 74 of the Senior Courts Act 2016 will often mean that the cases heard by the Court will involve both complexity and commercial significance. This case is no different in that respect. Nor, given that 25 weeks elapsed between leave being granted and the hearing on 23 February 2022, was the degree of urgency such as to warrant increased costs.

[15] The usual allowance for a half day appearance involving two counsel would be $15,000. We consider the appropriate award in these circumstances is $22,500 plus usual disbursements.

Costs in the Court of Appeal and the High Court

[16] Melco asks this Court to deal with costs in the Courts below. Melco seeks increased costs (a 50 per cent uplift on scale) in relation to both the High Court and the Court of Appeal. Melco relies primarily in this respect on the issues arising from the evidence about the timing of the telephone records.

[17] Mr Hall's response is that no increase in costs is appropriate. We agree. As Mr Hall says, Melco was unsuccessful in the Courts below because those Courts applied what this Court ultimately determined was the incorrect legal test as to the necessary nexus. The telephone records were not directly relevant to these issues. The increase in costs we have recognised relates to the costs in this Court. Accordingly, the usual awards in both the Courts below are appropriate.

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[14] SC judgment, above n 2, at [59].

[18] We record the advice from Mr Hall that Melco has already paid him costs with respect to the High Court and Court of Appeal decisions totalling $20,664 (band A/2B). Mr Hall explains that, in the usual case, this amount would need to be returned as well. But, here, he explains that Melco agreed 50 per cent of the total would not need to be returned by Mr Hall even were Melco successful in this Court. This was in exchange for Mr Hall agreeing to allow the caveat to remain in place without Melco obtaining a stay or interim orders.

Result

[19] For these reasons, the following orders are made:

(a) The respondent must pay the appellant costs in this Court of $22,500 plus usual disbursements.

(b) The costs award made in the Court of Appeal is quashed. The appellant is awarded costs in that Court on a band A basis together with usual disbursements.

(c) The appellant is awarded costs in the High Court on a 2B basis together with reasonable disbursements, to be fixed by the Registrar if necessary.

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