



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

12 May 2022

**MEDIA RELEASE**

MELCO PROPERTY HOLDINGS (NZ) 2012 LIMITED v ANTHONY JOHN HALL

(SC 64/2021) [2022] NZSC 60

**PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

**Background**

In December 2019, Mr Hall agreed to sell a commercial property to Melco Property Holdings (NZ) 2012 Ltd (Melco). The agreement for sale and purchase contained a due diligence condition under which Melco had to be satisfied the property was suitable for its requirements or waive compliance. Another clause provided that either party could avoid the agreement if the condition was not fulfilled or waived by the date that the parties had agreed for the condition’s fulfilment, which was 9 January 2020. Melco had asked Mr Hall for an extension to the time for fulfilment of the condition. A definitive answer to this request was not received.

As part of its due diligence, Melco wished to obtain a seismic report. For various reasons, that are in dispute between the parties, Melco did not have access to the property for an engineer to carry out a seismic inspection before 8 January. On 8 January, the parties arranged for site access later that day, but this site inspection was cancelled by Mr Hall two hours beforehand.

On 9 January 2020, Mr Hall purported to avoid the agreement as Melco had neither given notice of the condition’s fulfilment nor waived the requirement. Melco did not accept the avoidance. Rather, Melco maintained that Mr Hall’s actions put him in breach of the agreement so that he had no right to avoid 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

to settle. Melco then applied to the High Court for an order that its caveat not lapse. Whether the caveat lapsed was dependent on whether Mr Hall's termination of the agreement was valid.

### **The Courts below**

The High Court made an order that the caveat lapse. Melco appealed unsuccessfully to the Court of Appeal. Both of the Courts below considered it was arguable there was an implied term that Mr Hall would provide Melco with "reasonable" access to complete the due diligence. The High Court said that whether Mr Hall had met this obligation was a matter for trial. While the Court of Appeal considered it was reasonably arguable Mr Hall's conduct over 7–9 January did not meet the obligation, the Court agreed with the High Court that Melco failed 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. The Court of Appeal said that in the absence of evidence as to what would likely have happened if Mr Hall had granted access, all Melco could do was speculate.

Melco appealed with leave to the Supreme Court on the question of whether the Court of Appeal was correct to dismiss the appeal. By the time of the hearing of the appeal, evidence was admitted which showed that the Courts below incorrectly proceeded on the basis that Mr Hall cancelled the 8 January site visit before receiving a call from a potential third party buyer. Mobile phone records showed that he spoke with the other buyer prior to cancelling the site visit, so the evidence before the Courts below to the opposite effect was incorrect.

### **Supreme Court**

The Supreme Court unanimously allowed Melco's appeal. The Court issued a results judgment allowing the appeal and making an order that the caveat not lapse because of the proximity of the hearing of Melco's case against Mr Hall and has now issued its reasons for that decision.

At the hearing in the Supreme Court it was agreed that it was reasonably arguable that Mr Hall had a duty to facilitate access to the property so Melco's engineers could inspect the property for due diligence purposes. It was also accepted that it was reasonably arguable that Mr Hall, by his last-minute cancellation of the 8 January 2020 site visit, did not facilitate access.

The principal difference between the parties was as to the effect of the failure to facilitate access and as to the link required between Mr Hall's actions and the ability to satisfy the condition. Melco said that it was sufficient to show that it was reasonably arguable that the failure substantially impeded its ability to comply with the condition. Mr Hall's case was that the default must be causative and the failure had no causal effect because it was largely Melco's own conduct (its delay and mistaken view as to the due diligence deadline) that led to its position.

The Supreme Court considered the necessary link should reflect underlying policy considerations and the principle that a party should not be allowed to take advantage of a situation that party's default produced. The Court said the test was whether the default materially affected the prospect of the fulfilment of the condition. For present purposes, what was important was the conduct of the party avoiding the contract. A party whose

default 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”.

The Court prefaced its application of these principles by noting that at this stage of the dispute, Melco only had to show it is reasonably arguable that it had a caveatable interest. These matters would be fully determined at trial where the present evidence, which has not yet been tested, would be tested. On the (untested) facts, the Court held it was 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 the fulfilment of the condition.

For these reasons, the Court set aside the decisions of the High Court and Court of Appeal and made an order that the caveat not lapse.

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