**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 34/2020**
**[2020] NZSC 78**

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| BETWEEN | LONG CAPITAL HOLDINGS NZ LIMITED<br>Applicant |
| AND | JACKS POINT VILLAGE HOLDINGS NO 2 LIMITED<br>Respondent |

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: D J Chisholm QC and J P Nolen for Applicant
N R Campbell QC and M J Hammer for Respondent

Judgment: 6 August 2020

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## JUDGMENT OF THE COURT

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**A The application for leave to appeal is dismissed.**

**B The applicant must pay the respondent costs of $2,500.**

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## REASONS

### Forfeiture of deposits

[1] The applicant and the respondent entered into two agreements under which the applicant agreed to buy blocks of land near Queenstown from the respondent. The agreements were materially in the same form. The applicant purported to cancel the agreements because of the non-fulfilment of a condition. The respondent rejected this purported cancellation and itself cancelled the agreements on the basis of the applicant's repudiation. The respondent then sued for release of the deposits paid by

the applicant. It sought summary judgment and was successful in the High Court.[1] The applicant appealed to the Court of Appeal, which dismissed the appeal.[2]

## Leave sought

[2] The applicant now seeks leave to appeal to this Court against the decision of the Court of Appeal. It argues that both the High Court and the Court of Appeal erred in their interpretation of the contracts and also argues that both Courts proceeded on the basis of a mistaken assumption of fact.

## Agreements

[3] The blocks of land were within the Jacks Point Village development. The Court of Appeal said the effect of the agreement was that the respondent was selling to the applicant the opportunity to carry out the development of two areas of the Jacks Point Village development, subject to various obligations designed to ensure compliance with requirements applicable to the overall village development (the respondent was required to ensure that the blocks were developed within those parameters).[3]

[4] The relevant provisions of both agreements were:

(a) cl 20.3, which said that the agreement was conditional upon the applicant providing the respondent with a development plan within a specified timeframe and the respondent approving the development plan within a shorter specified timeframe;

(b) cl 32.2, under which the applicant was obliged to provide a development plan to the respondent for approval;

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1 *Jacks Point Village Holdings No 2 Ltd v Long Capital Holdings NZ Ltd* [2019] NZHC 1405 (Associate Judge Johnston).

2 *Long Capital Holdings NZ Ltd v Jacks Point Village Holdings No 2 Ltd* [2020] NZCA 102 (Goddard, Brewer and Gendall JJ) [CA judgment].

3 At [3].

(c) cl 10.8(2), which provided that the party or parties for whose benefit a condition had been included was required to "do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment";

(d) cl 42.1, which required each party to take the necessary steps to implement and carry out its obligations under the agreement;

(e) cl 20.5, which provided that if any of the conditions were not satisfied by the specified time, either party could cancel the agreement;[4] and

(f) cl 26.1(b), which provided that if the agreement was cancelled as a result of a default by the purchaser, the deposit would be released to the vendor. If cancellation occurred for any other reason, the deposit was to be refunded.

**Development plan not provided**

[5] The applicant did not provide a development plan to the respondent for approval, as required by cl 32.2. The reason for this was that it had come to the view that the proposed development of the two blocks was not economically viable.

**Court of Appeal decision**

[6] The Court of Appeal drew a distinction between the obligation to provide the development plan and the separate obligations to implement that plan.[5] It considered that allowing the applicant as purchaser to decline to deliver the development plan for commercial reasons and then cancel the agreement without any consequences would effectively convert the condition in cl 20.3 into a form of due diligence clause. It rejected an interpretation that led to that outcome.[6]

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4 This was cl 20.5 in one agreement and cl 20.4 in the other.
5 CA judgment, above n 2, at [54].
6 At [56].

[7] The Court of Appeal rejected an argument based on the decision of this Court in *Steele v Serepisos*.[7] The applicant argued that case supported its submission that it was not required to submit a development plan that would be unreasonably onerous to implement. The Court noted that *Steele v Serepisos* was concerned with a statutory condition imposed by s 225 of the Resource Management Act 1991, not with a contractual condition.[8] It also said the present case was not a case where the parties had anticipated that a condition would be satisfied in a manner that subsequently proved impossible for unanticipated reasons outside the parties' control. There were no unforeseen difficulties that had not been within the contemplation of the parties.[9]

[8] The Court found that the applicant was in breach of its obligations under cls 10.8(2) and 42.1 by failing to provide a development plan. The applicant could not cancel for non-fulfilment of the condition to provide the development plan as the non-fulfilment of the condition was as a result of its own default. Its purported cancellation was a repudiation of the agreements and that entitled the respondent to cancel, which it did. The cancellation was as a result of the applicant's default, which meant that the respondent was entitled to the release of the deposit.[10]

**Proposed grounds of appeal and our evaluation**

[9] The applicant wishes to raise two arguments on appeal if leave is given.

[10] The first is an argument that the Court of Appeal was wrong to conclude that the obligation to take all reasonable and necessary steps to submit a development plan extended to steps that would have had an unreasonably onerous financial consequence for the applicant. The obligation to provide the development plan was not an absolute obligation, but conditional.

[11] We see this issue as being simply an issue of interpretation of the bespoke provisions of the agreement between the parties. We do not see this as raising any

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7 *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1.
8 CA judgment, above n 2, at [53].
9 At [55].
10 At [58]–[59].

issue of general or public importance or of commercial significance.[11] Nor do we see any risk of a miscarriage of justice arising if we decline leave.[12]

[12] The second point the applicant wishes to raise is a factual one. It seeks to argue that the High Court and Court of Appeal decisions were based on a mistaken assumption of fact. It says the Courts assumed that the applicant had a development plan ready to provide to the respondent but resolved not to submit it. It says this was factually incorrect.

[13] We do not see this as a proper basis for the grant of leave for a second appeal. We do not consider that the decisions of the Courts below depended on the proposition that the applicant had prepared the development plan but resolved not to submit it. The evidence given by the principal of the applicant, Mr Ye, was that the development was not viable and no amount of refinement of the development plan could overcome this. That was the basis on which the applicant decided not to provide the development plan. Whether the plan was actually completed at the time that decision was made is not a matter that is of great significance to the outcome.

## Result

[14] The application for leave to appeal is dismissed.

[15] The applicant must pay the respondent costs of $2,500.

Solicitors:
K3 Legal Ltd, Auckland for Applicant
Anderson Lloyd, Queenstown for Respondent

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[11] Senior Courts Act 2016, s 74(2)(a) and (c).

[12] Section 74(2)(b); *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369; and *Shell (Petroleum Mining) Company Ltd v Todd Petroleum Mining Company Ltd* [2008] NZSC 26, (2008) 18 PRNZ 855 at [4]