

When can I cancel my conditional Sale and Purchase Agreement?

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The recent Supreme Court decision of *Melco Property Holdings (NZ) 2012 Ltd v Hall*¹ has provided helpful guidance on the circumstances in which a party may cancel² a contract for non-fulfilment of a condition.

The facts

Mr Hall agreed to sell Melco Property Holdings (NZ) 2012 Limited (**Melco**) a commercial property in Lower Hutt (the **Property**). The Sale and Purchase Agreement included a due diligence condition for the benefit of Melco which was due for confirmation by 9 January 2020.

Melco wanted to obtain a seismic assessment for the Property and arranged with Mr Hall to access the property on 8 January 2020 for that purpose. However, at the last-minute Mr Hall advised that he was unavailable to facilitate access that day.

Melco then asked Mr Hall for an extension of time to the due diligence condition. Mr Hall advised that he would discuss the request with his lawyer after the New Year.

Mr Hall ignored further requests by Melco for an extension and by the due date for fulfilment Melco had neither confirmed nor waived the due diligence condition. Mr Hall purported to cancel the agreement on the basis of Melco's failure to confirm the due diligence condition.

Melco did not accept Mr Hall's cancellation and contended that it was invalid as he had failed to facilitate access to the Property.

Melco lodged a caveat against the title to the Property to protect its claimed interest under the agreement. Melco then applied to the High Court to sustain it. The critical question before the courts was the validity of Mr Hall's cancellation.

¹ *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] 1 NZLR 59; [2022] NZSC 60.

² The parties used the term cancel but in reality meant void. For ease of reference in this article we used the better-known term cancellation.

The High Court and Court of Appeal

The High Court held that it was reasonably arguable that Mr Hall had a duty to facilitate access to the property so that Melco's engineer could inspect the Property. However, the Court ultimately determined that there was no link between Mr Hall's failure to facilitate access to the Property and Melco's failure to satisfy the due diligence condition because:

- a) Melco could have waived the due diligence condition and confirmed the Agreement without a seismic report therefore the ability to waive the condition was not affected by Mr Hall's actions.
- b) Even if Melco had access to the Property on 8 January 2020, there was no guarantee that a seismic report could be produced before 9 January 2020 (being the date for confirmation).
- c) Mr Hall was not obliged to grant an extension or respond to Melco's request.

The Court of Appeal agreed with the High Court's analysis and dismissed Melco's appeal.

The Supreme Court

The Supreme Court analysed the leading Australian and New Zealand case law on the extent to which a party can cancel a contract for non-performance of a condition when that party contributed to the non-fulfilment.

The Court concluded that while both parties had contributed to the non-fulfilment in this instance, the applicable test was whether Mr Hall had "materially contributed" to the non-fulfilment.

The Court considered that Mr Hall's failure to provide access to the Property on 8 January 2020 did materially contribute to the failure to fulfil the due diligence condition. The Court ordered that the caveat should not lapse and that the case is to proceed to a full trial.

Key takeaway

Melco highlights the risks of seeking to cancel a contract for non-fulfilment of a condition where the cancelling party may have contributed to the situation which is the basis for its cancellation.

For example, where a sale and purchase agreement is conditional upon the purchaser obtaining a building report, it would now appear unlikely that a vendor could cancel a

contract for non-fulfilment of that condition if it refused to provide the purchaser access to the property for that purpose.

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