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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 64/2021
[2022] NZSC Trans 5

BETWEEN **MELCO PROPERTY HOLDINGS (NZ) 2012 LIMITED**
Appellant

AND **ANTHONY JOHN HALL**
Respondent

Hearing:	23 February 2022
Coram:	William Young J Glazebrook J (via AVL) O'Regan J Ellen France J Williams J
Appearances:	A C Beck and J M Perry for the Appellant (via AVL) A L Holloway and T A Cunningham for the Respondent (via AVL)

CIVIL APPEAL

WILLIAM YOUNG J:

So we've got Justice Glazebrook on AVL. Appearances Mr Beck?

MR BECK:

May it please the Court. I appear with Ms Perry for the appellant.

WILLIAM YOUNG J:

Thank you Mr Beck.

MR HOLLOWAY:

May it please the Court. Counsel's name is Holloway and I appear with Mr Cunningham for the respondent.

WILLIAM YOUNG J:

Thank you Mr Holloway. Do we want to deal with the evidence issue now or can we leave it until we get into the running of the hearing?

MR HOLLOWAY:

It's my application Sir so I should speak to that. I had conferred with Mr Beck and on the assumption that the Court would wish to deal with it first we had agreed to do that, and hopefully relatively short-form with some submissions from me, hopefully no more than around 15 minutes, 10-15 minutes, followed by Mr Beck. But if the Court would prefer to deal with it as we go, I'm also happy to do that.

WILLIAM YOUNG J:

Well if you're ready to go now I suppose we can hear it. Yes, okay, Mr Holloway?

MR HOLLOWAY:

Thank you Sir. So these documents, of course they're not part of the bundle, but I'm checked with Mr Registrar that they should be available to you. there

is an application from Mr Hall, an affidavit from Ms Keely Gage, which attaches two documents, a chain of emails and some telephone records. There is the appellant's response to that application and then the Court's minute, which determined that the telephone records were to be admitted, and it is the first of the two documents attached to Ms Gage's affidavit, the email chain, which needs to be dealt with.

Just to provide some, Mr Hall applied himself to admit those telephone records because it was, in his view, the responsible thing to do. He had given evidence in an affidavit from his recollection which following discovery when these documents came to light had been proved wrong. Just simply an order in which two communications took place, and so it was his position and instructions that correcting that position was the right thing to do and necessary. But, of course, even if those telephone records had not been admitted, knowing of Mr Hall's mistake, having seen that document, counsel could not, of course, have relied on the relevant part of Mr Hall's affidavit, as doing so would have been in breach of the rules of conduct and client care.

It is the contested, moving to the email chain, which is the contested document, that's a document that was discovered by the appellant, and so the relevant chronology in respect of that is an order was made, and there is an underlying substantive High Court proceeding which has been making its way slowly along, and there was an order for discovery that the parties were to exchange documents on the 8th of October 2020. The respondent, Mr Hall, in fact received the appellant Melco's documents on the 2nd of February 2021, and then submissions in the Court of Appeal were due on the 17th of February 2021, and it is the case that this email chain simply wasn't a document that I was aware of ahead of that Court of Appeal submissions being filed.

So Mr Hall's application has been laid on the basis that the email chain is, in our submission, fresh, credible and cogent, and the response that I will engage with from the respondent has been that Mr Hall could've endeavoured to introduce this email chain at the Court of Appeal and didn't –

WINKELMANN CJ:

Perhaps, what's the relevance of it? Perhaps explain that.

MR HOLLOWAY:

So the reason why, in my submission, the email chain is cogent and relevant is it really comes down to the position that the appellant has taken before this court. So the appellant's argument has evolved and it's now in its written submissions taken the position that both the High Court and Court of Appeal seemed to have overlooked what occurred between the 9th of December and the 23rd of December. The appellant developed a narrative that over the whole period of the due diligence Mr Hall was in default and there is this sense that's developed that Melco was very diligently endeavouring to satisfy itself about the property about confirming, or otherwise, the contract and part of that was that they were driven to only engage engineers on or after the 17th of December, and that was the affidavit evidence in the High Court, and these emails simply do not bear that out. Now I'm not suggesting someone was deliberately misleading in the High Court, but clearly the deponent in the High Court who was not the person directly involved in this chain of correspondence, has given evidence that is not correct. So if we just look at the emails I can briefly describe why it is that they are so important, in my submission, to the argument here today.

So if we start at the very bottom one in terms of, obviously, so in the essence of this case that is being heard today is that it was Mr Hall's actions that were the substantial cause of Melco not being in a position to satisfy itself as t due diligence. But if we look at this email, at the very beginning of the process, or near the beginning of the process, on the 13th of December, Melco is clearly of a mind that it needs an earthquake report. So this is several days before in submissions, Melco says, that it contacted an engineer, so at the get-go there's a very clear problem in the evidence there.

WILLIAM YOUNG J:

I mean this is extremely fine-grained for what is meant to be a summary determination. What did the Melco affidavit say that you say is wrong?

MR HOLLOWAY:

The Melco affidavit said that –

WILLIAM YOUNG J:

Just take us to it please?

MR HOLLOWAY:

Yes Sir. So page 201.004, there's no need to go to this Mr Registrar, the evidence is that on the 16th of December Mr Hall advised there was no seismic report for the building and this prompted us to engage an engineer from Silvester Clark to carry out an inspection and prepare a seismic report.

ELLEN FRANCE J:

Sorry, what paragraph was that?

MR HOLLOWAY:

Paragraph 13 Ma'am. So that's clearly at odds with this and perhaps –

WILLIAM YOUNG J:

So just take us to the email it's at odds with.

MR HOLLOWAY:

So the very first email at the beginning of the chain, on the 13th of December is Melco contacting an engineer. So I appreciate Sir that's only three days difference, but if I think perhaps I haven't done a good job of explaining how important this is, because if we read on in that email, Melco says that it's due –

WILLIAM YOUNG J:

I know, they've got the due diligence date wrong.

MR HOLLOWAY:

That's right, and then as the email chain plays out, that is the predominant reason why nothing happens in December. The engineers –

ELLEN FRANCE J:

Sorry, what is the predominant reason?

MR HOLLOWAY:

That Melco has misunderstood from the beginning of the due diligence period when the deadline fell, and so while the engineers say that they are ready, willing and able to come and assist and do a report, Melco doesn't progress that until it belatedly shortly before Christmas it realises it's made a mistake.

WILLIAMS J:

Why does that matter if your man says he's able to attend the premises on the 8th so that the engineer can come in and then he reneges? Who cares what's happened in December, he's already agreed to do it a bit later and it would've all worked itself out if it had been allowed to go ahead.

MR HOLLOWAY:

Well a key issue between the parties. There's two key issues between the parties which are important in respect of these emails. The first is that it's the respondent's position that by the 8th it was all far too late already. There was no way that a report would've been made available on that date.

WILLIAM YOUNG J:

That sounds to me something that you'll have to deal with separately, but it's not the sort of issue that, on the face of it, is going to be easy to deal with on caveat proceedings.

MR HOLLOWAY:

I accept that Sir, but the second key and important reason –

WILLIAM YOUNG J:

And I just might add, put you on notice of this, if your client thought that there was no prospect of the contract being affirmed, why did he muck around on the 8th of January? I mean his assessment of this might be relevant.

MR HOLLOWAY:

He wasn't aware of this correspondence at that time.

WILLIAM YOUNG J:

No, of course he wasn't aware of the correspondent, but you're talking about whether, it was the second of the issues you say, which is whether it would've been possible for Melco to get what they wanted if access had been granted on the 8th of January. Now I'm just putting to you the proposition that if your client didn't think it was material, why did he give them the run-around that day?

MR HOLLOWAY:

Forgive me, I'm having a little difficulty following that, the reason Mr Hall says that he didn't come back to Wellington on the 8th is because he, for personal reasons, found himself in a position of not being able to do that.

WILLIAM YOUNG J:

His explanation is slightly, has a slight cloud over it now, given that the narrative of events he gave in his affidavit was misleading.

MR HOLLOWAY:

Can I, before moving on from this your Honours, make one other case for why these emails had become, in my respectful submission, so important. Belatedly the appellant now says that there is an estoppel argument, and that they were relying, so this is separate from the whether or not they were prevented from –

WILLIAM YOUNG J:

Can you just pause for a moment. Can we have a quick chat?

DISCUSSION BETWEEN MEMBERS OF THE BENCH (10:15:00)

WILLIAM YOUNG J:
This argument is starting to herniate a little. What I think we'll do is just admit the affidavit, the material, de bene esse, refer to it in your submissions, and we'll deal with the admissibility and its significance later.

MR HOLLOWAY:
Thank you Sir.

WILLIAM YOUNG J:
Right, Mr Beck?

MR BECK:
I don't know if that effectively resolves the application from the Court's point of view. I do say that there are issues with this evidence because all the respondent suggests, or says, is that it may suggest something that is actual. Actually no cogent inference that is put forward as being able to be formed form this material, and I say that's certainly the case, that it's material which is taken out of context without the witnesses there, and that really it's unhelpful, particularly in this context of –

WILLIAM YOUNG J:
Well I don't think you need to go into detail about it now. Deal with it as and when it is material to the argument you're advancing.

MR BECK:
Yes, thank you Sir. I don't think there's anything further for me then to say on that application your Honour.

WILLIAM YOUNG J:
Thank you. So if you just get on with your submissions.

MR BECK:

As your Honours are aware the case is in the very specific context of a (**inaudible** 10:17:11) application to the caveat being, of lapsing, and that of course is a summary jurisdiction, and I say that summary jurisdiction is very important in this situation because it covers the whole case. Because of the particular burdens that are relevant in that jurisdiction and of course the whole issue is whether there's an arguable case for sustaining that caveat and the Court of Appeal has certainly made it clear that it's only appropriate to remove the caveat if it's patently clear that it cannot be sustained. So the threshold is a high one.

Now it's obviously unusual for a case of this nature to come before the Supreme Court because of the interlocutory context.

WILLIAM YOUNG J:

Second one in two weeks.

MR BECK:

There are issues of contract law that arise here which give rise to some questions of principle. Now the case surrounds the breach of a duty by the respondent to co-operate in allowing the due diligence process to take place under the contract, and the Courts below have accepted that there is an arguable breach of that duty, and that has not been a point taken on appeal, although the respondent now appears to claim there was no breach of the duty. I say that's not a point that's actively been raised on appeal in this court, and that the findings of the Court of Appeal in that respect have not been subject to challenge. But the, one of the significant aspects in this case is that the factual aspects of what happened relating to the co-operating between the parties only emerged after the Court of Appeal decision, and it's now clear from the new evidence that co-operation between the parties, or co-operation on the part of Mr Hall ceased after the new offer was received by him to purchase the property at a higher price. And I say that, that also shows the dangers of trying to resolve in a summary jurisdiction matters which really are matters of fact which, where there's some material conflict between the

parties and that points to the fact that the whole case was never suitable for resolution in this jurisdiction.

Now as far as the substantive arguments of the appellant are concerned, they really sort into two categories. The first relating to the ability of a party in this court's position to cancel a contract while he himself is in breach of his obligations under the contract. Now I say that's a fundamental principle which has been established by the Courts and consistently upheld that it's not, that a party who is in breach is not able to then go on and behave as though he or she is able to enforce its contract rights as if nothing has happened in the past, and that in fact that's what happened in this case.

Now the respondent seems to take the position that this is not a cancellation case because the respondent was exercising a contractual right rather than a right to cancel following breach. I say that the principle which has been outlined by the Court is one of common law and it applies in exactly the same way whether or not the termination is pursuant to a contractual right or following breach, which is a contractual right in common law. So that once a party is itself in breach of contract then the situation changes. Now the respondent in this case tries to throw dust in the arena by flagging Melco for not doing things different or acting more quickly. I say that's not the relevant test. The question is whether Mr Hall was in breach, he's been held to be, found to be arguably in breach, and in that situation he can't simply go and then say he can enforce his rights regardless. So I say that the only situation where he could legitimately continue to enforce his rights, would be if he were able to show that what he had done, or what his breach of contract was, in fact, immaterial as far as the situation was concerned, and that's very different from where this case ended up in the Court of Appeal. I say that simply cannot be shown in this situation.

The second point relates to estoppel and here I say that the appellant relies on the general principles of equity, that a person who's made a promise, or given an assurance, cannot resile from that situation, in a situation where it would be unconscionable to permit that, and here the facts are clear that on

the evidence Mr Hall repeatedly assured Melco that he would get back to them regarding the possibility of extending the deadline for carrying out due diligence. The situation changed when he received a new offer. At that stage he changed his mind about selling the property to Melco and also changed his mind about presumably granting an extension. He deliberately didn't tell Melco that he had changed his mind and thereby effectively allowed them to continue believing that he was going to get back to them to advise them whether or not there would be an extension to the contract, and that I say is something that the law cannot allow, that it does affect his conscience and that he should be estopped from reneging on the assurance that he'd given.

So that's the essence of the appellant's case your Honours. Now I don't know if there's specific aspects that you'd like me to deal with further?

WILLIAM YOUNG J:
In terms of the cellphone messaging, have we got document which explains whose numbers are whose?

MR BECK:
You mean the phone calls that were received on the…

WILLIAM YOUNG J:
Yes, on the 8th of January.

MR BECK:
No, we don't have a document that says whose number is whose but we have Mr Hall's – the application where he effectively accepts that that was the call.

ELLEN FRANCE J:
On your first argument, Mr Beck, what do you say is the best authority for the proposition you're advancing?

MR BECK:
That the party in breach is not entitled to cancel?

ELLEN FRANCE J:

Yes.

MR BECK:

I think that the best statement of the principle does come out of *Noble Investments Limited v Keenan* [2006] NZAR 594 (CA), the Court of Appeal decision, which was endorsed by the Supreme Court in the *Ingram v Patcroft Properties Ltd* [2011] 3 NZLR 433 (SC) case, so that once the Supreme Court has effectively given approval to that…

WILLIAM YOUNG J:

The difficulty with *Noble Investments* is that it talks in terms – it's para 58 of your submissions – it talks of direct causation. So a party in breach can't rely on the breach of the other party if that other party's breach is a direct result of its own breach. So that's what seems to be what the Court of Appeal is relying on, that there's a straight causation issue. Then there's a slightly different way of putting it, in para 59, in the *Patcroft Properties* case where the proposition is simply that a cancelling party has to be ready, willing and able to cancel at the time, and ready, willing and able to perform at the time it invokes cancellation. So that suggests there's no causation issue, and then there are the Australian cases that talk about it in terms of substantial chance, material and so on.

MR BECK:

Yes, and I think the Australian cases are helpful insofar as clarifying that point which doesn't seem to have arisen in New Zealand decisions, that it's really the situation where your actions effectively substantially impede the other party from enjoying its contractual rights and then as a result of that they end up not fulfilling the condition. But it's, yes, this particular sort of situation seems to fall in between but the general principle that a party shouldn't benefit from its own wrong I say is what has to guide the way in which it's interpreted.

O'REGAN J:

Do you have an authority for the proposition that this analysis also applies where the party is not cancelling for breach but just invoking the contractual right to cancel because of a failure of the due diligence condition?

MR BECK:

I don't have anything specific on that, your Honour, but I think what is relevant, though, is the particular term in the contract here which says that if the condition is not fulfilled, it's not automatic that the contract comes to an end. It requires an action by the, in this case, the vendor to terminate as a result. So it's in all respects very similar to cancellation for breach because the vendor has to make a decision and, on the basis of that decision, the contract comes to an end. It's in making that decision, I say, that it has to be taken into account whether the parties itself were in breach at that time.

O'REGAN J:

But there's no question in this situation of anyone being in, of the proposed purchaser being in breach of the contract, is there?

MR BECK:

The –

WILLIAM YOUNG J:

Well you say that Mr Hall was in breach of the contract, but Melco didn't breach the contract by not waiving or confirming the due diligence clause?

MR BECK:

Well they – I suppose it's difficult to call it a breach as such. They are in a position where they say, well, Mr Hall has effectively withdrawn his co-operation, he's put us into an impossible position and at that stage he shouldn't be allowed to continue as though nothing has happened.

WILLIAM YOUNG J:

Don't you deal with this issue at para 67 on of your submissions. I took those submissions to be to the effect that the principles that apply for cancellation for breach, apply to cancellation for non-satisfaction of the condition.

MR BECK:

Yes. So those authorities deal with one of the conditions that one satisfied but the same, it's a very similar analysis that ultimately comes through at the end of the day.

WILLIAM YOUNG J:

All right.

O'REGAN J:

What do you say in response to the argument that your clients were the authors of their own misfortune for being too slow to operate and get their engineers in and so on?

MR BECK:

Well I say first, that that's a matter which really needs to be explored specifically in evidence with the relevant witnesses, questions as to what has actually happened, and that material is not before the Court. But the more important point is that it's not what they did that ultimately is the critical issue in this case. The question is whether Mr Hall in the situation that had arisen in fact did what he was required to do under the contract and Melco says that he didn't. That he failed to co-operate, in fact he actively decided not to co-operate. He didn't make any attempt to reschedule the appointment that he wasn't able to keep. At that point he had effectively decided that he wasn't going to continue with the sale.

WILLIAM YOUNG J:

Mr Beck, I'm still quite, slightly unsure of the narrative. I'm looking at the phone records on the 8th of January. So the 10.22 am text cancels the appointment for an inspection.

MR BECK:

Yes.

WILLIAM YOUNG J:

And is the 10.02 call, the call that makes the other offer?

MR BECK:

That's right your Honour, yes.

MS PERRY:

There is also, your Honour, I'll find the document number, but we have a series of events that were recorded in a detailed chronology by our client, and that might give a little bit more context around the timing and what happened at each given time, and that is document 301.0026.

MR BECK:

That document has the texts recorded in it your Honour.

MS PERRY:

I think it's a little bit further down, but just to note this is from Melco's perspective, so it gives a bit of context around, yes, so it confirms –

WILLIAM YOUNG J:

Yes, I'm more interested in it from Mr Hall's point of view, and what I – I assume from the document I'm looking at that the 10.02 am call is the call from the other prospective purchaser, and then at 10.22 am he cancels the inspection arrangement.

MR BECK:

Yes, that's right your Honour.

WILLIAM YOUNG J:

Are there any texts there? He said in his affidavit that he was texting someone he was going to meet up with. Are those texts there?

MR BECK:

No your Honour, we don't have those.

WILLIAM YOUNG J:

You mean you don't have them or there were no texts?

MS PERRY:

We don't have them. They haven't been in discovery in the substantive proceedings, so we are not aware.

ELLEN FRANCE J:

So you don't know whether there are any, or not?

MS PERRY:

No. That is correct.

WILLIAM YOUNG J:

I'm looking at Mr Hall's affidavit. "On 8 January I travelled to Masterton to get groceries and do some shopping. I thought it might be possible to go over to Wellington briefly, so I texted Jess Issacs to say that if she could give me two hours' notice I would return briefly to allow access. I later realised that I had indicated to 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."

Then paragraph 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." And so on.

MR BECK:

Yes, so this is the section that Mr Hall accepts was wrongly put in order.

WILLIAM YOUNG J:

He literally says that para 25 should come before 24. He doesn't say 24 and 25 are in chronological sequence, but that's certainly the implication.

MR BECK:

Yes, that's right your Honour, given the timing on the call and the text message.

WILLIAM YOUNG J:

Okay, thank you. well on the face of it that's a straight breach of the duty to co-operate to facilitate satisfaction of the condition, whatever else has happened earlier.

MR BECK:

Well that's Melco's position your Honour.

WILLIAM YOUNG J:

What evidence is there that, with that inspection your client may have confirmed the contract?

MR BECK:

Well we have the email correspondence with the engineer your Honour, this is on 301.0043A.

WILLIAM YOUNG J:

Okay, so that's…

MS PERRY:

The next page down, sorry.

WILLIAM YOUNG J:

So Wednesday is the 9th, is the 8th?

MR BECK:

Wednesday is the 8th.

WILLIAM YOUNG J:

All right, and then what's the response? Sorry, okay, right. Just go down, please, to 44. Okay, so he's saying he thinks he can do it?

MR BECK:

That is what the engineer says, your Honour, yes.

WILLIAM YOUNG J:

Yes. All right.

WILLIAMS J:

Isn't the: "I might not have enough time to finish it," it comes after that, is that right? You focus on the "might" and you say the Appellate Court took "might" and treated it as "can't", isn't that right?

MR BECK:

Yes, that is right, your Honour.

WILLIAMS J:

So you did have something of a problem with your engineer. Your engineer might not have been able to get you exactly what you wanted in time. You have to concede that?

MR BECK:

That's right, your Honour. He may not have been able to – well, he says there may not be enough time to finish it by Thursday, but by the same token he indicates that at least there's a possibility of getting something.

WILLIAMS J:

Yes, I see that.

WILLIAM YOUNG J:

Okay, so: "I think this may be okay." All right.

MR BECK:

Your Honours, I think I've outlined the essence of the appellant's submissions, unless there's anything else that you wish to look at.

WILLIAM YOUNG J:

Right, Mr Holloway.

MR HOLLOWAY:

Thank you. I'll address the law first and there is a substantial amount of agreement between the parties in terms of the law in that as your Honours identified in exchange with Mr Beck in my submission there is an applicable potential remedy, being the submissions that the appellant makes from 67 onwards around the fulfilment of conditions, and in terms of sort of finding our way to the right answer it's hopefully worth me addressing briefly whether repudiation is the right way to look at this case in –

WILLIAM YOUNG J:

Well, it's plainly not the right way to look at it.

MR HOLLOWAY:

Indeed.

WILLIAM YOUNG J:

It's not a repudiation case.

MR HOLLOWAY:

No, and that's certainly our position as well. So what the case is really about is whether there has been a, through Mr Hall's actions, a frustration of –

WILLIAM YOUNG J:

No. No, it doesn't have to be a frustration. The case you're meeting at its, I suppose at its most narrow, is that on the 8th of January he scuttles an arranged meeting which may have enabled the condition to be satisfied and he's done it with, not that the intention much matters probably, but he's plainly

done it with a view to making the condition difficult to satisfy, and that in those circumstances he's not entitled to rely on failure of a condition certainly not entitled to rely on it at this summary stage of the process.

MR HOLLOWAY:
Well, to address that in my submission when applying the principles of the remedy there does need to be, firstly, a breach that –

WILLIAM YOUNG J:
Well, you accept there was a duty to facilitate access?

MR HOLLOWAY:
Yes, that's always been accepted.

WILLIAM YOUNG J:
Okay. Do you accept that what he did on the 8th of January was a breach?

MR HOLLOWAY:
I accept that it's reasonably arguable that it was a breach Sir, yes.

WILLIAM YOUNG J:
Okay. Do you accept that it may have had an impact on the ability of the condition to be fulfilled? On the practicality of the condition being fulfilled?

MR HOLLOWAY:
No, with an explanation.

WILLIAM YOUNG J:
All right. Why, if it was so impractical for the condition to then be fulfilled, why did Mr Hall think it worthwhile scuttling the meeting?

MR HOLLOWAY:
You're asking me to give –

WILLIAM YOUNG J:
Well I'm just putting the proposition –

MR HOLLOWAY:
I can only address what's in the affidavit Sir.

WILLIAM YOUNG J:
I'm putting the proposition to you that's pretty obvious. That Mr Hall wouldn't have done that unless he thought it was material to what was going to happen. Why should we go past his assessment?

MR HOLLOWAY:
Can I deal with that in two ways. So firstly Mr Hall's evidence is what it is in terms of the reasons why he couldn't return to Wellington.

WILLIAM YOUNG J:
But it's untrue. It's substantially untrue.

MR HOLLOWAY:
That's not accepted Sir.

WILLIAM YOUNG J:
Well he – can we go back to the affidavit please.

MR HOLLOWAY:
It's at page 201.0017.

WILLIAM YOUNG J:
You accept it suggests that the offer came after he had cancelled the meeting?

MR HOLLOWAY:
Yes, which is why that position was corrected when he discovered his phone records.

WILLIAM YOUNG J:

But interestingly enough it doesn't actually literally say that. It's conveyed by the order of the paragraphs rather than anything else explicit.

MR HOLLOWAY:

Yes, but I accept the inference that that's certainly the order in which things happened.

WILLIAM YOUNG J:

Okay.

WILLIAMS J:

It's capable of construing that as carefully worded. So if you look at paragraph 25: "While I was in Masterton, before I went out of coverage," that appears to me to be intentionally setting a wide margin, a wide temporal margin, yet the point is made after the remembering the problem. That does seem to be careful, does it not?

MR HOLLOWAY:

I accept that you could view it that way, but that's not my understanding.

WILLIAMS J:

No quite, but in a summary proceeding that would be a fair way to view it, if you were contesting your case, if one was contesting your case.

MR HOLLOWAY:

Indeed, which is why, in my respectful submission, it is important to look at what needs to be established at law for the remedy that the appellant seeks to be available.

WILLIAM YOUNG J:

Well all they need to establish is that it was a breach which may have had a material impact on the ability of them practically to satisfy the condition, then you're in trouble, aren't you?

MR HOLLOWAY:

Well it's those words "material impact" yes Sir.

WILLIAM YOUNG J:

And there are cases that Mr Beck has cited where it is put in terms of practicalities, of material impact.

MR HOLLOWAY:

Sorry Sir I missed that, that it is or isn't put in?

WILLIAM YOUNG J:

It is, that there are cases that Mr Beck cited where this approach is put in terms of material impact rather than absolute causation, but for causation.

MR HOLLOWAY:

And I would agree that the appropriate standard, and this is not something that's terribly clear in the law in New Zealand, and this is perhaps an opportunity to gain clarity, but if you were to ask me from a neutral standpoint what the best legal standard is to adopt, that it would be that there needs to be a substantial cause, or a significant impedance in the "innocent" party being able to fulfil the condition. But what I would go on to say is that in his submissions Mr Beck put it on the basis that once you point to the breach it is Mr Hall who had the onus of demonstrating that the breach had, and he put it as broadly as no effect. In my submission, in the context of caveats and the very significant commercial consequences of a caveator being able to put a caveat on a property, quite rightly the process under section 143 of the Land Transfer Act 2017 puts on that caveator the onus of establishing a reasonably arguable case, and hand-in-hand with that is the onus of demonstrating that what happened did indeed cause them some substantial barrier to fulfilling the condition.

WILLIAM YOUNG J:

But they have established that. They've got an engineer who is saying, as I read the emails: "Well, we may be able to get it done," and your client won't let him have access.

MR HOLLOWAY:

It is worth, however, following that chain up because as that conversation evolves his starting position is: "We might be able to do this." He then says, actually, it's going to be challenging, and I'll just get my learned junior to find the reference in the emails.

WILLIAM YOUNG J:

Yes, and they want to get an extension.

MR HOLLOWAY:

"And I may want to" – "Can I please have an extension?" or words to that effect, and I'll direct you to the document in a moment.

But then Melco comes back and says yes, 10 am on Friday would be fine. So they've granted the extension. So they've now put that engineer in the position of being able to –

WILLIAM YOUNG J:

What time did the condition have to be fulfilled by?

MR HOLLOWAY:

5 pm on the 9th. So by saying to their engineer: "That's fine. Friday morning is acceptable to us," they can no longer expect to receive that report and then –

WILLIAM YOUNG J:

That is probably in anticipation of them getting an extension though, isn't it, from –

MR HOLLOWAY:

And I can address that because that is certainly a separate and secondary argument that situations conceptually as a second string to the appeal. There is the –

WILLIAM YOUNG J:

No, no, I'm not really dealing with it as a second string. I'm just trying to understand what the emails mean.

MR HOLLOWAY:

So that may be what that email means but in fact we know, and this will be the only email that I refer to from Ms Gage's affidavit and it's the very top one in the chain, sent on Thursday, the 9th, around the middle of the day, from Melco to the engineers, Silvester Clark, which were the first set of engineers they tried to engage: "Based on our discussion and the preliminary discussion and the report received from Silvester Clark this morning we have withdrawn our scheduled deposit payment and instructed our lawyers to force an extension until the 17th," et cetera.

So in terms of estoppel, the critical element, of course, is reliance. There has to be evidence, and again I would say that the onus sticks with Melco, to make out a reasonably arguable case for its reliance on the communications causing it to believe that either an extension would be granted, and there really isn't a strong basis for that and what words Mr Hall conveyed, or perhaps –

WILLIAM YOUNG J:

This is after the site meeting's been cancelled, isn't it?

MR HOLLOWAY:

This is after the site meeting's been cancelled, yes, Sir, which happened on the 8th.

WILLIAM YOUNG J:

Well, how do we know what would have happened if the site meeting had gone ahead?

MR HOLLOWAY:

On the 8th?

WILLIAM YOUNG J:

On the 8th.

MR HOLLOWAY:

Well, we know that Melco would have asked for the engineer who attended that site meeting to provide a report on Friday.

WILLIAM YOUNG J:

Sorry, you're going to have to take me back to the –

GLAZEBROOK J:

That's –

WILLIAM YOUNG J:

It would be actually quite helpful if this was all in a chronological sequence. Where's the 10 am Friday email? I know you've got it because I've seen it.

MR HOLLOWAY:

Yes, Sir. So it is at page 301.43. 301.0043, Mr Registrar So we see at the top of that the engineer coming to Melco saying: "Yes, I'm available Wednesday," which is the 8th, "but there might not be enough time to finish it by Thursday. Can we extend the deadline to Friday?" Then we go up to 301.0042: "I will check with my manager, I think this may be ok," et cetera. Then we go over to .0041, Melco to the engineer: "I have just spoken with my manager and requested the property files, he is going to look for them now. He has asked if it would be possible to get the report prior to 10 am on Friday as the deposit is due on Friday.'

WILLIAM YOUNG J:

Yes.

MR HOLLOWAY:

And then there's a response: "Cheers." And, in fact, of marginal relevance the engineer says, we usually have delay for final quality assurance signoff from our directors. So one thing in terms of the overall context, which in my submission does have some relevance, and I appreciate that the focus is and needs to be on the 8th, but over the entire due diligence period the first and only time that Melco approached Mr Hall for access for an earthquake engineer, was by text message on the morning of the 7th saying: "Can we get access either today or tomorrow, on the 7th or the 8th." So Melco has compressed it's opportunity with no prior notice to Mr Hall into the space of essentially two days, the 7th or the 8th.

WILLIAMS J:

For myself I don't see why that helps you because your man agreed to it so if the standard is reasonable co-operation, your man obviously thought that was reasonable co-operation because he was coming back to Wellington to provide it, and then when he decided not to, it's at least reasonably arguable that he did that for a reason unrelated to his own inconvenience, but related to something else.

MR HOLLOWAY:

And certainly if that were to be found to be the case, that goes to the first of the two elements being breach, but not the second which is what was the consequence of that breach.

WILLIAMS J:

Yes, and that's really where you need to focus because the argument you were just putting doesn't help you, that's my point.

MR HOLLOWAY:

And so in terms of the consequence, there is, the evidence that we have, even setting aside the fresh evidence, is that there was no earthquake report that was planned to be available before the Friday, that Melco must have understood that it could not rely on an extension. It instructed its lawyers on the morning of the 9th to write to Mr Hall's lawyers saying, in essence, you haven't granted an extension yet, can we please have one. There's no evidence of any weight, in my submission, of reliance that there would just be this concession made by Mr Hall of an extension to the deadline. In fact Melco is planning quite actively for that not being the case by engaging new engineers and putting the pressure on. So on the 9th not having the earthquake report, having told their engineer they don't need it until the 10th, they had a day –

GLAZEBROOK J:

Did you say the morning of the 10th?

MR HOLLOWAY:

Correct. So they told their engineer the deadline was the morning of the 10th.

GLAZEBROOK J:

Well you don't just provide a report on the – what do you say to the possibility of an oral report, because you don't just report – you don't just produce a report on the 10th, a written report on the 10th, do you?

MR HOLLOWAY:

My response to that is that if indeed it is Melco's case that they could have received an oral report from EQSTRUC, then again the onus was on them to put forward the evidence that EQSTRUC would have even been comfortable giving an oral report like that, given the liability position for earthquake engineers and the need for quality assurance from the directors of that engineering company, which is in the evidence.

WILLIAM YOUNG J:

I suppose the point on the merits that is sort of bugging me slightly is that your client is seeking to take advantage of uncertainty as to what might have happened, when there would have been no uncertainty if he'd just turned up as agreed on the 8th of January. The events would then have taken their course. So in a sense there's something to be said for the view that the party, he creates the uncertainty, he may just have to wear it.

MR HOLLOWAY:

Look I accept that view can be taken, and I guess the counterview is that the party that put Mr Hall in the position of contacting him on the final days of the due diligence period when he was not in town, and there had been no prior communication with him saying, we will need to get back in, we've decided we need an earthquake report, that will mean engineers need to visit, can we please together, as a duty of co-operation make plans for that, and so the other option that Melco had available to it, through the course of the 9th, when it knew that no extension would be granted, and that it wasn't going to get a report, would have been to waive that condition, and indeed it did do that in the end, purportedly, some time later on about the 23rd of January. So it has made a series of commercial decisions around the risk it was prepared to accepted, and I guess the alternate view is it connects to where the consequences of those decisions that it made, about how it handled itself, and how it protected its own commercial interests over the course of the due diligence period. The one other point I would make in terms of the availability of the report is of course that in the High Court Melco's counsel accepted in a subsequent telephone conference that was regarded as part of the hearing, that the report would not have been available on time, even if access had been granted on the 8th.

WILLIAM YOUNG J:

Where is that recorded?

MR HOLLOWAY:

That is in the High Court decision. So the start of the document is 101.0039.

WILLIAM YOUNG J:
Yes.

MR HOLLOWAY:
So at paragraph 55, which is on page .0053: "I convened a teleconference with counsel on 27 October 2020 to hear further submissions…Mr Collins," that is Melco's solicitor and counsel in that hearing, "responsibly accepts that Melco would not have received a written seismic report before 10 January 2020." And he went on – and it records that he argued that perhaps they could have received an oral report, and it's the "perhaps" that is the sticking point, because I stick to the submission that if it important, in terms of striking an appropriate balance between a registered owner of a property, and a caveator, to put the caveator to the sword of putting forward their evidence and making out their reasonably arguable case. If the standard can be met by raising only possibilities, or suggestions with no evidential backing, then it would be very easy for a sophisticated solicitor to push any caveat through to a substantive hearing, and that is –

GLAZEBROOK J:
It's difficult to think that he could have said anything other than perhaps because the inspection hadn't been allowed and it would be very difficult for an engineer to say: "Well, in principle if it was – I might've been able to give them enough information orally for them to decide whether they waived or did not waive the condition." It's difficult for hypotheticals to be put to people in this circumstance, isn't it, at what is a summary stage?

MR HOLLOWAY:
Yes, Ma'am, it is difficult but it is certainly not impossible to get an affidavit from an engineer that says: "We, as a matter of principle, are happy to give oral reports. I can't tell you what my oral report –

GLAZEBROOK J:
Well, they're never going to say that, are they? They are never going to say: "We're happy to give oral reports." It would depend on the particular

circumstances at the particular time and the conditions upon which they might be asked to do that.

MR HOLLOWAY:
I can see –

GLAZEBROOK J:
There was at least an indication from Mr Hall, wasn't there, that there could well be an extension granted. From his point of view he didn't have a problem with it.

MR HOLLOWAY:
Well, that's a separate point but I will address that second –

GLAZEBROOK J:
No, it may or not be a separate point but it's a point that must go into the mix in terms of an argument that Melco didn't behave reasonably which is what – or have a reasonable prospect – which is what your argument is.

MR HOLLOWAY:
In my submission Mr Hall's response to the request for an extension where he says: "I don't see a problem with it but I'm not going to give you an answer. I want to meet with my lawyer on the 9th," that would only be relevant in terms of the chronology of what happened subsequently if there was any evidence that Melco then changed what it did because of that, and that is simply missing. So there is no evidence that Melco conducted itself on the assumption that it would be getting an extension.

WILLIAM YOUNG J:
But isn't the sort of lack of push on the Melco part consistent with a view that there probably would be an extension?

MR HOLLOWAY:
There was no lack of push, so Melco –

WILLIAM YOUNG J:

For instance, saying a report by 10 am on the Friday should be okay?

MR HOLLOWAY:

Well, I mean that – we're both in the position of speculating about that but it would be again something that was in the evidence in the High Court and Melco would have been able to give evidence about and hasn't, if that was genuinely what drove that decision to be relaxed about the advice.

GLAZEBROOK J:

Why else would you be relaxed about a decision to have something after the deadline?

MR HOLLOWAY:

Perhaps because having miscalculated the due diligence period once at the outset you've done it again.

WILLIAM YOUNG J:

Well, they've got it right. They corrected, they've said in the email exchange that the due diligence date was the 9th, isn't that right?

MR HOLLOWAY:

In which email, Sir?

WILLIAM YOUNG J:

Well, I thought it was in the email chain you took us to earlier where – or someone took us to – where they'd initially thought the due diligence date was the 2nd and then they wrote back to the engineers saying: "No, it's actually the 9th."

MR HOLLOWAY:

Yes, so in the email chain attached to Ms Gage's affidavit there is, if my memory serves me, an email from Mr John Ellison where he does realise his mistake and correct it to say that it is the 9th.

WILLIAM YOUNG J:

Yes. So why do you think –

MR HOLLOWAY:

And indeed I've just checked that that is there. But the email –

WILLIAM YOUNG J:

Why would they make another mistake then – I know – about due diligence date?

MR HOLLOWAY:

Well, it's not Mr Ellison who's then involved in the subsequent chain where they ask for the 10th. So that comes from the directors of Melco speaking, and this is on its face speaking with Jessica Isaacs.

WILLIAM YOUNG J:

Just stop there. Okay. So what else do you want to say Mr Holloway?

MR HOLLOWAY:

In my submission we've spoken about the first leg of the appeal, which really turns on, in my submission, the consequences of the alleged breach. The other element which does potentially stand on its own is the argument with respect to estoppel. That from the appellant's perspective the representations made by Mr Hall in relation to coming back to them following their request for an extension, operates so as to stop him from I assume coming back to them ahead of –

GLAZEBROOK J:

Isn't the representation more that he didn't see a problem with it, but he was going to check with his lawyers, who you can't imagine would have a legitimate reason for saying there was a problem with it.

MR HOLLOWAY:

The – what I would say –

GLAZEBROOK J:

Except in respect of the new offer.

MR HOLLOWAY:

My response to that is twofold. Firstly those are very imprecise words to convert into an enforceable estoppel. That I don't see a problem with it but I am going to consult with my lawyer. We are also dealing with a retired gentleman who is entitled to lean on his lawyer for commercial advice and discussing what decision he might make. What is consistent through the representations is that I'm not going to give you an answer, until I've spoken with my lawyer. I'm not going to speak to my lawyer until the 9th. Then the flip side of that, of course, is what was Melco's state of mind, and it was for Melco to address that in its evidence, and it simply hasn't. So there's no affidavit from someone within Melco saying, gosh that was important to us, we really hung our hat on that. We just assumed that we would, even if the answer was we're not going to give you an extension, we would be granted some sort of grace period to then make commercial decisions in response to that ahead of the parties rights under clause 10.8 of the contract coming into effect. That's a very specific understanding they would have needed to have and be prepared to put in evidence to establish a claim for estoppel. So, look, that is my submission in respect of that second leg of the appellant's argument. That it fails for want, primarily, of reliance.

GLAZEBROOK J:

And do you or do you not accept that it is still relevant in respect of the – I can understand your submissions on estoppel, do you accept that it's still relevant for a consideration of the other argument or not? And if not, why not?

MR HOLLOWAY:

Either not relevant, Ma'am, or only in the most minor way. The disciplined analysis is to say, firstly, what was Mr Hall's obligation, because we're talking about an implied obligation here, so what was the content of what do you have to do to co-operate or provide access. Is it reasonably arguable that he breached that, and then –

GLAZEBROOK J:

Well you've already accepted both of those, that he had to facilitate access, and it's reasonably arguable that he didn't. So what about the third one?

MR HOLLOWAY:

And then what was the consequence, if any, of Melco not having access on the 8th when it asked for it, and the fact that there was the separate communication, of which there is no evidence of reliance, can only play no, or the most minor of roles, in addressing that question of consequences of what was the consequence? Was the position Melco found itself in over the course of the 9th a substantial result of this alleged breach on the 8th or not? Does that answer the question mark?

GLAZEBROOK J:

Yes.

O'REGAN J:

Was there any evidence as to why access required Mr Hall's personal presence, that his being out of Wellington meant that access was impossible?

MR HOLLOWAY:

So that is addressed in the evidence. Right at the beginning the agent, and it's important to note that the agent in these events was Melco's agent, told Melco, so the contract was signed on the 6th, it was given to Melco's agent, Melco's agent then distribute it to each party's solicitors on the 9th, and then if I can just turn up the relevant email, on the morning of the 10th, and this is at 301.0019 – no particular need to go to it, Mr Registrar – Kevin Dee, the agent, emails Melco and copies in Mr Hall and he says: "The building is split into two units. The northern unit is leased to Wholesale Cars Direct. Tony will email us tomorrow with the contact at Wholesale Cars for arranging access" to that unit. "The southern unit is not leased. Tony has the key. Tony, who lives up north, will be here on Monday. Please liaise directly with Tony on Monday for access," and so access is then provided on the Monday and the Tuesday, the 16th and the 17th.

GLAZEBROOK J:
So who's Tony again? Remind me who Tony is.

MR HOLLOWAY:
Beg your pardon. So "Tony" is Mr Hall, Ma'am. So if Melco had, on the 16th and 17th when Mr Hall attended with the key, had perhaps said to him: "Hey, this might not be enough for our purposes. We're thinking we might need an engineer to visit. Can you please leave the key with us?" then things may have played out differently. But in terms of how the further term of sale clause 19 works –

GLAZEBROOK J:
I thought there was. I thought there was some evidence that supposedly Wholesale Cars had a key. Is that not right?

MR HOLLOWAY:
No, Ma'am, it's simply a misunderstanding of the evidence and in fact that allegation has been removed from, in the High Court, the plaintiff, Melco's, claim.

So this has always been the position. There were two units, two keys. One key was held by the tenant, so that's fairly straightforward, and the other key was held by Tony and he lives up north.

So to finish my train of thought, while Mr Hall had an obligation to provide reasonable access, he was still in this as a relatively placid player. It was always for Melco to do all the running on the further term of sale clause 19 and do what it ever felt necessary or not necessary to reach whatever degree of satisfaction it felt it required to either waive the clause or confirm it, which is essentially the same thing, and it is really part of my argument about why Mr Hall's decision on the 8th is not a substantial cause is because throughout Melco made decisions about not giving notice it would need access, not asking to hold onto the key, not engaging an engineer at the appropriate time, until it concertinaed everything up into one day when it was not going to be

possible to get a report, and then over the course of the 9th, knowing that that was the case but having a preliminary report from Silvester Clark, so a desktop report, it said: "That's it. We're not going ahead with this." So it made a very specific conscious choice not to waive clause 19 which it could've but to in fact do the opposite and, as it said, in its words, force an extension.

WILLIAMS J:
I'm just wondering why it's not an arguable inference from the facts as you've gone through them that Melco, either Jess or John or both, knew the deadline was 5 pm on Friday, knew they –

MR HOLLOWAY:
Thursday, Sir. The 9th is the Thursday.

WILLIAMS J:
Sorry. 5 pm on the 9th, yes. Knew that that was the deadline. Knew that they could not get a written report from EQSTRUC until the Friday but decided to go ahead anyway because the site visit would mean they could get something from an engineer before the deadline. Why is that not a reasonable inference if the start from the proposition they knew 5 pm on the 9th was the deadline?

MR HOLLOWAY:
It is a reasonable inference that they, even if they had known they weren't going to get a written report, that something might be better than nothing. But nevertheless it can't be that every breach of a contract is relevant to relieving the party of its own obligations and –

WILLIAMS J:
We're just talking about arguabilities here. That's all. We're just talking about what's reasonably arguable. Your case really hinges on the idea that Melco had no idea that 5 pm on the 9th was the deadline. They thought it was going to be the 10th or they thought they'd – they just mistakenly thought it was the

10th or they mistakenly thought they were going to get an extension and they weren't.

MR HOLLOWAY:
I would take a step back from that and say that the obligation to fulfil clause 19 was one which – and if I can just read the words – one which Melco was required to, I think it was, use all reasonable endeavours to fulfil, and that, in essence, is what it failed to do by leaving things until the last minute.

WILLIAMS J:
Yes, I know that's your argument and that would probably be quite a powerful argument if your man had said on the 7th and 8th: "Can't do it. I'm in the bush." You would have been able to come here and say: "Well, they just dithered and my guy's retired. You've got to take that into account in working out what's reasonable co-operation," but your guy agreed to the 8th and that fact you have to contend with.

So if we, on the basis of the evidence, are able to conclude at least arguably that Melco knew what the deadline was, there are inferences to be drawn from that about the importance of the inspection and what they'd get out of their engineer, aren't there?

MR HOLLOWAY:
I would say I wouldn't put it as high as an inference, Sir. I'd say that we can all speculate about what might or might not have happened.

WILLIAMS J:
Well, it's just arguable inferences from circumstantial evidence. It's what the courts have to do every day, unfortunately.

MR HOLLOWAY:
Indeed, and what my submissions is is that in the context of this caveat argument the right approach is indeed to take a step back and look at what happened in the round and really interrogate that question. Can it reasonably

be said, reasonably argued, that that one moment in time on the 8th had a substantial impact on what transpired, and not even Melco's inability to confirm the contract on the 9th but its decision not because it knew what it was doing.

The decision that the parties have I think both referred to which does have some similarities to this is the decision in *Nopera Log*, and if I can just refer to that by its correct name, *Nopera Log House Ltd v Godsiff* [2014] NZHC 639, (2014) 15 NZCPR 144, which is a High Court decision, which has a similar fact pattern in that the purchaser dillied, I think that was the word your Honour used, dallied perhaps, in terms of applying for an OIA approval and that, the Court found, had consequences. That even though the vendor may not have been as quick as they might in handing over certain information, it was already too late. The substantial cause of not being able to proceed with the agreement fell on the purchasers side of the fence in terms of responsibility rather than the vendor, and that pragmatic assessment in the context of a caveat case is also what is available to the Court here.

WILLIAMS J:
It's not the equivalent analogue, is it, because the equivalent analogue is the vendor in that case saying I'll help you with your application. I'll provide these documents to support it and then not doing so.

MR HOLLOWAY:
In my understanding of the facts of this case they did have an obligation to provide information and they were asked for it, it was just provided slow. The problem was that the application just needed to be made to the OIA on time, and that was the responsibility of the purchaser.

WILLIAM YOUNG J:
Where else do you want to go with your submissions Mr Holloway?

MR HOLLOWAY:

Unless your Honours have further questions for me, I think that encapsulates the case for the respondent on the key issues.

WILLIAM YOUNG J:

Thank you.

GLAZEBROOK J:

Can I just check on a factual matter. I think the other allegation is that your, that Mr Hall was actually out of contact over a long part of that period, and therefore they wouldn't have been able to arrange anything earlier in any event.

MR HOLLOWAY:

Yes, I can briefly deal with that. Perhaps the way to deal with it is my friend has attached to his written submissions a calendar. It's at the third to last page of that. So this is the appellant's submissions, 1st of November. It shows in our bundle as "00 appellant's submissions". I'm not sure if it's easily viewable by you or not. It's appearing as quite small on my screen, so the contract was signed on the 6th, provided to Kevin Dee, Melco's agent, who distributed it on the 9th. It says here that Melco promptly request access for due diligence purposes on the 9th. In fact that occurred on the 10th, the relevant document being 301.0019.

So an email goes to Mr Hall saying can we talk to you about arranging access, and then the way that plays out is that John Ellison of Melco emails Kevin Dee and Anthony on the 11th. "FYI Kevin, after our discussion this morning," so the inference is a discussion between Mr Ellison and Mr Hall, "myself and Tony have agreed that Monday," which is the 16th, "would be a good time to meet to review the premises." Now Melco says that all of these days are coloured red because Mr Hall was not available, and my response to that would be to say they didn't ask him to be available. They had a phone call where it was agreed that the 16th would be "a good time to meet to review the premises." So Melco has agreed the 16th. In fact they visited on the 16th

and the 17th, and then there's some yellow coloured boxes, which are the key says access neither required nor prevented, and we go through into the new year.

Now six is coloured red, but in fact no request had been made to view the premises on the 6th, so importantly from the 17th forward there is no clear piece of communication that says we would like to come and visit again, we need access for an engineer. So the 6th, nothing happens on the 6th. There's a text message sent on the morning of the 7th saying can we have access today or tomorrow, and it is that text message that Mr Hall responds to ultimately on the 8th to say, actually I can come in, and then again say, hold it, no I can't.

So that's the chronology Ma'am, and I don't know if that's helpful in terms of viewing the whole period, but the point for Mr Hall that I would make is that having agreed, seemingly in a very co-operative and mutual way, to visit on the 16th and 17th, there are a great number of days in the scheme of the type due diligence period that go past until on the morning of the 7th Mr Hall receives a text message, and this is over the Christmas period, a retired gentleman, he lives up north, he's the only one who has the key. When we are assessing the reasonableness of the expectation that he be at Melco's beck and call, that context is relevant in my view.

GLAZEBROOK J:
Thank you.

WILLIAM YOUNG J:
Mr Beck, it's 11.33. Do you want to reply?

MR BECK:
I think I'm right, if your Honours are happy to carry on.

WILLIAM YOUNG J:
How long would you want to reply for?

MR BECK:
I shouldn't need more than 10 minutes your Honour.

WILLIAM YOUNG J:
I think we might take the adjournment and reconvene at 11.45.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

MR BECK:
(audio restarts at 11:49:21) … and at paragraph 11 he does say that if, they'd been told by Mr Hall that he wouldn't be responding to the extension of time or if they request was declined they could have quickly considered and chosen to elect not to require a seismic report until they confirmed the agreement. I mean it doesn't say much but the fact is that there is evidence that they were waiting for the confirmation from Mr Hall, that he had promised that he would get back to them and give them an answer on the extension of time.

The other point in that regard is that Mr Hall had consistently said that he wanted to talk to his lawyer, with the inference that he was going to get advice before he came back on the extension of time, and as it turns out that isn't what happened, and this is reflected in the affidavit of Mr May, which is 201.0025. This is at paragraph 12, Mr May's only reference to contact from Mr Hall on that day is that he received an email confirming that he was not to respond to Gibson Sheat's request for an extension and he was to cancel the agreement. So there is no indication that there was any advice sought and why, of course, it's not clear exactly what happened. What it does suggest is that Mr Hall had, in fact, made up his mind at that stage that he was not going ahead with the agreement, that he wasn't going to provide access, that he wasn't going to give an extension of time, he had already done that without telling Melco what the position was.

The other point that I wanted to make was just that it may be relevant to keep in mind that there are two sets of engineers involved. That's the initial engineer, Silvester Clark, the first of the engineers with whom the disputed correspondence is. So those emails that the respondent is seeking to admit are all with Silvester Clark. The correspondence in January the 7th to the 9th of January is with EQSTRUC, and that's the correspondence where the engineers say that they may not be able to provide a report but they, depending on when they get access. So there are two different streams of correspondence which shouldn't be confused.

WILLIAMS J:
In the EQSTRUC correspondence do they say we may not be able to provide the report by the deadline of 5 pm on 9 January, or do they say something else?

MR BECK:
They do say that they may not be able to provide it by – so that's the correspondence that we looked at earlier on page 301.0043A where they said that they – if they had access on Tuesday they'd be able to provide a report on Wednesday. Then on the previous page .0043, if they get access on Wednesday there may not be enough time –

WILLIAMS J:
Yes, thank you.

MR BECK:
Those are the only points that I wanted to make.

WILLIAM YOUNG J:
Thank you.

MR BECK:
One thing more I just thought I should mention that the High Court trial, the specific performance case, is set to commence on the 9th of May.

WILLIAM YOUNG J:

Thank you. I think that's in the submissions somewhere?

MR BECK:

I think it is there somewhere your Honour.

WILLIAM YOUNG J:

Thank you Mr Beck. We'll reserve our judgment and deliver it in writing in due course.

COURT ADJOURNS: 11.54 AM