IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA678/2025
[2025] NZCA 609

BETWEEN	MICHAEL DAVID SIDEY Appellant
AND	NGATAPA LIMITED Respondent

Hearing:	3 November 2025
Court:	Cooke, Walker and Cull JJ
Counsel:	R B Butler and T P Refoy-Butler for Appellant B M Russell for Respondent
Judgment:	20 November 2025 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Cooke J)

[1] Mr Michael Sidey seeks to appeal from a decision of the High Court dismissing his application to sustain a caveat.[1] The caveat had been lodged in relation to an agreement for sale and purchase dated 8 July 2025 for the sale of a rural property in Christchurch for $7.75 million. Associate Judge Lester held that the contract had been

[1] *Sidey v Ngatapa Ltd* [2025] NZHC 3056 [judgment under appeal].

validly cancelled by the respondent after Mr Sidey had not confirmed the contract as unconditional under its terms. He rejected Mr Sidey's argument that the respondent had affirmed the contract after Mr Sidey had not confirmed the contract as unconditional within the time required.[2]

The relevant facts

[2] There are no material factual disputes.

[3] The agreement for sale and purchase dated 8 July 2025 (the Agreement) was on standard ADLS/REINZ terms. The relevant land involved 198.2447 hectares of rural land at Coutts Island Road in Christchurch. The Agreement was subject to a number of special terms, including a due diligence clause in the following terms:[3]

> **35 DUE DILIGENCE**
>
> 35.1 This Agreement is conditional upon the Purchaser being entirely satisfied that the property is suitable to them at the agreed price and for their intended uses following the Purchaser undertaking a due and diligent investigation of the property which may include (without limitation).
>
> a) Architectural and engineering analysis in respect of the buildings.
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> b) The property's compliance with the Resource Management Act 1991 and the Building Act 2004 including future compliance given the Purchaser's proposed uses of the property.
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> c) A valuation report by a registered valuer appointed by the Purchaser.
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> d) A review of the Certificate of Title, Easements and EQC Claims.
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> e) The obtaining of a satisfactory Land Information Memorandum from the local territorial authority.
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> f) An assessment of the overall financial suitability of the Purchaser's proposed investment in the property.
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> g) Securing finance upon terms and conditions satisfactory to themselves.

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2 At [54]–[56].
3 Emphasis in original.

35.2 The parties acknowledge that the satisfaction of clause 35.1 shall be at the sole discretion of the Purchaser and that if the condition is not fulfilled due to the Purchaser not being satisfied with any aspect of the property the Purchaser shall not be obliged to state any reason for the Purchaser's lack of satisfaction.

35.3 The time for satisfaction of the conditions in clause 35.1 shall be confirmed with **fifteen (15) working days** from the date of this agreement.

35.4 The parties acknowledge that clause 35.1 is inserted for the sole benefit of the Purchaser and may at any time prior to the Agreement being voided be waived by the Purchaser giving written notice of waiver to the Vendor.

35.5 The parties acknowledge that the Purchaser may elect to employ independent consultants at the Purchaser's cost to prepare a report on the property and that the Vendor will at all reasonable time and upon reasonable notice provide or cause to be provided access to any necessary part of the property to enable the consultants to undertake the report.

[4] The standard terms included a clause relating to conditions of this kind in the following terms:

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.

(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.

The Agreement also provided that all notices were required to be given in writing.

[5] Mr Sidey did not give confirmation by the date specified in cl 35.3. But the parties expressly agreed to an extension of that time on two occasions, first extending the time to 30 July 2025, and the second extending time to 5.00 pm on 4 August 2025.

[6] Mr Sidey did not give confirmation by the extended date and time on 4 August 2025, however discussions continued between the parties beyond that date. Those discussions focused on three matters. First, Mr Sidey wanted to check the position regarding previous EQC claims associated with the farmhouse located on the site. Secondly, Mr Sidey wanted to ensure that the full suite of water allocation rights associated with the farm property would be transferred on settlement. Lastly, Mr Sidey wanted to commence grazing on the property before the proposed settlement on 13 October.

[7] Progress was made on the outstanding items with proposals to vary the terms of the Agreement. For example, the parties agreed on varied terms in relation to the water rights so that those rights would be confirmed after varied terms were agreed. By email dated Wednesday 6 August from Ms Lucy Robinson of the vendor's solicitors (Anthony Harper) to Ms Olivia Macgregor of Mr Sidey's solicitors (Tavendale & Partners), Ms Robinson summarised the negotiations and the areas of potential agreement. Her email ended:

> These terms are still subject to the vendor's final approval. The intention is that once further terms are agreed, due diligence is then confirmed and the agreement is unconditional, with your client's option to cancel if the water consent is not transferred with the full allocation.

[8] On the morning of Thursday 7 August, the respondent's real estate agent then sent an email to Mr Sidey further summarising the negotiations, which included outlining the details that were to be agreed that day. For example, his email said:

> 1. [Mr Sidey] to go unconditional on all matters except transfer of water (i.e. today)

[9] At 4.32 pm that afternoon, Ms Robinson sent Ms Macgregor an email in the following terms after further negotiations:

> Thanks Olivia, we are very close, just a few amendments to the final clause below which are to reflect that the agreement is around grazing by the purchaser prior to settlement, rather than early possession, with some comments below.

And after setting out a marked-up version of the grazing clause, the email ended:

> Can you give me a call if any queries. If these are now agreed I can circulate a final copy of the further terms that have been amended and ask for your confirmation by return that the further terms are varied as per the attached, due diligence is confirmed and the agreement is unconditional.

[10] Ms Macgregor replied four minutes later, saying:

> Thanks Lucy. This is consistent with [Mr Sidey]'s instructions to me earlier this afternoon, so if you could provide the final further terms that would be great.

[11] Nothing further happened that day or the following morning. It appears, however, that the respondent received an offer to purchase the property from another potential purchaser for a higher amount. At 11.43 am the following day, Friday 8 August, Ms Robinson sent an email to Ms Macgregor, saying:

> Our client has instructed us to terminate this agreement, as due diligence has not been confirmed prior to the extended deadline for satisfaction of due diligence.
>
> We record that the agreement is now at an end.

[12] This termination was disputed by Mr Sidey, who then lodged a caveat, which was subsequently subject to the application to maintain the caveat considered by the High Court. In his judgment, Judge Lester dismissed that application, rejecting Mr Sidey's argument that the respondent had affirmed the Agreement. He held:[4]

> [49] I do not find an arguable election to affirm in Ngatapa's email of 7 August 2025 at 4.32 pm. In this email, Ngatapa was not making an unequivocal election to affirm the Agreement following a failure by Mr Sidey to confirm the due diligence condition. The high point was that as at 4.32 pm on 7 August 2025, the agreement was still alive and the due diligence condition remained unsatisfied. Ngatapa recorded that due diligence needed to be confirmed and called for confirmation by return, as had been agreed

[4] Emphasis in original.

> would happen (save as to water) in the email of 7 August 2025 at 10.15 am. Ngatapa, through to 7 August 2025, was "merely keeping the question open" of whether to avoid or affirm. In calling for confirmation of due diligence, Ngatapa was not abandoning its right to avoid for the due diligence condition not being confirmed. As I have said, Ngatapa was keeping that option alive. Calling for confirmation of the due diligence condition of itself signals that Ngatapa was not affirming the Agreement following due diligence being not confirmed by 5.00 pm on 4 August 2025. Essentiality of time in respect of due diligence had not been lost because there had not been affirmation.
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> [50] The context of the 7 August 2025 email at 4.32 pm is Mr O'Brien's email of 10.15 am on 7 August 2025 requiring confirmation by the end of that day. Ms Robinson asks if the terms as amended in the email are agreed and if so, she will circulate a copy of the final terms. The email then sets out *additional* requirements. The steps called for by Ms Robinson after the words "*and* ask for your confirmation by return" were to be completed, as the email says, "by return".

The appellant's argument

[13] For Mr Sidey, Mr Butler argues that the respondent had affirmed the Agreement prior to cancellation by clear words and conduct. Conditional contracts such as the Agreement give rise to equitable, and therefore caveatable, interests in land. Moreover, the Judge had failed to apply the threshold of whether the conduct of the respondent could reasonably be argued to amount to affirmation.

[14] The interpretation of the email exchanges by the Judge was not reasonably available. Rather than keeping its options open, the respondent was conveying that it was keeping the Agreement with Mr Sidey on foot. At the very least the email exchanges amounted to an arguable case of affirmation. The respondent had been under no obligation to continue to negotiate the further terms, or confirm a settlement date, if the Agreement was at an end. Instead, it elected to treat the Agreement as if it was ongoing.

[15] In terms of the legal principles, *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* confirmed that it is enough for the applicants to put forward a reasonably arguable case to support their interests in the land.[5] In terms of affirmation,

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5 Citing *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* [2022] NZCA 218, (2022) 23 NZCPR 259 at [80].

comparatively minor words and conduct by an innocent party can be regarded as an election to affirm an agreement.[6]

[16] For the respondent, Mr Russell relies on the analysis undertaken by the Judge.

Analysis

[17] We do not accept Mr Butler's argument that the Judge erred by not recognising that a caveatable interest can arise if there is an arguable case to sustain the caveat. A caveat can be sustained if the applicant puts forward a reasonably arguable case of an interest in the land.[7] But here there were no further inquiries relevant to assess whether there was such an interest in the land. The relevant events were clear and enabled the Court to draw a conclusion on whether a caveatable interest existed as a result. Either there was an enforceable agreement to sell the land arising from the exchanges between the parties, or there was not. There was no factual dispute in relation to the key events, and further evidence was most unlikely to alter the conclusions that could be drawn from the events described in the affidavit evidence.

[18] Neither do we consider that this is a case that turns on the principles of affirmation. An affirmation must be clear and unequivocal.[8] But here, after 4 August, the parties were proceeding to negotiate varied terms of an agreement for sale and purchase of the land. Those negotiations proceeded on the assumption that Mr Sidey was not prepared to confirm the terms of the contract of 8 July 2025 within the required time, but required additional terms. So, it is clear from the communications that neither party was confirming that the Agreement was binding upon them. Moreover, Mr Sidey had expressly sought extensions of time for electing to make the Agreement unconditional on two occasions. But he did not do so beyond 4 August. What then followed was a negotiation on varied terms. We do not consider that it can be said that the respondent was affirming the Agreement by engaging in those negotiations. Those negotiations proceeded on the basis that the Agreement had not been made binding,

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6 Relying on *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300 (CA) at [25].

7 *Philpott v Nobel Investments Ltd* [2015] NZCA 342 at [26], approved in *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60, [2022] 1 NZLR 59 at [56].

8 *Kipling v Van Kan* [2012] NZCA 163 at [33].

and at no stage did the respondent expressly or implicitly say it would not exercise its right to cancel as a consequence.

[19] The real issue is whether the email exchanges between the parties, in the context of their earlier, and unconfirmed, conditional contract, amounted to a binding agreement in varied terms. On that question, we agree with the Judge that it did not. It is clear that the parties came very close to reaching such an agreement—indeed, that was the very expression Ms Robinson used in her email to Ms Macgregor at 4.32 pm on 7 August. But that email also identified what needed to happen before a binding agreement on varied terms was entered, namely:

(a) Mr Sidey had to confirm his agreement to the marked-up version of the grazing clause Ms Robinson had sent;

(b) if he did, Ms Robinson was to be advised, and then Ms Robinson would circulate a final copy of all the further terms and conditions;

(c) on receipt, Ms Macgregor would then confirm by return that those terms were agreed, that the due diligence clause was satisfied, and the agreement as varied was accordingly unconditional.

[20] We do not accept Mr Russell's argument that those steps all had to be completed on 7 August because the real estate agent's earlier email had stated these steps had to be done that day. We consider that Ms Robinson's email of 4.32 pm superseded that, and it had no specific time frames. But we accept Mr Russell's argument that the email set out requirements that had to be undertaken before the agreement, as varied, would be treated as entered. That did not require the parties to formally sign a varied agreement. But it nevertheless outlined steps that were to be undertaken before the new agreement was to be formed.

[21] Only one step in that process had been completed. Ms Macgregor had confirmed that the proposals were consistent with Mr Sidey's instructions. Under the process Ms Robinson had outlined, the next step was for Ms Robinson to send

Ms Macgregor a document containing all the varied terms, following which Ms Macgregor would confirm the three matters referred to in [19(c)] above.

[22] Those further steps never took place. The proposal in Ms Robinson's email of 4.32 pm was withdrawn as a consequence of the email sent the following day which cancelled the Agreement, and effectively withdrew the respondent's offer to enter the Agreement on the varied terms that had been negotiated.

[23] This was a contract for the sale of a significant farm. It was entered on the standard ADLS/REINZ terms, which itself contains formalities. The critical negotiations were conducted between solicitors in which the requirements for forming an agreement in amended terms were clearly set out. Those requirements were not satisfied prior to the respondent advising it was no longer prepared to agree to them.

[24] Mr Sidey negotiated extensions of time for satisfaction of the due diligence clause prior to 4 August, but elected not to do so after 4 August. From that time the respondent was entitled to cancel the Agreement. By not seeking and obtaining an extension of time for the compliance with the due diligence clause, Mr Sidey exposed himself to the risk that the respondent could cancel for a failure to confirm the condition within the time required. It may well be that this possibility was considered to be unlikely given the parties were negotiating comparatively minor terms for a varied agreement. But the risk nevertheless existed.

[25] Mr Sidey was very unlucky that an alternative purchaser offering a better deal emerged, and the respondent was equally lucky that one did. But there is no binding agreement until there is a binding agreement. The original Agreement was validly avoided by the respondent under cl 9.10(5), as Mr Sidey had not given notice under cl 9.10(4) that the conditions in cl 35 of the further terms of sale were satisfied within the required time, and the proposed varied agreement was never entered.

Result

[26] The appeal is dismissed.

[27] The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
Holland Beckett, Tauranga for Appellant
Lane Neave, Christchurch for Respondent