IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA685/2021
[2022] NZCA 249

BETWEEN	FUTURE SUSTAINABLE DEVELOPMENT LIMITED Appellant
AND	WENJING LIU Respondent

Hearing:	9 May 2022
Court:	Miller, Goddard and Duffy JJ
Counsel:	R J Hollyman QC and N G Lawrence for Appellant D K Wilson for Respondent
Judgment:	14 June 2022 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order removing the appellant's caveat is set aside.

C The respondent must pay the appellant costs for a standard appeal on a band A basis with provision for two counsel.

REASONS OF THE COURT

(Given by Miller J)

[1] The short question on which this appeal turns is whether the purchaser might unilaterally waive a clause in an agreement for sale and purchase of sensitive land

making the agreement conditional on the purchaser or its nominee obtaining regulatory consent to purchase the property under the Overseas Investment Act 2005 (OIA).

[2] The purchaser, Future Sustainable Development Ltd (FSD), waived the condition before 1 October 2020, the final date for its fulfilment. The vendor, Wenjing Liu, took the stance that FSD could not waive the condition without her agreement. On 2 October she avoided the agreement for non-fulfilment of the condition and immediately agreed to sell the property to another buyer for a higher price.

[3] The trial Judge, Jagose J, found that the OIA condition was inserted for the benefit of both parties, so could not be waived by the purchaser alone.[1] He held accordingly that Ms Liu was entitled to cancel the agreement when she did, and he ordered removal of a caveat lodged to protect FSD's interest.[2] The caveat survives pending this appeal.

Narrative

[4] The facts are simple and not relevantly controversial. Ms Liu acquired the property, at 45 Woodford Avenue, Henderson, on 9 April 2020, as nominee for a company named Xinda International Group Ltd. Xinda is controlled by her husband, Wangliang Li, who acted on her behalf in subsequent negotiations with FSD.

[5] Monica (Yue) Hou is the sole director and shareholder of FSD. Her husband Luban (Xiaojiang) Chen, who is the company's Chief Executive, conducted the parties' negotiations.

[6] Mr Li and Mr Chen knew one another through a previous employer, and there had been discussions between them about financing the purchase of the Henderson property.

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1 *Liu v Future Sustainable Development Ltd* [2021] NZHC 2909, (2021) 22 NZCPR 767 [High Court judgment] at [29].

2 At [31].

[7] The agreement with which we are concerned was entered after Mr Chen told Mr Li around June 2020 that he was looking for a property to develop. Mr Li offered the Henderson property. During negotiations Mr Chen advised that an overseas person might acquire it and asked that the agreement be conditional on OIA consent. The agreement was also to be conditional on the issue of a resource consent for a development which would replace the existing dwelling with eight townhouses.

[8] There was some dispute in evidence about the terms of Mr Chen's advice about the overseas investor. Mr Li deposed that Mr Chen had made it clear that FSD itself would not complete the purchase and the purchaser would be an overseas investor. Mr Chen's account was that while there was a very high chance of onsale, it was always clear that FSD itself might complete the purchase. For reasons given at [19] below nothing turns on this difference of view.

[9] The agreement was made conditional on FSD, its unnamed "investor" and/or its nominee obtaining an OIA consent to purchase the land. In the event the condition was not fulfilled by 1 October either party might cancel the agreement.

[10] The agreement was executed on 18 June 2020, for a purchase price of $1,180,000. Mr Li signed the agreement in Ms Liu's name; no issue is taken with that. The due date for compliance with the OIA condition was 1 October 2020.

[11] During July FSD negotiated an agreement to onsell the property for $1,600,000 to a company, Hou Ching and Hou Lun Group Ltd (HCG), whose shareholder is said to have been an overseas person. It appears from Mr Chen's evidence that HCG's shareholder was the "investor" contemplated by the agreement. Although the evidence is unclear, it is possible that had this transaction proceeded FSD would have nominated HCG as purchaser under the agreement with the result that on settlement Ms Liu would have transferred the property to HCG. There is no suggestion that HCG would acquire an interest in FSD itself; this was to be an onsale from FSD to HCG. An agreement was concluded between FSD and HCG. It was subject to conditions including OIA consent. The evidence is that it was cancelled by agreement between HCG and FSD because of Ms Liu's refusal to settle.

[12] On 8 September Mr Li sought to negotiate an increase in price, saying that a neighbouring property had sold for more. Mr Chen refused to pay more.

[13] On 21 September, Ms Hou wrote to Ms Liu by email waiving conditions of the agreement requiring a resource consent and OIA approval. She declared the agreement unconditional. The email stated relevantly:

> Congrats! The investor's OIA application has been approved in principle. We are instructed to confirm that the purchaser condition (Clause 20.3) under the agreement is [waived]. Currently the purchaser side is unconditional.
>
> We understood that the Vendor has the obligation to satisfy Condition Clause 20.1 and Clause 20.2. As the OIA application has been approved in principle, the Clause 20.1 and Clause 20.2 condition is not critical for the Purchaser. The purchaser is happy if Clause 20.1 and Clause 20.2 to be [waived].
>
> Based on the Clause 21, the sunset settlement date is Oct.1st 2020. This email is the formal notice in [writing] that the condition in Clause 20.1, Clause 20.2, Clause 20.3 is [waived]. As the purchaser side is unconditional, we can make the settlement on any date before Oct.1st 2020. If you want to extend the sunset date after Oct.1st 2020, please note us as soon as possible.

[14] Jagose J noted that the claim that the OIA application had been approved in principle was said to be a mistake; it was intended to state that the investor's — meaning HCG's shareholder — New Zealand residence visa had been approved in principle. Nothing turns on that. What matters is that the parties agree the final paragraph of this email was effective to waive the OIA condition, if it were open to FSD to do so in law.

[15] Since giving this notice FSD has sought to complete the purchase itself. Mr Chen deposed that FSD would purchase the property itself, using its own funds. It appears that, having completed the transaction, FSD still intends to onsell to an overseas investor subject to OIA consent.

[16] On 22 September Mr Li advised Mr Chen that his own "investors" were unhappy that FSD had not obtained OIA approval or resource consent to develop the land. At the same meeting it was suggested that the purchase price would remain the same but Mr Chen would pay Mr Li an additional $50,000. The parties discussed what losses FSD might suffer if the agreement were cancelled. No agreement to increase the price was reached.

[17] On 2 October Ms Liu's solicitors gave notice cancelling the agreement for non-fulfilment of the OIA condition. On the same day she entered an agreement to sell to another party for $1,536,000.

[18] Caveats were lodged by both purchasers. Ms Liu brought proceedings seeking a declaration that she had lawfully cancelled the agreement. FSD counterclaimed, seeking specific performance.

The agreement for sale and purchase

[19] The agreement was in the standard ADLS/REINZ form (10th edition). It named Ms Liu as the vendor and FSD "and/or nominee" as the purchaser. Accordingly, FSD might give effect to the transaction and take title itself, or it might nominate another person to take title under the transfer.[3] Under cl 1.5(2) FSD remained liable for all the purchaser's obligations notwithstanding that it might nominate another person as transferee.[4] For these reasons Ms Liu could not, and does not, contend that FSD was a mere agent for an overseas principal.

[20] Special conditions were inserted. Relevantly, cl 20 provided that:

> 20 Conditions
>
> [20.1] The agreement is conditional upon the issue of resource consent for the lot(s) as per the attached plan in Annexure A.
>
> 20.2 The vendor shall forward a copy of the draft resource consent conditions to the purchaser for the purchaser's approval.
>
> 20.3 This agreement is conditional upon the Purchaser, the Purchaser's investor and/or its nominee obtaining an OIA consent to purchase the land under the Overseas Investment Act 2005(OIA).

[21] Clause 21.1 provided for the consequences of failure to satisfy any of the specified conditions by 1 October:

> 21 Sunset clause
>
> 21.1 If any of the conditions above are not satisfied by ~~15 October~~ (1st October) 2020, either party may, at any time before such condition is waived

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3 DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland) at [3.03].

4 Clause 1.5(2) applied where the purchaser executed the agreement with provision for a nominee or acted as agent for an undisclosed or unidentified principal.

> or satisfied by either party, cancel this agreement by giving written notice to the other, or extend the sunset date by mutual agreement.

[22] Clause 9.10 dealt generally with the operation of conditions, providing that either party might avoid the agreement for non-fulfilment of a condition and that at any time before the agreement was avoided either party might by notice waive any condition which was for the "sole benefit" of that party:

> 9.10 Operation of conditions
>
> If this agreement is expressed to be subject either to the above or to any other condition(s), then in relation to each such condition the following shall apply unless otherwise expressly provided:
>
> (1) The condition shall be a condition subsequent.
>
> (2) The party or parties for whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment.
>
> (3) Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.
>
> (4) The condition shall be deemed to be not fulfilled until notice of fulfilment has been served by one party on the other party.
>
> (5) If the condition is not fulfilled by the date for fulfilment, either party may at any time before the condition is fulfilled or waived avoid this agreement by giving notice to the other. Upon avoidance of this agreement, the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid by the purchaser under this agreement and neither party shall have any right or claim against the other arising from this agreement or its termination.
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> (6) At any time before this agreement is avoided, the purchaser may waive any finance condition and either party may waive any other condition which is for the sole benefit of that party. Any waiver shall be by notice.

[23] Clause 24.1 provided that the special conditions applied if there was any conflict between them and the general conditions.

[24] The box on the front page of the standard form listing certain conditions and allowing for them to be marked "Yes/No" was not completed; that is to say, the agreement did not specify on that page whether OIA consent was required or not required. Clause 9.6 of the general conditions provided for OIA consent or the

purchaser's decision to not require it, or failure to say anything about it, when completing the front page:

> 9.6 OIA consent condition
>
> (1) If the purchaser has indicated on the front page of this agreement that OIA consent is required, this agreement is conditional upon OIA consent being obtained on or before the OIA date shown on the front page of this agreement on terms and conditions that are satisfactory to the purchaser, acting reasonably, the purchaser being responsible for payment of the application fee.
>
> (2) If the purchaser has indicated on the front page of this agreement that OIA consent is not required, or has failed to indicate whether it is required, then the purchaser warrants that the purchaser does not require OIA consent.

[25] It is not in dispute that when the contract was entered cl 20.3 supplanted cl 9.6, by providing that the agreement was conditional on OIA consent. This might be debated; cl 20.3 was not in conflict with cl 9.6(1) to the extent that the latter required that consent be on terms satisfactory to the purchaser, acting reasonably. But cl 20.3 clearly left no room for the operation of cl 9.6(2).

[26] Counsel joined issue on whether cl 9.6(2) was "reinstated" or "resurrected" if FSD lawfully waived cl 20.3. For the appellants, Mr Hollyman QC argued that the purchaser's warranty in cl 9.6(2) was revived because following waiver there was no longer a conflict between cl 9.6 and the special conditions, and that the warranty adequately protected the vendor. It seems to us that the better view is that on waiver the agreement ceased to provide at all for OIA consent. The prerequisites to the warranty — an affirmative indication on the front page that consent is not required, or silence as to whether it is — would not be met. To waive OIA consent is not to assert that it is unnecessary. Nothing turns on the point, since on the view we take of this case no question of loss to the vendor arises. The only significance of the warranty is that, as we discuss below, it envisages there may be circumstances in which failure to obtain a necessary OIA consent causes a vendor loss.

The High Court judgment

[27] Jagose J observed that the question whether FSD might waive cl 20.3 was one of construction.[5] He cited the leading authorities on the point — this Court's judgments in *Globe Holdings Ltd v Floratos*[6] and *Hawker v Vickers*[7] — and, as to contract interpretation generally, the Supreme Court decision in *Bathurst Resources Ltd v L & M Coal Holdings Ltd*.[8] He gained little assistance from the parties' oral evidence, which tended to confirm only that this was an arm's-length transaction.[9]

[28] The Judge reasoned that cl 20.3 was not expressed as being for the sole benefit of any party,[10] while cls 20.1 and 20.2 arguably were for the purchaser's sole benefit.[11] He rejected an argument that waiver of cl 20.3 reinstated cl 9.6 and with it the purchaser's warranty that OIA consent was not required.[12] He found it arguable, though doubtful, that the OIA may treat the vendor as an associate of the purchaser and so at risk of prosecution for noncompliance.[13] Ultimately he rested his decision on the view that OIA consent may have implications for parties other than the purchaser.[14] That being so, cl 20.3 was not for the sole benefit of FSD and could not be waived unilaterally. It followed that Ms Liu lawfully avoided the agreement on 2 October 2020.[15]

The appeal

[29] For FSD, Mr Hollyman argued that, having regard to cl 20.3 itself, its insertion by the purchaser and the agreement as a whole, it is clear that the condition was inserted for the purchaser's benefit. Clause 21.1 contemplated unilateral waiver; and once it was waived cl 9.6 came into operation, importing a warranty that OIA approval was not needed. The vendor's only interest was in receiving payment. The proposition that the OIA created a benefit to the vendors was novel. There is no reason to think

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5 High Court judgment, above n 1, at [15]–[16].
6 *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (CA) at 334.
7 *Hawker v Vickers* [1991] 1 NZLR 399 (CA) at 402–403.
8 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
9 High Court judgment, above n 1, at [25].
10 At [22].
11 At [24].
12 At [29].
13 At [28].
14 At [29].
15 At [30].

the legislation captures a vendor. In any event, the question is one of contractual substance. It is not enough to find a minor benefit to the other party as a matter of fact; it is necessary rather to decide whether the parties intended that the condition exist for the sole benefit of one of them. So, for example, a finance condition is generally considered to be for the sole benefit of the purchaser, notwithstanding that it may provide a vendor with some comfort that finance has been arranged and the opportunity to cancel once the time for fulfilment elapses. Counsel submitted that on the evidence, the vendor was selling to a New Zealand entity controlled by New Zealand residents.

[30] For Ms Liu, Mr Wilson submitted that waiver of cl 20.3 did not reinstate cl 9.6; that being so, the agreement did not specify for whose benefit the condition was inserted. The agreement identified the purchaser as FSD or nominee, and of course the nominee might be a person who required OIA consent. It is clear that the parties had in mind an overseas investor. The condition works in part for the benefit of the vendor, because non-fulfilment was a future contingency that might affect the vendor. The condition also protected the vendor, who might be an associate of the purchaser, or a party to a criminal offence, against non-compliance with the Act.

Waiver of a condition inserted for a party's sole benefit

[31] As noted, the agreement provided that either party might waive any condition which was for its "sole benefit". That reflects the rule at common law. As this Court explained in *Hawker v Vickers*, still the leading authority:[16]

> A party may waive a condition or provision in a contract which is solely for that party's own benefit and is severable.

It is not in dispute that the OIA condition in this agreement is severable; that is to say, it is independent of any other condition affecting the agreement.[17]

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16 *Hawker v Vickers*, above n 7, at 402.
17 See *Marima Valley Farm Ltd v Bartholomew* [2010] NZCA 441 at [19] n 12.

[32] The fact that the agreement provides that either party may avoid the agreement in the event a condition is not satisfied by its fulfilment date does not establish that the condition exists for the benefit of both parties, as the Court went on to explain:[18]

> … there is nothing inconsistent in providing expressly or by necessary implication for unilateral waiver of a condition up to a certain date and thereafter for allowing either party to avoid the contract for nonfulfilment of the condition. Such a provision simply recognises the commercial reality that the nature and significance to the parties of a condition in a contract may change over time or at a point in time. If the contract is fulfilled or waived, the parties then have the certainty of an unconditional contract. If not fulfilled or waived by the nominated date, each is free to end the contract by appropriate notice to the other.

[33] The question whether a condition is for a party's sole benefit is one of construction of the agreement, turning on whether the stipulation is in terms or by necessary implication for the exclusive benefit of that party.[19]

[34] In *Hawker v Vickers* and *Globe Holdings Ltd v Floratos* the Court went on to hold that oral evidence of the parties' intentions and of the course of negotiations is inadmissible.[20] That statement is no longer good law in New Zealand following *Bathurst Resources*, in which the Supreme Court rejected the exclusionary rule and held that prior negotiations may be admissible background where relevant to the search for objective shared meaning.[21] As will be seen, the decision in this case does not turn on the parties' negotiations. Their subsequent conduct does not bear on interpretation either, but is relevant because it concerns the exercise of rights conferred under the agreement.

[35] When deciding whether a condition is by necessary implication for the benefit of one party it is usually appropriate to enquire what is the other party's interest in performance of the condition, as Blackburne J held in *Irwin v Wilson*.[22] The condition in that case related to provision of a plan showing the correct location and floor layout of premises the lease of which was being sold. The Court held that, if the condition

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18 *Hawker v Vickers*, above n 7, at 403; followed in *Globe Holdings Ltd v Floratos*, above n 6, at 339; and *Marima Valley Farm Ltd v Bartholomew*, above n 17.

19 *Hawker v Vickers*, above n 7, at 402–403; and *Heron Garage Properties Ltd v Moss* [1974] 1 WLR 148 (Ch).

20 *Hawker v Vickers*, above n 7, at 403; and *Globe Holdings Ltd v Floratos*, above n 6, at 334.

21 *Bathurst Resources*, above n 8, at [44], [48], [70] and [76].

22 *Irwin v Wilson* [2011] EWHC 326 (Ch) at [25]–[26].

was performed, and if the transaction settled, the vendor no longer had any interest in the property of which he was no longer the owner; defects in his former title ceased to be of concern to him. That being so, the condition was for the exclusive benefit of the purchaser.[23]

[36] In *Erceg v Balenia Ltd* this Court suggested that one tests whether a clause or condition is for the benefit of a particular party by asking whether, if that clause were removed, the other party would complain.[24] The cases we have cited show that in practice other parties may sometimes complain about the loss of an advantage, such as the right to cancel for non-fulfilment. However, the Court's rhetorical question was clearly addressed to the other party's alleged interest in performance of the condition. The case concerned a condition that the vendor was to provide the purchaser's agent with evidence of its clear title to the movable property being sold. The Court held that the vendor manifestly would not have complained if the obligation to satisfy the purchaser as to its title had been removed.[25]

[37] Consistent with these authorities, a finance condition has traditionally been regarded as for the sole benefit of the purchaser notwithstanding that a vendor may take comfort from the knowledge that finance has been arranged, and notwithstanding that in the event of failure to arrange it by the fulfilment date the vendor may avoid the agreement.[26] The cases adopt the stance that the vendor's interest lies in being paid, not in the source of funding; and this is so notwithstanding that the purchaser's capacity to settle may in fact depend on third party financing.[27] And as the Court explained in *Hawker v Vickers*, the vendor is obliged to complete notwithstanding the loss of the advantage conferred by the right to avoid the agreement if the condition is unfulfilled by due date.[28]

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23 At [26].
24 *Erceg v Balenia Ltd* [2009] NZCA 48, [2009] NZCCLR 32 at [46].
25 At [46].
26 *Globe Holdings Ltd v Floratos*, above n 6, at 338; and *Graham v Pitkin* [1992] 1 WLR 403 (PC) at 405. The agreement in this case expressly provided that the purchaser might waive a finance condition.
27 *Globe Holdings Ltd v Floratos*, above n 6, at 338; and *Graham v Pitkin*, above n 25, at 405.
28 *Hawker v Vickers*, above n 7, at 402–403

[38] A condition that the agreement is subject to resource consent for the purchaser's intended use is often, but not invariably, for the sole benefit of the purchaser.[29] In this case, it is not now in dispute that special conditions 20.1 and 20.2, making the agreement conditional on a resource consent for development of the property and the purchaser's approval of draft resource consent conditions, were for the sole benefit of the purchaser and were waived in Ms Hou's email of 21 September.

[39] However, it appears that the question whether an OIA consent condition is for the purchaser's sole benefit has not previously been answered. As noted, the Judge tentatively answered it by reasoning that a vendor may be deemed an associate of the purchaser for purposes of the OIA. We turn to that issue.

Vendor not an associate of the purchaser for OIA purposes

[40] The Act's purpose is to regulate investment by overseas persons in sensitive New Zealand assets by requiring that overseas investments in those assets meet criteria for consent and by imposing conditions on such investments.[30] A transaction resulting in an overseas investment in sensitive land, which includes residential land,[31] requires consent under the Act, and consent must be obtained before the investment is given effect under the transaction.[32] For residential land, the criteria for consent include, by way of illustration, a commitment to reside in New Zealand and the provision of increased housing.[33] The decision is made by a delegate of the Minister responsible for the administration of the Act.[34] In practice decisions are delegated to the Chief Executive of Land Information New Zealand, which contains the Overseas Investment Office (OIO) and is also the regulator under the Act.

[41] An overseas person is relevantly an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand.[35] The definition includes a body corporate if an overseas person or persons have more than 25 per cent of any class of

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29 *Globe Holdings Ltd v Floratos*, above n 6; and *Heron Garage Properties Ltd v Moss*, above n 19.
30 Overseas Investment Act 2005 (OIA), s 3.
31 Schedule 1.
32 Sections 10–12.
33 Section 16 and sch 2 cl 11.
34 Sections 30 and 32.
35 Section 7(2)(a).

its securities.[36] We understand it to be common ground that Ms Hou and Mr Chen are not overseas persons; that being so, FSD was at all material times not an overseas person. We record that we did not hear argument on the question whether the regulator may reject an application which does not require consent. We express no view about that.[37]

[42] Each overseas person or associate making the overseas investment must apply for consent to an overseas investment transaction.[38] "Associate" receives an extended definition aimed at an overseas person's control, direction or influence over the associate.[39] One person may be an associate of another if they act jointly or in concert in relation to the overseas investment, or if they participate in the investment as a consequence of any arrangement or understanding with the overseas person.[40] As noted earlier, the Judge drew attention to these provisions, but doubted whether they are intended to capture an arm's-length vendor selling to an overseas person.[41]

[43] We do not exclude the possibility that there may be circumstances in which a vendor makes an investment in sensitive land as an associate of the purchaser. But on the evidence Ms Liu's role was that of a vendor only. She was not making an overseas investment as an associate of FSD; and that being so, she did not attract an obligation to seek consent under s 22.

The vendor's interest in the purchaser's OIA compliance

[44] Section 29 of the Act provides for the consequences of the transaction for which consent is required being given effect to without that consent:

> **29 Transaction may be cancelled**
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> (1) A transaction for which consent is required under this Act and under which the overseas investment has been given effect without that consent—

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36 Section 7(2)(d).

37 As a matter of practice, the Overseas Investment Office website appears to contemplate that an application may result in a decision that no application was necessary.

38 Section 22.

39 Section 8(a)–(b).

40 Section 8(c)–(d).

41 High Court judgment, above n 1, at [28].

(a) is not an illegal contract for the purposes of subpart 5 of Part 2 of the Contract and Commercial Law Act 2017; and

(b) is not void only because the overseas investment has been given effect to without the requisite consent or because giving effect to the overseas investment without the requisite consent is an offence; but

(c) may be cancelled by—

(i) a party to the transaction who was not required to obtain consent to the transaction under this Act, by giving notice in writing to all the other parties; or

(ii) the court, on the application of the regulator.

(2) On cancellation under this section,—

(a) the court has the same powers as it has under sections 43 to 48 of the Contract and Commercial Law Act 2017; and

(b) if the court orders the cancellation on the regulator's application, the court may also make any other order necessary to give effect to the cancellation.

[45] It will be seen that such transaction is not by definition an illegal contract, and it is not void merely because it has been given effect to without the requisite consent, or because giving effect to the overseas investment without consent is an offence. Rather, the transaction may be cancelled by a party to it who was not required to obtain consent, or by a court on the application of the regulator.

[46] It follows that if we assume FSD, or a nominee to whom it directed that Ms Liu should transfer the property, did require consent under the Act, then the consequence is that the transaction might be completed and Ms Liu would not act unlawfully merely by doing so. However, under s 29 she might cancel at her election after the transaction had been given effect. The transaction would have been given effect at the point where the OIA consent was waived; that is so because the purchaser would have acquired an equitable interest in the land, and the express exclusion from the definition of "give effect to an overseas investment" of acquisitions that are conditional on consent would no longer apply.[42]

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[42] Section 6; and *Nopera Log House Ltd v Godsiff* [2014] NZHC 639, (2014) 15 NZCPR 144 at [40].

[47] If a party is entitled to cancel under s 29, and does so, the court may exercise the same powers as it has under ss 43 to 48 of the Contract and Commercial Law Act 2017. These include directing a party to transfer property to any other party, or to pay to any other party such sum as the court thinks just.[43]

[48] These powers might also be exercised on the regulator's application for cancellation. The regulator might also invite the transferee by notice under s 41F to dispose of the property, which may meet the regulator's objective with respect to foreign ownership of sensitive land. Disposal relieves the transferee of liability for some breaches of the Act.[44]

[49] Any person required to apply for consent commits an offence under s 42 if that person gives effect to the transaction without consent. And under s 43 any person also commits an offence who knowingly or recklessly enters a transaction, executes an instrument, or takes any other step for the purpose, or with the effect, of in any way defeating, evading or circumventing the Act. Mr Wilson focused on this latter provision, arguing that Ms Liu was potentially at risk of prosecution, directly or as a party under s 66 of the Crimes Act 1961, should she transfer the property to a person who required OIA consent but had not obtained it.

[50] This survey of the legislation suggests that there are several circumstances in which a vendor may have an interest in a purchaser obtaining OIA consent where the purchaser requires it under the Act. First, the purchaser, having failed to obtain consent, may decline to settle, leaving the vendor to its remedies under the contract. The vendor would likely have to cancel and sue for damages. This is analogous to the position of a vendor whose purchaser has waived a finance condition but then failed to settle. Because it reduces the risk that the purchaser will default, consent is an advantage to the vendor, but it does not follow that the OIA condition was for the vendor's benefit. That remains the case notwithstanding that the vendor's remedies might not include specific performance, which a court would refuse if it resulted in an overseas person giving effect to the transaction by making an investment in sensitive land contrary to the Act.

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43 Contract and Commercial Law Act 2017, s 43(3).
44 OIA, s 41G.

[51] Second, the regulator might take action under s 29 to cancel the contract after settlement, with the result that subject to the court's remedial discretion under the Contract and Commercial Law Act the vendor might have to refund the purchase price, less any damages awarded, in return for getting the property back. Third, the vendor might be prosecuted under s 43 if it knowingly or recklessly did anything with the intent or effect of circumventing the Act.

[52] On the record before us, which does not include any evidence as to the regulator's publicly notified enforcement policy when this contract was entered, the latter possibilities must be considered unlikely in this case. We have explained that the Act does not treat the vendor as a wrongdoer merely by reason of being party to the transaction. On the contrary, the agreement is not illegal and may be completed unless the vendor chooses to cancel or the regulator intervenes under s 29. The regulator can achieve the object of the legislation by requiring that the purchaser resell to someone else. For these reasons, an arm's-length vendor would seem to be at low risk of being required to disgorge the purchase price and resume ownership.

[53] We noted earlier that cl 9.6(2) of the standard form agreement was excluded in this case by special condition 20.3 but remains of interest because it contemplates that a vendor may suffer loss from the breach of a purchaser's warranty that the purchaser does not require OIA consent. For the reasons we have just given, the clause may be taken to envisage that such loss might arise if the purchaser declines to settle because it would breach the Act by doing so, or in the event of regulatory intervention affecting the vendor after settlement. We accordingly agree with Jagose J that there are circumstances in which a purchaser's OIA non-compliance may have implications for a vendor.

OIA consent for the purchaser's sole benefit

[54] That brings us to the question whether cl 20.3 was for the sole benefit of FSD. The question is one of construction of the agreement, as we have explained. The fact that a condition confers an advantage on the other party is not conclusive. The parties may assign risk as they see fit.

[55] Clause 20.3 was introduced at the purchaser's request. On its face, it was intended to ensure the transaction could proceed lawfully if FSD introduced an overseas investor. It did so by making the agreement conditional on FSD, its unnamed investor and/or nominee obtaining OIA consent. The agreement accordingly envisaged that a person giving effect to the transaction, whether FSD or another party, might require OIA consent. But it also envisaged that FSD might not introduce an overseas investor; a nominee could be anyone and FSD might complete the transaction using its own resources.

[56] We have explained that FSD was not in fact an overseas person at any material time. However, it might require consent if it became an associate of the overseas investor or if the investment involved the investor acquiring a qualifying shareholding in FSD itself. Neither of these things happened in fact — as explained above, the investment was to take the form of an onsale to HCG, not a sale of shares in FSD — but the agreement indicates they were in the parties' contemplation when it was entered.

[57] The right to introduce an overseas investor could be exercised unilaterally and the OIA condition supported that right. That suggests strongly that the parties contemplated FSD might unilaterally waive compliance with the OIA condition if it elected not to introduce an overseas investor. Should it give effect to the transaction itself, or should it nominate a transferee who did not need consent, an application for consent would be redundant. (As noted earlier, we did not hear argument on the question whether the OIO might decline consent in such circumstances.) Unless FSD could waive the condition it would nonetheless be contractually obliged to obtain consent for itself or nominee if it wished to prevent Ms Liu from avoiding the agreement after the fulfilment date.

[58] Because there was no commitment to an investment by HCG when the condition was waived on 21 September 2020, it could not be said at that time that FSD or its nominee needed OIA consent. FSD was neither an overseas person nor an associate making an overseas investment for purposes of s 22. On the facts as they stood then it would not contravene the Act by taking title itself.

[59] The possibility remained at that time, and still remains, that on settlement FSD might nominate an overseas person as transferee. Ms Hou's email of 21 September 2020 did not preclude that. So it is possible that Ms Liu might be required to transfer the property to a person who needed OIA consent but had not obtained it. We observe that these contingencies affect any arm's-length transaction in which an agreement is silent as to OIA consent (or in which the vendor warrants that it is not required). Ms Liu might learn of the transferee's identity when the transfer was tendered on settlement and she might be told nothing of the transferee's status under the OIA.

[60] Benefit is a matter of substance. We have explained that the substance of OIA consent is that an overseas person needs it to purchase sensitive land. The legislation gives a purchaser who needs consent powerful incentives to obtain it, while a vendor's interest in the purchaser's OIA compliance is both less immediate and less powerful. In the factual circumstances we have just outlined, any risk of regulatory action against Ms Liu must be considered slight. We add that given the disparity between the price at which the property was sold to FSD and the property's market value, it also seems unlikely that FSD would need or choose to risk cancellation under s 29 by nominating an overseas person to whom Ms Liu must transfer the property. It would make more sense to arrange back-to-back transactions if FSD still wanted to onsell to an overseas person who did not have OIA consent at that time.

[61] For these reasons we conclude that the OIA condition in this agreement was for the sole benefit of the purchaser. FSD was accordingly entitled to, and did, waive the condition before the fulfilment date.

Decision

[62] The appeal is allowed. It is not in dispute that, the waiver being effective in law, FSD is entitled to an order for specific performance of the agreement. There will be an order accordingly. The order removing FSD's caveat is set aside. The status of the caveat lodged by the person to whom Ms Liu resold the property on 2 October 2020 remains to be resolved in other proceedings.

[63] FSD having succeeded, Ms Liu must pay costs for a standard appeal on a band A basis with provision for two counsel.

Solicitors:
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