IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 64/2021
[2022] NZSC 60

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

Hearing:	23 February 2022
Court:	William Young, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	A C Beck and J M Perry for Appellant A L Holloway and T A Cunningham for Respondent
Judgment:	6 May 2022
Reasons:	12 May 2022

JUDGMENT OF THE COURT

A **The application for leave to adduce new evidence (the email chain discussed at [67]–[69] below) is dismissed.**

B **The appeal is allowed. The decisions of the Court of Appeal and High Court refusing to sustain the caveat are set aside.**

C **Order made that caveat No. 11659182.1 lodged by Melco on 16 January 2020 over the title to the property at 5 Parliament Street, Lower Hutt (WN13A/124), not lapse.**

D **Costs are reserved**.

REASONS
(Given by Ellen France J)

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Introduction

[1] The respondent, Mr Hall, agreed to sell a commercial property to the appellant, Melco Property Holdings (NZ) 2012 Ltd (Melco). The agreement for sale and purchase contained a due diligence clause under which Melco had to be satisfied the property was suitable for its requirements or waive compliance. Mr Hall purported to cancel the agreement when, after the close of business on the date for fulfilment, Melco had neither given notice of fulfilment nor waived the requirement.[1]

[2] Melco did not accept cancellation. Rather, Melco maintained that Mr Hall's actions put him in default of the agreement so that he had no right to cancel it. Melco lodged a caveat against the title to 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 came to an end because it was conditional on Melco removing its caveat. Melco did not do so. Instead, Melco purported to waive the due diligence condition and sought settlement of the agreement. Mr Hall refused. Melco then applied to the High Court for an order under s 143 of the Land Transfer Act 2017 that its caveat not lapse. Whether the caveat lapsed turned on whether Mr Hall validly terminated the agreement.

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1 The parties used the term cancellation but in reality meant avoidance.

[3] In the High Court, Associate Judge Paulsen dismissed Melco's application and made an order that the caveat lapse.[2] Melco's appeal to the Court of Appeal was unsuccessful.[3] Leave to appeal to this Court was granted on the question of whether the Court of Appeal was correct to dismiss the appeal.[4]

[4] In determining that question, it is common ground that Mr Hall had a duty to facilitate access to the property so Melco's engineer could inspect the property in undertaking its due diligence. Also, it was accepted at the hearing that it is reasonably arguable that Mr Hall, by his last-minute cancellation on 8 January 2020 of an appointment that day for access to the property, did not facilitate access. The principal difference between the parties is as to 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. Melco says that it is sufficient to show that it is reasonably arguable that the failure substantially impeded its ability to comply with the condition. Mr Hall says the default must be causative and that, here, the failure had no causal effect. It had no causal effect because, in large part, Melco's own conduct led to the situation in which it found itself.

[5] In addition, Melco relies on what it says was Mr Hall's equivocal behaviour in response to Melco's request for an extension of time for fulfilment of the due diligence clause. Mr Hall's case is that there is no evidence anything that Mr Hall did, or did not do, caused Melco to believe an extension would be given.

[6] On 6 May 2022 we delivered a results judgment in which we allowed the appeal.[5] We said we would deliver our reasons later. These are those reasons.

Background facts

[7] It is helpful at this point to provide a more detailed narrative of the relevant events.[6]

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2 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2020] NZHC 2831 [HC judgment].
3 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2021] NZCA 184, (2021) 22 NZCPR 186 (Collins, Brewer and Dunningham JJ) [CA judgment].
4 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2021] NZSC 108 (William Young, O'Regan and Ellen France JJ) [SC leave judgment].
5 *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 56.
6 This account largely adopts the description in the HC judgment, above n 2, at [5]–[30].

[8] Melco runs its business from premises at 1 and 3 Parliament Street, Lower Hutt. It wanted to buy Mr Hall's property at 5 Parliament Street to expand its operations. With the assistance of a real estate agent, Kevin Dee, Melco expressed interest in buying the property. The parties' negotiations resulted in an agreement for sale and purchase dated 6 December 2019. The agreement was in the REINZ/ADLS Ninth Edition 2012(8) form. The purchase price was $1,500,000 plus GST (if any). The settlement date was 1 February 2020.

[9] The due diligence clause in issue was a special condition in the following terms:

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

[10] The parties agreed the date for fulfilment of cl 19 was 9 January 2020. Clause 10.8(5) of the agreement provided that if a condition was not fulfilled or waived by the due date, "either party may at any time before the condition is fulfilled or waived avoid" the agreement by giving notice to the other party.

[11] Melco was given access to the property on both 16 and 17 December 2019. During the inspection on 16 December, in response to an inquiry Melco had made on 12 December, Mr Hall confirmed that he did not have earthquake or building reports on the building. Later on 16 December, Melco engaged a structural engineering firm, Silvester Clark, to undertake a seismic assessment of the building. Melco's builder and roofer inspected the property the next day, 17 December 2019.

[12] The next relevant step in the chronology is that, on 23 December 2019, Silvester Clark told Melco that it would not be able to do a physical assessment of the property until the week of 13 January 2020 with a view to completing a report by 17 January 2020. John Ellison, an Operations Manager for Melco, emailed the real estate agent asking him to talk to Mr Hall to see if the due diligence deadline could be extended to 17 January 2020.

[13] On 24 December 2019, Mr Dee emailed Mr Hall seeking an extension of the due diligence condition. Mr Hall's response, on 26 December 2019, was that he did not "see any issues" with the request but he would discuss any changes to the agreement with his solicitor, Paul May, in the New Year. We note that Mr May was expected to return to the office on 9 January 2020.

[14] Around this time, Melco appears to have become concerned about the expiry of the due diligence condition. On 6 January 2020 Melco decided to engage a second structural engineer, EQ STRUC Ltd, to prepare a report on the property.

[15] On 6 January 2020, Alden Balili, a structural engineer from EQ STRUC responded to Melco saying "I think we have time to do an ISA [Initial Seismic Assessment] for the structure. I could do an inspection tomorrow then complete the report on Wednesday [8 January 2020]." In response to Melco's inquiry on 7 January as to whether Mr Balili would be available on 8 January, he responded "Yes, I'm

available Wednesday but there might not be enough time to finish it by Thursday [9 January 2020]. Can we extend the deadline to Friday [10 January 2020]?" Later on 7 January 2020, Jessica Isaacs from Melco asked Mr Balili if it would be possible to get the report before 10 am on Friday "as the deposit is due on Friday". This statement appears to be incorrect because by the Friday, 10 January, the date for responding one way or the other to the due diligence clause (9 January) would have passed. Mr Balili's response was that, "If we can start tomorrow that is possible. We usually have a delay in final QA [quality assurance] sign-off from our directors but would inform them in advance."

[16] Ms Isaacs was in contact with Mr Hall that same day, 7 January, about access to the building. By that point in time, Mr Hall was on a camping trip in the Tararua Ranges where there is apparently limited cellphone coverage.

[17] Early on the morning of 8 January 2020, Mr Hall sent a text message to Ms Isaacs saying he would provide access to the property if Melco's engineer was available. A meeting was arranged for 12 pm at the property at which time Mr Hall would meet Ms Isaacs and the engineer, Mr Balili. However, at 10.22 am Mr Hall sent a text message saying that "due to an unforeseen delay where I am I will have to postpone the appointment". Mr Hall in his evidence in the High Court suggested that it was after this that he got a call in relation to another buyer for the property. However mobile phone records, which we ruled admissible by consent, show that Mr Hall was wrong about that timing. The records show that he spoke with the other buyer prior to sending the message to Ms Isaacs cancelling the site inspection.

[18] On 9 January 2020 at 6.10 am, Melco's solicitor emailed Mr Hall's solicitor seeking an extension of the due diligence condition deadline to 17 January 2020. This email was forwarded to Mr Hall who instructed Mr May that he was not to respond to the request and was to cancel the agreement as soon as he was able to do so.

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

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

[21] Melco neither confirmed nor waived the due diligence condition. On 9 January at 5.03 pm, Melco's solicitors received a letter from Mr May sent by email purporting to cancel the agreement on the basis of the failure to confirm the due diligence condition.

High Court judgment

[22] The Associate Judge held it was arguable that there was an implied term that Mr Hall would provide Melco with "reasonable" access to complete the due diligence.[7] Whether Mr Hall had met this obligation was a matter for trial.[8] The right to avoid was only lost if Melco would have confirmed (or waived) the due diligence condition if granted access between 7–9 January. Where Melco failed was in showing there was an arguable case that its failure to confirm the due diligence condition was due to Mr Hall's default in not providing access.[9]

[23] Melco's counterfactual analysis turned on the acceptance it was reasonably arguable that:[10]

> (a) had Melco been given access to the property on 8 January 2020 it would have requested EQSTRUC to provide an oral report prior to the expiry of the due diligence condition;
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> (b) that EQSTRUC would have been both able and willing to provide such a report knowing it was to be relied upon by Melco;
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> (c) that such a report would have been provided and satisfactory for Melco's purposes; and
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> (d) that Melco would have acted on such a report and confirmed (or waived) the due diligence condition prior to Mr Hall cancelling the agreement.

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7 HC judgment, above n 2, at [42]. See also [49] and [50].
8 At [51].
9 At [52].
10 HC judgment, above n 2, at [56].

[24] In this respect the Associate Judge said that neither of the firm's engineers was able to provide a seismic report before the due diligence condition expired. Indeed, Melco accepted that it would not have received a written seismic report before 10 January 2020. The Associate Judge saw Melco's argument that an oral report could have been obtained as speculative as these matters were not addressed in Melco's evidence.

[25] The Associate Judge also considered the suggestion an oral report may have been available was inconsistent with the email from Mr Balili of EQ STRUC to Ms Isaacs, at Melco, of 7 January 2020 referring to a sign-off from EQ STRUC's directors. Further, there was no evidence about what an oral report would contain nor whether Melco, on the basis of an oral report, would have been prepared to confirm or waive the due diligence condition. Indeed, there was evidence to suggest otherwise. This is a reference to Ms Isaacs' email to Mr Balili on the afternoon of 7 January 2020 which refers to her manager needing the report prior to 10 am on 10 January 2020 to have time to review the findings.

[26] The Associate Judge also noted the "curious" feature of Ms Isaacs' email of 7 January, namely, the reference to the report being needed by 10 am Friday as "the deposit is due on Friday".[11] The Associate Judge considered that because the deposit was payable upon the satisfaction of cl 19 this suggested that either Ms Isaacs or her manager were mistaken as to when the due diligence clause had to be satisfied. Nor did the Associate Judge accept the argument that Mr Hall's failure to communicate that he would not grant an extension of cl 19 deprived Melco of the opportunity to waive the due diligence condition. On this the Associate Judge said Mr Hall had no obligation, either express or implied, to tell Melco there would be no extension.

[27] As the due diligence condition was neither confirmed nor waived, and Mr Hall was entitled to cancel the contract, Melco no longer had an equitable interest in the property as purchaser. Accordingly, the Associate Judge ordered that the caveat lapse.[12]

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11 At [58].

12 The Associate Judge rejected a number of further arguments raised by Melco but it is not necessary to refer to these.

Court of Appeal judgment

[28] There was no challenge to the finding it was arguable there was an implied term that Mr Hall would provide Melco with reasonable access to the property to undertake due diligence.[13] The Court of Appeal accepted that it was reasonably arguable that, in context (a short due diligence period and "a looming deadline"), that Mr Hall's conduct on 7, 8 and 9 January 2020 did not meet that obligation.[14] But, like the Associate Judge, the Court considered it was necessary for Melco to demonstrate a reasonably arguable case that the counterfactual was correct, that is, if given access Melco would have fulfilled the condition either by confirming it or waiving it.[15]

[29] Accepting the Associate Judge's analysis of the counterfactual, the Court said there was no evidence that access would have generated a seismic stability report, oral or written, before 9 January 2020. The Court also considered that, given the importance to Melco of obtaining the seismic stability report, it could be inferred that Melco had not waived the provision because there was no report to hand. Nothing Mr Hall did had prevented waiver.

[30] The Court concluded that without evidence on what would likely have happened if Mr Hall had granted access during 7–9 January, Melco's case was speculative.[16] The High Court was accordingly correct that it was not reasonably arguable that Melco's failure to fulfil the due diligence condition was due to Mr Hall's default.[17]

[31] Finally, the Court of Appeal agreed with the High Court that there was no obligation on Mr Hall in good faith to advise Melco that he would not extend the time period for compliance with the due diligence period. On this aspect, the Court said:[18]

> Mr Hall never promised to extend the period. He was equivocal as to whether he would. This was a transactional agreement for the sale and purchase of land with clearly defined obligations. In any event, the uncontradicted evidence of Mr Hall is that he did not learn of an alternative purchaser until

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13 CA judgment, above n 3, at [39].
14 At [47].
15 At [48].
16 At [52].
17 At [53].
18 At [55].

> after he had cancelled the 8 January 2020 appointment. We accept Mr Holloway's submission that the evidence is Mr Hall decided not to extend the cl 19 deadline on 9 January 2020.

The applicable principles

[32] It is not disputed by the parties that it is arguable that, in certain circumstances, failure to meet the obligation to facilitate access might defeat what would otherwise be Mr Hall's right to avoid the contract. We agree. There is authority for the proposition that in a case such as the present, a party cannot rely on non-fulfilment of a condition where the non-fulfilment was connected to the default of that party. The position is encapsulated in *Burrows, Finn and Todd* in this way:[19]

> Although the failure of a condition normally operates to terminate any contractual liability, a party to the contract will be able to rely on the failure of the condition only if he or she was under no obligation to achieve fulfilment of the condition or if the condition failed despite the use of sufficient endeavour to achieve fulfilment.

[33] The authors go on to say:[20]

> A party will not be allowed to assert that the failure of a condition has terminated any contractual liability if the condition has only failed through that party's own default.

[34] The result is that "a party to a contract may be held to it despite the failure of the condition if the condition has failed because of his or her own default."[21] Where the parties are in dispute as to "whether the contractual standard of endeavour has been met, it is for the party claiming such default to prove it."[22] Finally, the authors note that where a party fails to meet a condition "not through a default on that party's own

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19 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th edition, LexisNexis, Wellington, 2022) at 278, citing *Neylon v Dickens* [1977] 1 NZLR 595 (CA), affirmed *Neylon v Dickens* [1978] 2 NZLR 35 (PC); *Connor v Pukerau Store Ltd* [1981] NZLR 384 (CA); and *Moreton v Montrose Ltd* [1986] 2 NZLR 496 (CA).

20 Todd and Barber, above n 19, at 278, citing *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1 (HL); *Scott v Rania* [1966] NZLR 527 (CA); compare *Firestone Tire & Rubber Co New Zealand Ltd v Harvard Construction Ltd* (1997) 3 NZ ConvC 192,665 (HC).

21 Todd and Barber, above n 19, at 280.

22 At 280, citing *Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590 (CA). The authors note also, "[a]s stated there, if there is anything suggesting the insufficient efforts were made by a party, that party may have an evidential onus to show what steps it did take": at 280, n 20.

part but because the other party has made performance of it impossible, the condition will be treated as having been satisfied".[23]

[35] Don McMorland similarly makes the point that:[24]

> It has consistently been held in New Zealand that a party cannot rely on the failure of a condition where that failure was caused by that party's own default … [The] relevant party is under an obligation to take all reasonable steps to fulfil the condition. A failure to do so bars that party from relying on the failure of the condition to avoid the contract.

[36] In discussing the proposition that a party cannot effectively take advantage of the party's own wrong in considering the ability to terminate a contract, there is frequent reference to *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*.[25] That case dealt with the effect of a provision in a ship building contract which said that if the ship was not ready by a certain date, the contract "shall become void". Disruptions due to World War I meant the shipbuilders could not build the ship by the specified date. The shipbuilders argued the contract was at an end but the purchaser's case was that the contract was voidable at the option of the purchaser. The approach taken relevantly for present purposes is captured by Lord Finlay's observation that "[it] is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced".[26] However, on the facts, it was found that there had been no such default on the part of the shipbuilders and so they were not precluded from claiming that the contract was void.

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[23] At 280, citing *Mahoney v Lindsay* (1980) 33 ALR 601 (HCA).

[24] Don McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at 203–204, citing *New Zealand Shipping Co Ltd*, above n 20; *Barber v Crickett* [1958] NZLR 1057 (SC); *Eastmond v Bowis* [1962] NZLR 954 (SC); *Mulvena v Kelman* [1965] NZLR 656 (SC); *Scott v Rania*, above n 20; *Valley Ready Mix Ltd v Utah Finance and Development (NZ) Ltd* [1974] 1 NZLR 123 (HC); *Connor v Pukerau Store Ltd*, above n 19; *Innes v Mars* [1982] 2 NZLR 68 (HC); *Hay v Laurent Construction Ltd* (1990) 1 NZ ConvC 190,387; *Cadman v Buttelman* HC Auckland CP 3013/88, 20 December 1990, Thorp J, noted in Don McMorland "Conditional on sale of purchaser's existing property — Last-minute offer by vendor to buy existing property" (1991) 5 BCB 291; *United Realty World Ltd v Ordeal Enterprises Ltd* (1992) 2 NZ ConvC 191,288 (CA). To similar effect, see Hugh G. Beale (ed) *Chitty on Contracts* (34th ed, Sweet & Maxwell, London, 2021) vol 1 at [15–113] and [25–069]; and Peter Blanchard *A Handbook on Agreements for Sale and Purchase of Land* (4th ed, Handbook Press Ltd, Auckland,1988) at [1205].

[25] *New Zealand Shipping Co Ltd*, above n 20.

[26] At 6. See also Lord Atkinson at 9; and Lord Shaw at 12. The "taking advantage" principle was referred to by the Court of Appeal in *Wallace v Herron* [2017] NZCA 346 at [49] and [52]. *Wallace v Herron* was referred to by this Court in *Savvy Vineyards 4334 Ltd v Weta Estate* [2020] NZSC 115, [2020] 1 NZLR 714 at [84].

[37] The question arising in this case is as to the circumstances in which default by the party seeking to take advantage of non-fulfilment of a condition will defeat the right to avoid the contract. The parties were asked to address this question in the judgment granting leave to appeal.[27]

[38] Melco's approach is that it is sufficient to show that the actions of the defaulting party substantially impeded the other party fulfilling the condition. Melco relies in this respect, amongst other matters, on Australian authority which draws in aid the principle that a party must not engage in conduct preventing the other party from enjoying the benefit of the contract.[28] Melco also relies on *Nopera Log House Ltd v Godsiff* where a similar argument about the effect of the vendor's failure had been made but failed on the facts.[29]

[39] Mr Hall's case is that while the principle commonly associated with *New Zealand Shipping* has "broad remedial potential", it needs to be applied "with rigour" especially where, as here, Melco as the caveator has the onus. Mr Hall's position is that there is a need for a direct causal link in that Melco has to show the alleged default was a substantial cause of the failure to fulfil or waive the condition. His argument is that Melco must fail because, at best, Melco's case is that it has lost the chance of a different outcome.

[40] It is apparent from our discussion of the judgments in the Courts below that those Courts proceeded on the basis that the right to avoid the contract was only lost if Melco would have either confirmed or waived the condition if granted access on 8 January. We see this as requiring a direct causal link as envisaged by Mr Hall. The Court of Appeal does not give any authority for that approach. The High Court referred to *Nopera Log House* but, as we read *Nopera*, did not apply it.

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27 SC leave judgment, above n 4, at [1(a)].

28 For example, *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69. *Bensons* is a case where the Court refers to the "prevention principle", that is, the conception that a party to a contract must not act in such a way as to prevent the other party from enjoying the benefit of the contract: at [101]–[102] citing, *Mackay v Dick* 1881 6 App Cas 251 (HL) and *Butt v M'Donald* (1896) 7 QLJ 68 (QSC).

29 *Nopera Log House Ltd v Godsiff* [2014] NZHC 639, (2014) 15 NZCPR 144.

[41] It is the case that the High Court in *Nopera* refers to the need for a causal link and discusses the extent to which the vendors, the Godsiffs, had responsibility for the position in which the purchaser found itself. But, when assessing whether the link had been established, the Court also considered whether the vendor's actions "materially affected the prospect" of fulfilment of the relevant condition, namely obtaining consent from the Overseas Investment Office (OIO).[30] Nopera said that the Godsiffs delayed in providing the information necessary for Nopera to lodge its application with the OIO. There was no challenge to the principle relied on by Nopera, that is, that a party could not rely on non-fulfilment of a condition and then terminate the contract on that ground where the non-fulfilment was as a result of its own default. But Nopera's claim failed on the facts where Nopera had not indicated any element of urgency for a response to the requests for information until very late in the piece. At most, the element of delay that could possibly be sheeted home to the Godsiffs was minimal and "the evidence [did] not establish an arguable case that this period of time *materially affected* the prospect of consent being granted in time".[31]

[42] It is difficult to discern from the cases a clear pattern as to the nexus required. In some cases, the language of "but for" causation or something very close to that is used. In *New Zealand Shipping* itself, for example, Lord Finlay referred to the fact that non-completion of the building of the ship was not "brought about" by the shipbuilders.[32] In that situation, there was no reason why "void" did not mean that the contract was automatically at an end.[33]

[43] In *Noble Investments Ltd v Keenan* the Court of Appeal saw the common law rule that a party does not benefit from its own wrong as underlying the requirement that a party must be ready, willing and able to proceed to complete the contract in order

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30 At [37].

31 At [37] (emphasis added).

32 *New Zealand Shipping Co Ltd*, above n 20, at 8. Lord Atkinson and Lord Shaw also use the language of having "brought about" the event: at 10, 12 and 13. Similarly, Cooke J in *Moreton v Montrose*, above n 19, referred to a party disqualifying himself or herself from relying on a condition if that party had "brought the state of affairs about" by the party's own default: at 503.

33 At 8.

to be able to validly cancel the contract.[34] The Court gave two illustrations of when a party could be seen as benefiting from its own wrong. The first of these was where the party sought:[35]

> … by cancellation to deprive the other party of the benefit of the contract in circumstances where the other party's breach is *a direct result* of breach committed by the party seeking to cancel the contract.

[44] The other illustration was where the party was "unable or unwilling to perform its obligations under the contract and seeks to avoid liability for its own breach" by cancelling on the basis of the other party's breach.[36]

[45] *Noble Investments* involved an agreement for the sale and purchase of land. At the time the purchasers purported to cancel, they were in breach of the agreement themselves as they had not paid the deposit. The Court in addressing the effect of that breach, made the point that non-payment of the deposit "had no causative effect" on the alleged breach by the vendor of its obligations (in relation to title).[37] In that situation, non-payment did not affect the purchasers' ability to cancel, provided there were valid grounds for cancellation. The difference between the current case and *Noble Investments* is that here the claim is that the right to avoid has been lost. In *Noble Investments* the Court dealt with the situation where party A purported to cancel for breach by party B of its obligations where party A was also in breach.

[46] Other cases deal with the other side of the equation from the present situation, that is, where a purchaser has not complied with a condition requiring reasonable endeavours. For example, *Barber v Crickett* dealt with a contract conditional on the purchaser raising a mortgage. The Court held that the purchaser could assert the condition's non-fulfilment "only where it occurs without any default on his part".[38]

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34 *Noble Investments Ltd v Keenan* [2006] NZAR 594 at [44] and [47]. This Court in *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433 at [40] endorsed the proposition in *Noble Investments* as to the purpose of the common law rule and that the rule survived the passage of the Contractual Remedies Act 1979 but did not apply where the cancelling party did not so benefit.

35 At [47] (emphasis added).

36 At [47]

37 At [48].

38 *Barber v Crickett*, above n 24, at 1060.

[47] It seems to us that the situation in *Nopera* is more analogous to the present case. A similar approach to that adopted in *Nopera* can be found in a number of Australian cases dealing with the effect of failure to register a subdivision plan or similar. *Sanctuary Investments Pty Ltd v St Gregory's Armenian School Inc* illustrates the approach taken in this line of cases.[39] The New South Wales Supreme Court observed that earlier cases have tended to see things "very starkly" on the basis that there was a blameworthy party and a blameless party.[40] However, the Court noted that "life is not always that simple and often the non-registration of a plan or non-fulfilment of a condition comes about through a variety of factors".[41]

[48] Accordingly, the Court concluded that:[42]

> … one does not have to see that the default was the whole cause of the non-fulfilment of the condition, nor must the opposing party necessarily be blameless. One has got to look at whether the person seeking to rescind the contract *materially contributed* to the non-performance of the condition on which it now bases its rescission.

[49] The parties in *Sanctuary Investments* entered into a sale and purchase agreement that was conditional on registration of a plan of subdivision within six months. Both parties contracted to use best endeavours to achieve this. When this condition was not met, the vendor purported to rescind the contract. The purchaser sought specific performance.

[50] Applying the test set out above, the Court stated it was necessary for the purchaser to show that there was a material default on the part of the vendor. To determine this, it was necessary to consider why the condition was not met and in doing so, the entire six month period was relevant. The Court considered that there was much delay on the purchaser's side in organising the registration of the plan. The purchaser had taken a "fairly leisurely" approach to registration for about the first four months with several delays on their side.[43] When the plan was prepared and delivered

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39 *Sanctuary Investments Pty Ltd v St Gregory's Armenian School Inc* (1998) 9 BPR 16,823 (NSWSC).

40 At 16,826.

41 At 16,826.

42 At 16,826 (emphasis added). The Court makes it clear that this material contribution test is based on the principles in *New Zealand Shipping*: at 16,825 and 16,829.

43 At 16,829.

to the vendor, there was "insufficient time for the many unexpected things that happen in registration of plans to be dealt with completely before the deadline".[44] Therefore, it had not been shown the vendor had materially contributed to the condition's failure.[45]

[51] Other cases dealing with contracts conditional on the registration of certain plans have adopted a "material contribution" or a, similar, "deprivation of a chance" test.[46]

[52] Against this background, there plainly has to be some nexus between the default and the prospect of fulfilment of the condition in a case such as the present. If the default was not material there would be no basis to defeat the right to avoid. Further, as Mr Hall says, such an approach would cut across the law relating to repudiation.

[53] We consider the strength of the nexus required in a case such as the present should reflect the underlying policy considerations. A requirement that there is evidence that the default materially affected the prospect of fulfilment of the condition is a principled approach in that, consistently with the underlying *New Zealand Shipping* principle, it puts the risk where it belongs, namely, on the party in default. For present purposes, what is important is the conduct of the party avoiding the contract. A party whose breach of the contract has contributed materially to non-fulfilment of the condition may not rely on such non-fulfilment to avoid a contract. When considering the situation where both parties have contributed to some extent in the non-fulfilment of a condition, in other words the contribution to the non-fulfilment is shared, it will be necessary to construe "material" as meaning "substantial and operating".

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44 At 16,829.

45 See also *Gange v Sullivan* (1966) 116 CLR 418. In the context of determining the meaning of "void", Taylor, Menzies and Owen JJ referred to forestalling a party to a contract from achieving an advantage "from his own conduct in securing, or contributing to, the non-fulfilment of a condition bringing the contract to an end": at 441.

46 For example, *Pelley v Tebran Pty Ltd* [2006] NSWSC 1072 at [170]; *Mitchell v Pattern Holdings Pty Ltd* [2002] NSWCA 212, (2002) 11 BPR 20,241 at [56]; *Mordue v Kroone* [2009] NSWSC 255, (2009) 14 BPR 26,771 at [16]; and *Joseph Street Pty Ltd v Tan* [2012] VSCA 113, (2012) 38 VR 241 at [47].

[54] We also see our approach as having practical advantages in that it is realistic and avoids a counterfactual analysis which may well be speculative. The move away from such a speculative analysis would also better accommodate Mr Hall's concerns about commercial and contractual certainty.

[55] We turn now to apply this approach to the present case.

Application of the principles to Melco's case

[56] It is important to preface this part of the discussion by noting it is accepted Melco has to show its case (that it has a caveatable interest) is reasonably arguable.[47] The matter would then proceed to trial on Melco's claim for specific performance. At trial, the evidence, which has not been tested to date, will be tested.

[57] There is some merit in the argument for Mr Hall that Melco's own delay led to the difficulties in which Melco found itself and that this position was likely driven by Melco's mistaken view as to the deadline for compliance. We say this because the timeline of events we have discussed above shows there were delays on Melco's part. Melco knew from 16 December that no seismic report was available. The narrative of events also indicates there was obviously some confusion on Melco's part about the date for fulfilment of the due diligence condition. Nor did Melco show a lot of vigour in pursuing the seismic engineering report until fairly late in the piece. Even when Melco did show some urgency it did not get firm confirmation as to the availability of an oral report.

[58] On the other hand, on the current state of the evidence, there is support for the proposition that Mr Hall engineered the position in which Melco found itself on 9 January. Certainly, his affidavit dealing with the critical steps appears to have been carefully crafted. We refer here to Mr Hall's explanation for what occurred over 8 and 9 January which is as follows:

> [23] On 8 January I travelled to Masterton … I thought it might be possible to go over to Wellington briefly, so I texted Jess Isaacs to say that if she could give me two hours' notice I would return briefly to allow access.

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[47] *Philpott v Noble Investments Ltd* [2015] NZCA 342 at [26(b)].

> [24] I later realised that I had indicated to the people I was camping with that I would be returning shortly, and I had no way of contacting them to tell them that my plans had altered. I therefore texted Jess back to say that I couldn't attend and that I would be in touch with her the following day when I returned to Wellington.
>
> [25] While I was in Masterton, before I went out of coverage, I received a call from a person who had heard that the property was on the market for sale. I do not know how they became aware of that fact. I explained that it was under contract. They indicated that they would pay a sum of $1.6 million for it.
>
> …
>
> [28] On 9 January I didn't return to Lower Hutt, but I called Paul May to discuss the matter. I decided not to grant the extension and to let the contract be terminated if it wasn't confirmed.

[59] It is now clear, as Mr Hall has appropriately drawn to the Court's attention, that this timeline was not accurate. Before the contract was avoided, Mr Hall spoke with the other buyer. Given that clarification, the reasons he gave for cancelling the access visit do not appear to stack up. In context, the inference must be available that he cancelled the 8 January 2020 inspection at the last minute because he thought that would have some material impact on Melco and was keen to take advantage of that.

[60] Moreover, Mr Hall terminated the access arrangement the day before the expiry of the due diligence period, by which time he had a better offer. At that point, from the narrative set out at [15] above, it appears that Mr Balili had been made aware of the correct deadline, presumably by Melco.[48] Melco was deprived of the access to the building that Mr Hall knew was necessary. Further, Mr Hall was aware that Melco was seeking an extension of time for fulfilment of the due diligence condition. It is reasonably arguable that his response to the request for an extension of time can be seen as an attempt to create uncertainty and then to take advantage of that position in a way which materially affected Melco's position. As we have noted, Mr Hall relies on the absence of evidence that anything that he did or omitted to do caused Melco to believe it would be given an extension. However, indicating that no issues were seen with an extension at the least added to the uncertainty. Melco's argument is not that there was a promise to extend time for fulfilment but, rather, that Mr Hall would come back to Melco on this point. Instead, the position was not clarified.

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[48] It is however unclear whether Ms Isaac's later email muddied the waters.

[61] It was accepted in the High Court and Court of Appeal that no written engineering report would have been available in a timely manner. Whether Melco would have received an oral seismic report or would have waived the condition will ultimately depend on the evidence at trial. While the evidence before us is not strong we consider at least there is a reasonably arguable case that Melco could have had a response from EQ STRUC indicating that the building was highly problematic (or otherwise) from the seismic perspective. Further, we agree with Melco that while it would still have been technically possible for Melco to waive the condition, Mr Hall, by then having a better offer, had placed them in the position of having to do so without engineering input. In other words, Melco was prevented from being able to satisfy itself of the integrity of the building and to then decide whether to take the risk. There is a reasonable argument that this undermined the whole purpose of the due diligence period.

[62] In these circumstances, we consider it is reasonably arguable that Mr Hall's failure to allow access to the property on 8 January 2020 had the necessary material effect on the prospect of fulfilment of the condition. On that basis, the matter should proceed to trial.[49]

Availability of specific performance?

[63] The judgment granting leave also asked the parties to address whether or not a default in the obligation to provide reasonable access to the premises would sound only in damages, leaving avoidance of the contract in place.[50]

[64] Melco relies on authorities to the effect that agreements relating to interests in land are generally enforceable by specific performance.[51] In addition, Melco says that damages are not an adequate remedy in the present case given the evidence that it is this property Melco requires in order to expand its business. Melco also submits that there are various difficulties in quantifying damages in this case.

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49 Given our conclusion, we do not need to address Melco's arguments based on estoppel.

50 SC leave judgment, above n 4, at [1(b)].

51 Citing *Adderley v Dixon* (1824) 1 Sim. & St. 607, 57 ER 239 (Vice Chancellor's Court). See also Todd and Barber, above n 19, at [21.4.2(d)].

[65] Mr Hall submits that there are a number of reasons why the discretion would be exercised against a grant of specific performance.[52] He says, first, that specific performance would result in a "winner take all" outcome whereby Mr Hall would have to accept $1.5 million for a property he could have sold for $1.6 million in early 2020 and reinvested the money. Melco meanwhile would have had the use of its money for over two years and would acquire the property at a price less than its current market value. Second, Mr Hall contends the fact this is a "loss of chance" case should rule out specific performance. Third, various other discretionary factors such as the conduct of parties tell against a grant of specific performance.

[66] We consider it would be premature to rule out specific performance at this stage on the current state of the evidence. On our approach, it is reasonably arguable an assessment of the conduct of the parties favours Melco.

Application to adduce new evidence

[67] Mr Hall sought leave to adduce new evidence on the appeal. The evidence comprises an email chain over the period from 13 December 2019 to 9 January 2020 between Melco and Silvester Clark, the first of the two engineering firms with which Melco engaged over the provision of a seismic report on the building.

[68] Mr Hall says that this evidence is cogent in that it responds to various aspects of Melco's arguments about the timing of events, emphasising the emails indicate Melco contacted Silvester Clark in mid-December. At that point, Silvester Clark had an engineer who "could start almost straight away". Further, Mr Hall submits the email chain makes it clear that until quite late in the piece, 23 December 2019, Melco mistakenly believed the due diligence deadline was 2 February 2020, not 9 January 2020.

[69] We do not consider this evidence is either fresh or sufficiently cogent.[53] In terms of freshness, while the material was not available at the time of the High Court

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[52] Section 43 of the Contract and Commercial Law Act 2017 preserves the discretion to refuse specific performance. See also Todd and Barber, above n 19, at [21.4.2].

[53] *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650; and see *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 2)* [2007] NZSC 1, [2007] 2 NZLR 124.

hearing, it came to light as part of the discovery process on 2 February 2021. That was prior to the hearing in the Court of Appeal on 16 March 2021 so leave to adduce it in that hearing could have been sought. In terms of cogency, there is evidence before the Court as to the timeline and as to Melco's misapprehension about the due date. The new evidence does not add materially to the current evidence and, as Melco says, Melco would have needed the opportunity to respond to put the material in context.

Result

[70] The application for leave to adduce new evidence (the email chain discussed at [67]–[69] above) is dismissed.

[71] The appeal is allowed. The decisions of the Court of Appeal and High Court refusing to sustain the caveat are set aside. We make an order that caveat No. 11659182.1 lodged by Melco on 16 January 2020 over the title to the property at 5 Parliament Street, Lower Hutt (WN13A/124), not lapse.

Costs

[72] We are not aware of any reason why costs should not follow the event in the usual way. Further, costs in the Courts below should be reconsidered to reflect this Court's decision. However, as we did not hear from the parties on costs, costs are reserved. Unless the parties are able to agree on costs, we seek submissions on that issue.

[73] Submissions for the appellant are to be filed and served by 3 June 2022. Submissions for the respondent are to be filed and served by 23 June 2022 and any submission for the appellant in reply by 30 June 2022.

Solicitors:
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