

Court of Appeal on 'anticipatory breach' of contract and when it occurs

In *Sun & Others v Peninsula Road Limited (in rec and in liq)* [2016] NZCA 427 (9 September 2016) the Court of Appeal considered the right of a party to a contract to cancel the contract or be treated as relieved from further performance for 'anticipatory breach'.

Stuart Dalzell, Partner

The factual context

This was a dispute over settlement by purchasers in Stage 1 of a planned three-stage development in Queenstown. The Stage 1 assets were acquired by a company called Melview. By 2011, however, Melview was in receivership, as was its subsidiary company, KVHL (to which Melview had assigned its rights under the sale and purchase agreements ("ASPs")).

Receivers completed Stage 1, but by the time of trial and the appeal hearing Stages 2 and 3 of the development had not been progressed. Despite this, settlement notices were issued to the purchasers in Stage 1 in late 2011; and when the purchasers refused to settle, KVHL purported to cancel the ASPs and declare some \$10 million of deposits forfeited.

The purchasers sued, seeking return of their deposits and arguing that KVHL could not demand performance when KVHL itself was not 'ready, willing and able to settle' and a three-stage development was now commercially impossible. Further, KVHL's inability to fulfil its side of the bargain meant its purported notices of cancellation transformed into an invalid repudiation of the contracts, entitling the purchasers to cancel.

The purchasers' argument failed in the High Court, which declined to find any obligation on the developers to

complete stages 2 and 3, but succeeded before the Court of Appeal.

The legal context

The rules governing cancellation of contracts are set out in sections 7 and 8 of the Contractual Remedies Act 1979. In brief, if one of the parties to a contract breaches an obligation under the contract, that breach may give rise to a right of cancellation in the injured party if, but only if, the breach is substantial in its effects or if it is a breach of an essential term. In this context, the Court of Appeal said it was required to decide three issues:

- Firstly, whether there was a positive obligation on the vendors to complete stages 2 and 3;
- Secondly, whether the obligation on the vendors to complete stages 2 and 3 was an essential term from the point of view of the purchasers; and
- Finally, was there an anticipatory breach of the obligation to complete Stages 2 and 3?

A positive obligation on the vendors to complete Stages 2 and 3?

The Court of Appeal found that there was an obligation on the vendors to complete Stages 2 and 3 of the development. In reaching this conclusion, the Court focused on clause 5.7 of the agreements. This clause stated that "the Vendor covenants that it *will* (or *will* procure that) the Precinct *shall* be developed (albeit in stages)" (Court's emphasis).

The Court noted that clause 5.7 was subject to important qualifications which

gave the vendors a substantial degree of flexibility as to the time by which the "Precinct" or development had to be completed. A straightforward reading of clause 5.7, however, imposed a qualified but clear obligation on the vendor to complete Stages 2 and 3.

Essentiality

The Court seemingly had little difficulty with the proposition that the vendors' failure to complete Stages 2 and 3 was a breach of a sufficiently serious or 'essential' term of the contract from the point of view of the purchasers – a conclusion it reached in just five short paragraphs. The vendors relied strongly on provisions containing what on their face were acknowledgements of "no reliance" by the purchasers on completion of the Precinct project. But the Court held such acknowledgements, expressed as they were to be subject to other clauses in the contract, did not negate clause 5.7. And applying Supreme Court authority on the test for 'essentiality', the Court considered it unlikely a purchaser would have proceeded to purchase a unit in a stand-alone building in the absence of an obligation to complete the overall development.

Anticipatory breach

An anticipatory breach is where a party makes clear its intention to break a contract. The intention must be "unequivocal". But express words are not required. And failure to perform an

obligation in a timely matter can result in a breach.

Here the evidence clearly showed that it was inevitable that the vendors would not be able to complete Stages 2 and 3 either themselves or by procuring someone else to do so.

Of particular importance was evidence from the receivers of Melview that only the Stage 1 assets had been acquired by Melview from the original development company (also in receivership) and subsequently transferred to KVHL along with all rights under the ASPs. In the context of this separation of ownership of the Stage 1 and Stage 2 and 3 assets, the evidence was clear that to the extent to which the ASPs contemplated KVHL's completion of Stages 2 and 3, there was no future opportunity to complete performance such that it was clear breach was inevitable.

Conclusions

We offer two comments or conclusions.

The first is that there has been a legally subtle yet practically significant shift in the Courts' approach to contractual interpretation, in which interpretation is anchored in the words used as the primary factor of importance – rather than, e.g., what might be seen by one or other party or the Court as the commercially more 'business-like' meaning. Under this approach, the Courts' should generally give effect to clear and unambiguous language. This is often easier said than done as lawyers are adept at finding ambiguities. Yet Justice Terence Arnold remarked in the latest Supreme Court decision on interpretation, *Firm PI*, the "central importance" of the text at [63].

Secondly, the vendors breach of (what the Court had earlier held to be) an essential term of the contract amounted to a repudiation and it did not matter that completion of Stages 2 and 3 was an obligation to be fulfilled in the future.

The judgment also confirms that, in the context of inevitable non-performance,

anticipatory breach and cancellation of a contract for repudiation, a lot will turn on factual points and a court's decision may vary, depending on the facts of each case.

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