

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA814/2024
[2026] NZCA 220

BETWEEN GREEN CITY DEVELOPMENTS
LIMITED
Appellant

AND MURPHYS PARK DEVELOPMENT LP
Respondent

Hearing: 30 July 2025

Court: Courtney, Powell and Cull JJ

Counsel: J D McBride and F L Chan for the Appellant
E St John and D L C Liu for the Respondent

Judgment: 2 June 2026 at 12 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant is to pay the respondent costs for a standard appeal on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Powell J)

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Introduction

[1] Green City Developments Ltd (Green City) and Murphys Park Development LP (Murphys Park) are property developers who, in 2016, were seeking to develop adjoining properties in Flatbush, Auckland. Murphys Park agreed to sell a block of land to Green City. This land was referred to as the boundary adjustment land (BAL). It sat on the Murphys Park side of the boundary between the two properties. The necessary connection of services to the BAL (the enabling works) had to be provided from the Murphys Park land.

[2] Green City on-sold the BAL to a third party (the on-sale). Settlement of the on-sale was conditional on Green City providing a separate title from the BAL, which in turn was dependent on Murphys Park completing and vesting the enabling works. Settlement was to take place 10 working days after the BAL received a separate title or on 31 July 2017, whichever was the later date.

[3] The enabling works were not completed within the time initially agreed, nor within the further time agreed in a variation of the agreement. Completion of the enabling works was further complicated by a land swap provided for in the variation agreement, which altered the original boundaries of the BAL land. This meant that work to move power lines underground pursuant to an agreement with Transpower New Zealand Ltd (Transpower) (to which Green City, Murphys Park and other local developers were party) would cut across part of the BAL.

[4] The enabling works were eventually completed in August 2021. Title to the adjusted BAL was issued in March 2024 and the on-sale settled in April 2024.

[5] In proceedings brought by Murphys Park against Green City to recover money held on trust to secure Murphy Park’s obligation to complete the enabling work and to receive payment for other work it had undertaken, Blanchard J:¹

- (a) allowed the claims by Murphys Park for the cost of earthworks carried out by it on behalf of Green City;² but
- (b) dismissed Green City’s counterclaim which had alleged the time to connect services to the BAL breached Murphy Park’s obligation to take all reasonable commercial endeavours to complete that connection as soon as possible.³

[6] On appeal, Green City contends the Judge:

- (a) misinterpreted Murphys Park’s obligation to take “all reasonable commercial endeavours” when completing the enabling works (Ground one);
- (b) failed to apply the correct burden of proof (Ground two);
- (c) failed to reconcile Murphys Park’s “contradictory positions” (Ground three);
- (d) failed to “consider” expert evidence (Ground four);
- (e) misunderstood the meaning of “completion” (Ground five);
- (f) incorrectly calculated the interest payable on the second period of loss (Ground six); and (in relation to the claim by Murphys Park)
- (g) erred in concluding the costs of filling in a sediment control pond should be met by Green City (Ground seven).

¹ *Murphys Park Development LP v Green City Developments Ltd* [2024] NZHC 3572 [judgment under appeal].

² At [146]–[148].

³ At [145].

Relevant background

[7] The BAL comprised 2.5669 hectares block of land to Green City. As noted, it was situated on Murphys Park's side of the boundary between its property and that owned by Green Park. The agreement for sale and purchase in respect of the BAL dated 22 May 2016 (BAL agreement) relevantly provided:

19. Subdivision Consent & Settlement

Subdivision Consent & Settlement should be finished and provided to the purchaser on/before 15-12-2016. [Murphys Park] must provide updates to [Green City] from time to time. Any extension needs to be approved by both parties.

20. Enabling Works(services) to the property.

All costs relating to the enabling works (including roads, services, water main, stormwater, sewer, power, gas, telephone line, internet etc..) will be paid/covered by [Murphys Park].

The capacity of all the services must be enough for [Green City]'s developments in the future in the property.

All enabling works shall finish on/before 01/10/2017. [Murphys Park] must provide updates to [Green City] from time to time. Any extension needs to be approved by both parties.

[8] On 14 July 2016, Green City on-sold the BAL to a third party for \$11.25 million. A deposit of \$7.5 million was paid by the purchaser.⁴ Settlement of the on-sale was conditional on Green City providing a separate title from the BAL to the purchaser, which in turn was dependent on Murphys Park completing and vesting the enabling works referred to in the BAL agreement. Settlement was to take place 10 working days after the BAL received a separate title or on 31 July 2017, whichever was the later date.⁵

[9] The enabling works were not completed by 1 October 2017. Following negotiations the parties signed a further agreement on 7 December 2017 (variation

⁴ At [10]. The judgment says \$7.3 million, but the deposit paid was \$7.5 million. Nothing turns on this point.

⁵ At [12].

agreement). With regard to the completion of the enabling works, cl 1.1 of the variation agreement provided:

[Murphys Park] will use all reasonable commercial endeavours to complete the enabling works to the Property by the anticipated completion date provided for in the schedule marked “Appendix 1” to this agreement. [Murphys Park] will keep [Green City] informed on progress by way of monthly updates and will advise [Green City] of any changes to the anticipated completion dates. If required by either party, the parties will promptly meet to discuss any matters under this agreement.

[10] Appendix 1 to the variation agreement confirmed that the enabling works were to be completed by Murphys Park no later than 20 August 2018 as part of Stage 5 of Murphys Park’s development of their land.⁶ Stage 5 itself was not scheduled to be completed until 10 December 2018. Appendix 1 confirmed the scope of the enabling works as being road access, wastewater, water and utilities (electricity, gas and telecommunications). In the event Murphys Park was not able to complete the enabling works by 30 April 2019, cl 1.3 of the variation agreement went on to provide:

... then [Green City] is entitled to instruct and engage a third party contractor to complete the enabling works at market competitive prices, at the cost of [Murphys Park] provided that [Green City] must act reasonably, in good faith and work collaboratively with [Murphys Park] before engaging the third party contractor and have regard to the nature and extent of the remaining incomplete works, the reasons for the delay, whether or not [Murphys Park] has the right to terminate its works contract with its contractor and the need to practically transition works between [Murphys Park]’s contractor and the third party contractor. [Green City] may pay for such costs on behalf of [Murphys Park] under this clause and any payments made shall be a debt from [Murphys Park] to [Green City] and shall be paid by [Murphys Park] to [Green City] within 10 working days of [Green City] issuing a tax invoice to [Murphys Park].

[11] In addition, and importantly with regard to the issues on appeal, the variation agreement introduced what became known as “the land swap”. This gave Green City an option to relinquish land along the northern boundary of the BAL in favour of land owned by Murphys Park of an equivalent size located on the eastern boundary of its property. The effect of the land swap was to move the northern boundary of the BAL

⁶ At [20].

some 22.5 metres to the south. In relation to the land swap the variation agreement provided:

- 3 Following signing of this agreement by both parties and up to 24 months from the date of the finalization of the location of the power line by Transpower, if required by [Green City], [Murphys Park] agrees, unequivocally and without any conditions, to the following swaps:
 - 3.1 That part of the Property marked as B, C and E on the attached plan marked Appendix 3 (which will be purchased by [Green City] following settlement under the Agreement) will be exchanged with that part of [Murphys Park]'s land marked as B', C' and E' with nil consideration.
- 4 The areas marked B', marked C' and marked E' are not to scale and the approximate measurements are to be advised by [Green City's advisors]. However, the parties agree that:

...

 - 4.2 If there is a change in the location of the Transpower's powerline and consequently the change affects the location or area of B, C & E, then at the request of [Green City], [Murphys Park] unequivocally and unconditionally agrees to change the location and area of B', C' and E' as nominated by [Green City] provided that the new location and area are reasonable.

...
- 6 If [Green City] wishes for the swaps described in clause 3 to be undertaken, [Green City] must apply to Auckland Council, at its own cost, for a subdivision consent for a boundary adjustment between the land owned by [Green City] and [Murphys Park] as described in clause 3.1. [Murphys Park] shall use its best commercial endeavours to assist [Green City] to complete the swapping of the land and to procure a freehold title for the Property.

[12] Finally, cl 7 of the variation agreement provided for Murphys Park to carry out additional earthworks, separate from the enabling works, on behalf of Green City in what became known as the "Transpower corridor". This foreshadowed an agreement between Transpower and a number of its customers namely, Green City, Murphys Park, and two other landowners/property developers in the area, Hugh Green Ltd and Vista Estate LP (the customers). The object was to provide for certain existing overhead power lines owned by Transpower, including those running along the original northern boundary of the BAL, to be relocated underground at the cost of the customers (the Transpower agreement).

[13] By at least May 2017 the negotiations with Transpower had identified the likely alignment of the underground lines would see them built to the south of Transpower's existing overhead lines and thereby cut across the northern part of the BAL.

[14] The Transpower agreement, entitled Agreement for Deviation of Transmission Line: OTA-WKM A and B lines – Flat Bush Special Housing Area, appears, like the variation agreement, to have been finalised around 7 December 2017, but not signed by the parties until later that month, on or around 17 December 2017.

[15] Even when the Transpower agreement was signed, it remained conditional. It did not confirm that the power lines would be re-sited underground, still less that the final alignment of the underground power lines had been confirmed. Instead cl 6.2 of the Transpower agreement provided that changes could still occur to the alignment of the new lines and the easements required to be given by each of the customers. The various conditions were not required to be satisfied until June 2018.

[16] In the event the conditions were met and the contract proceeded, each of the customers undertook to carry out “cut and fill operations” at the direction of Transpower along the final alignment of the underground power lines located on their land, known as the “New Line Section”. Likewise, each customer relevantly undertook that:

... Transpower may have access to and temporarily remain on any part of the Land owned or occupied by the Customer and do anything reasonably necessary to undertake the Deviation, including:

...

- (f) cut off Structure foundations at approximately 600mm below ground level and abandon the Structure foundations below that level;
- (g) remove existing Structures, structures, conductors, earthwires, insulators, guys and other fittings from the Land;

[17] Subject to the completion of necessary preliminary works by the relevant customer including the “cut and fill operations”, the satisfaction of the conditions, the payment of all charges by the customers, the provision of access tracks to the location

of the works and Transpower's ability to arrange for suitable outages on the transmission lines it was agreed that:⁷

Transpower will use its reasonable endeavours to complete the Deviation, commissioning of the New Line Section and removal of redundant conductor and tower superstructures by 28 May 2020. ...

[18] As a party to the Transpower agreement, Green City was fully aware of the conditional nature of the Transpower agreement and the resultant uncertainty over both the final alignment of the underground power lines and the completion date. Despite this, Green City moved quickly to effect the land swap, well before the Transpower agreement went unconditional and the final alignment of the underground lines was confirmed.

[19] It is common ground that while there is no record of any formal request by Green City to proceed with the land swap, it nonetheless took place with effect from 22 March 2018 when new plans were issued showing the new BAL boundary (the adjusted BAL boundary).⁸ Critically, this meant the enabling works now had to cross the Transpower corridor, being the intended location of the underground power lines, in order to connect with the new boundary of the BAL land.⁹ The difference between the original BAL and the adjusted BAL boundary as well as the location of the Transpower corridor is set out in the annexure to this decision.

[20] As a result, while Murphys Park ultimately completed the enabling works up to the original northern boundary of the BAL by February 2019, some six months after the completion date specified in the variation agreement, it was not connected to the adjusted BAL boundary. Ultimately this meant the enabling works were not completed by 30 April 2019.¹⁰ Although Green City was at that point entitled to exercise its option to appoint a contractor to complete the enabling works itself, it did not exercise this "step in" right.¹¹

⁷ Detailed in cls 6.3 and 6.4(a) and (c) of the Transpower agreement.

⁸ Judgment under appeal, above n 1, at [36]–[37].

⁹ At [42].

¹⁰ At [23].

¹¹ At [23].

[21] Instead, Murphys Park, following confirmation of the alignment of the Transpower corridor as detailed in the Transpower agreement, completed the necessary “cut and fill” works in the Transpower corridor both for itself and on behalf of Green City. The land in the Transpower corridor was then handed over to Transpower to enable its contractors to complete the realignment of, and undergrounding of, the power lines on the north side of the adjusted BAL boundary. The enabling works therefore were only resumed after the completion of the undergrounding of the power lines and the return of the Transpower corridor to Murphys Park in February 2020.

[22] The enabling works were completed through to the adjusted BAL boundary in August 2021. Following the completion of the enabling works a separate title for the adjusted BAL was issued on 1 March 2024, and the on-sale settled on 8 April 2024.¹²

The High Court Proceedings

[23] In the course of Murphys Park completing the enabling works Green City lodged a caveat over Murphys Park’s land and this was ordered to be released in exchange for Murphys Park paying \$1.5 million into trust to secure its obligation to complete the enabling works.¹³ Even after the enabling works were completed Green City refused to consent to the release of the \$1.5 million on the basis it was required to secure its claim for damages against Murphys Park for breach of cl 1.1 of the variation agreement.¹⁴ Murphys Park brought the present proceeding in 2021. As well as suing for the return of the \$1.5 million, it also sought payment and interest for the earthworks it had carried out for Green City in respect of the Transpower corridor, together with interest and costs.

¹² At [46].

¹³ At [49]–[50], citing *Murphys Park Development LP v Green City Developments Ltd* [2020] NZHC 813, (2020) 21 NZCPR 104.

¹⁴ At [51].

[24] In response Green City counterclaimed under cl 1.1 of the variation agreement.¹⁵ It claimed Murphys Park breached both the BAL and variation agreements in that Murphys Park had:

- (a) failed to keep [Green City] informed of progress with the Enabling Works, by way of monthly updates;
- (b) failed to inform [Green City] that the proposed “land swap” would render the “Outline Master Programme” completely unrealistic and obsolete;
- (c) promoted the “Outline Master Schedule” as being reasonably commercially achievable, when it was not;
- (d) failed to use all reasonable commercial endeavours to complete the Enabling Works to the BAL by the Completion Date; and
- (e) failed to complete the Enabling Works by the Completion Date.

[25] As a consequence of the breaches Green City claimed it had suffered “loss, damage, and expenses” in the total sum of \$2,144,588.06 made up as follows:¹⁶

- (a) Actual interest costs incurred of **\$1,076,106.38**, being interest on [Green City]’s borrowing costs from 1 May 2019 to 30 April 2021; ...
- (b) Additional delay costs of **\$982,425.34** from 1 May 2021 to 1 April 2024, being interest on the balance of the [on-sale] purchase price (\$3.95m) at 8%, from 1 May 2021 to 1 April 2024, compounding monthly, and representing [Green City’s] direct loss from the delays to the settlement funds due to [Murphys Park’s] breaches. ...
- (c) **\$86,056.34** of rates payments in relation to the BAL.

[26] In the judgment Blanchard J dismissed Green City’s counterclaim for breach of the variation agreement and broadly upheld the claims of Murphys Park, although noting that the amount in dispute had narrowed by the conclusion of the trial as a result of payments made by Green City in the interim, and the evidence filed by Green City.¹⁷

[27] The Judge accepted that under the variation agreement the completion date for the enabling works was 20 August 2018,¹⁸ but he did not accept that Murphys Park had breached its obligation to use all reasonable commercial endeavours.¹⁹

¹⁵ At [56].

¹⁶ Emphasis in original.

¹⁷ Judgment under appeal, above n 1, at [52]–[55] and [138].

¹⁸ At [63].

¹⁹ At [81].

[28] In reaching that conclusion his Honour accepted the summary of the law relating to endeavours clauses in *Focus Construction Interiors Ltd v Spaceworks Design Group Ltd*,²⁰ and noted:²¹

[67] Importantly, when assessing a claim for alleged breach of an endeavours clause, the Court must ask what steps the defendant might reasonably have taken in the circumstances. [Green City] has the burden of proof here. It is incumbent on it to specify the steps that it says that [Murphys Park] should have taken and to explain how those steps would have [sped] up the works.

[29] The Judge went on to say that, while the enabling works took longer than anticipated:

[69] ... it does not necessarily follow that [Murphys Park] failed to use all reasonable commercial endeavours to complete the work on time. [Green City] has the burden of proof, and it has not specified the steps that it says that [Murphys Park] should have taken and explained how those steps would have [sped] up the works.

[30] The Judge identified two issues that initially slowed the work down: a delay in the start of the wastewater works as a result of Council imposed revisions to the design and the remediation of a landfill containing asbestos.²² The Judge found that the effect of these delays meant that by the time the landfill remediation was completed Murphys Park had to backfill the excavated land in accordance with Transpower's designs, which took until March 2019.²³ Transpower then took possession of the Transpower corridor in order to undertake the undergrounding of the power lines and did not hand back possession of the land until February 2020, which meant the final section of the enabling works could not commence until 1 March 2020.²⁴ The Judge then found that although the final section of the enabling works was given priority by Murphys Park it nevertheless took a further 17 months to complete.²⁵ As a result, while this final section of the enabling works also took longer than expected the Judge considered Green City was not able to show that the delay was due to failure by

²⁰ *Focus Construction Interiors Ltd v Spaceworks Design Group Ltd* [2019] NZHC 2211 at [36]. Subsequently approved by this Court on appeal; *Focus Construction Interiors Ltd v Spaceworks Design Group Ltd* [2020] NZCA 269 at [14].

²¹ Judgment under appeal, above n 1 (footnotes omitted).

²² At [70]–[71].

²³ At [72].

²⁴ At [73]–[74].

²⁵ At [77].

Murphys Park to use all reasonable commercial endeavours.²⁶ On the contrary the Judge noted the delays after 1 March 2020 were due to the winter weather,²⁷ COVID-19 lockdowns and other restrictions,²⁸ and time lost due to the need for the enabling works to get permission in order to cross the Transpower corridor.²⁹

[31] The Judge went on to conclude that any delays in obtaining title to the BAL after completion of the enabling works in August 2021 could not be attributable to Murphys Park, and in any event did not fall within Green City's claim under cl 1.1 of the variation agreement which related only to the completion of the enabling works.³⁰

[32] The Judge then went on to consider whether Murphys Park had failed to keep Green City informed as also required by cl 1.1, namely that Murphys Park:³¹

... will keep [Green City] informed on progress by way of monthly updates and will advise [Green City] on any changes to anticipated completion dates.

[33] The Judge rejected Green City's assertions that Murphys Park had an obligation to inform Green City that the anticipated completion date of 20 August 2018 would not be achievable if the land swap proceeded, and that Murphys Park continued to have the obligation after the land swap was effected.³²

[34] The Judge explained:

[88] The first part of the clause (“[Murphys Park] will keep [Green City] informed on progress by way of monthly updates”) required [Murphys Park] to keep [Green City] informed about progress to-date, not inform it about the future. The second part of the clause (“[Murphys Park] ... will advise [Green City] of any changes to the anticipated completion dates”) required [Murphys Park] to advise [Green City] about the future, but it refers to “changes” not “potential changes”. It only required [Murphys Park] to advise Green City about changes to the anticipated completion date that had actually occurred, not about changes that might potentially occur, if certain events transpired. Even though, from the time the variation agreement was signed on 7 December 2017, it was highly likely that the land swap would occur, until it actually occurred on 22 March 2018, it was not a matter that might trigger an obligation on [Murphys Park] to give advice about a change of the

²⁶ At [81].

²⁷ At [78].

²⁸ At [79].

²⁹ At [80].

³⁰ At [82]–[84].

³¹ At [85].

³² At [86]–[87].

anticipated completion date under cl 1.1. To put this another way, [Murphys Park] did not have an obligation under cl 1.1 to warn [Green City] about possible future events, including the land swap, that might affect the anticipated completion date.

[89] After the land swap occurred, the position was different. At that time, the land swap had actually occurred. It was therefore a matter that might trigger an obligation on [Murphys Park] to give advice about a change of the anticipated completion date. However, this could only be if and when [Murphys Park] itself realised that the previously advised anticipated completion date was no longer appropriate. [Murphys Park] could not “anticipate” a change to the completion date unless and until it became aware of the effect that the land swap was likely to have.

[35] Although the Judge noted the evidence of Murphys Park’s consultant, Clayton McKenzie, that the land swap “dramatically altered the scope” of the enabling works,³³ the Judge concluded that this comment as well as the acceptance under cross-examination by Murphys Park’s director Hao (Raymond) Wong that Murphys Park had an obligation “to tell Green City that if it went ahead with the land swap, it was going to change the scope and timeline for the enabling works”,³⁴ were reflections made with the benefit of hindsight. As a result, Blanchard J concluded:

[91] There is no evidence that at the time either party realised the impact that the land swap would have. It appears that neither party turned their mind to the question.

[36] The Judge went on to note Murphys Park’s arguments that it had in any event kept Green City informed through invitations to site meetings Green City’s and its contractors’ own proximity to the works, and the fact that Green City did not regularly avail itself of the right to call meetings with Murphys Park to discuss progress.³⁵

[37] More substantively the Judge noted that even if Murphys Park had breached its obligation to keep Green City informed, Green City had not established how it would have made any difference to the outcome.³⁶ Indeed, as the Judge noted, although Green City was aware of the implications of the land swap from May 2019, at no point did Green City identify any alternative resulting in the earlier completion of the enabling works. The only concrete proposal identified by the Judge as having

³³ At [90].

³⁴ At [100].

³⁵ At [92].

³⁶ At [93].

been made on behalf of Green City, the so called “chimney proposal”, involved a partial reversion to the original boundary of the BAL. However, as the Judge noted, this only occurred late in the trial in the course of Green City’s consultant witness Alastair Turnbull’s oral evidence and was not subject to full scrutiny,³⁷ and it could not have been imposed without Murphys Park’s agreement in any event.³⁸

[38] As a result, the Judge concluded:

[102] In summary, [Murphys Park] had no obligation to warn [Green City] about the effect of the land swap before it occurred. After the land swap, [Murphys Park] was obliged to advise [Green City] about the effect of the land swap, but only when it itself became aware of the effect it was likely to have. The evidence suggests that it was not aware of the effect until well after the land swap occurred. Although [Murphys Park] did not formally revise the Programme, it may have met its obligation to inform [Green City] informally. Even if [Murphys Park] did breach cl 1.1 by failing to advise [Murphys Park] regarding the effect of the land swap (after it occurred), the evidence suggests that it would have made no difference to the outcome.

[39] Having concluded Green City’s claims against Murphys Park failed, Blanchard J indicated that he would have also concluded that Green City had not established the quantum claimed. Although his Honour concluded Green City’s claim for interest as damages was not too remote, Green City was unable to prove it “suffered loss calculated at eight per cent per annum compounding monthly”,³⁹ having “not led any evidence of that kind”.⁴⁰ Given that position, the Judge expressed the view that had Green City’s claims been established, damages would have been calculated using the Interest on Money Claims Act 2016 (IMCA). Although the IMCA did not directly apply it could “be used as a proxy for the loss that [Green City] suffered as a result of being deprived of the funds”.⁴¹

[40] The final part of the judgment considered Murphys Park’s claims. As noted, those claims had narrowed by the time the trial took place, and as a result only two issues were required to be determined.

³⁷ At [97] and [99].

³⁸ At [98].

³⁹ At [127].

⁴⁰ At [127].

⁴¹ At [128].

[41] The first involved a claim for further interest on sums paid by Green City in respect of the earthworks carried out by Murphys Park on behalf of Green City within the Transpower corridor. The Judge’s conclusion on the issue required a further calculation by the parties and is not subject to appeal.⁴²

[42] The second and final issue concerned the sum of \$113,956.62 together with interest, being the balance of the sum of \$550,930.03 claimed by Murphys Park for earthworks carried out on behalf of Green City, a sum which was by then otherwise no longer in dispute. The sum challenged by Green City related to the cost of filling in a sediment control pond on Murphys Park’s land located to the north of the adjusted BAL boundary and which lay in the path of the enabling works. According to Green City, due to its location, the sediment control pond necessarily formed part of the enabling works and was therefore required to be filled in at Murphys Park’s expense. Dismissing Green City’s contentions the Judge concluded:

[142] In my view, [Green City] is required to pay the cost of filling in the sediment control pond. The creation and filling in of the sediment control pond was part of the earthworks that [Green City] was required to pay for, not the enabling works that [Murphys Park] was required to pay for. The sediment control pond had already been filled in as part of completion of the earthworks before construction of the relevant part of Picturesque Drive commenced in order to complete the enabling works.

[143] [Green City] is therefore required to pay the full amount of \$550,930.03.

Green City’s appeal

[43] Overall, Green City’s position is that Murphys Park failed to take all reasonable commercial endeavours to ensure that the enabling works to the adjusted BAL boundary were completed in accordance with the variation agreement. In particular, Green City contends Murphys Park should have disclosed that the land swap made the Stage 5 programme that underpinned the variation agreement “obsolete” and “completely unrealistic”. Had Murphys Park done so:

[Green City] would have either negotiated different boundaries ensuring connection [of the enabling works] by end-2018, or issued proceedings for breach of the original [BAL agreement].

⁴² At [134]–[137].

[44] Some of the grounds of appeal overlap. We therefore briefly set out the arguments on each of the grounds of appeal before moving to a general discussion of them.

Ground one — All reasonable commercial endeavours

[45] On the first issue, Green City alleges the obligation to use all reasonable commercial endeavours was wrongly interpreted by the High Court “as a low threshold that did not require [Murphys Park] to explore alternatives”. In contrast, Mr McBride on behalf of Green City submitted:⁴³

An obligation to use “all reasonable endeavours” equates with using best endeavours. Critically, and self-evidently, it requires a party to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. If one reasonable endeavour is not going to meet the contractual objective, then the party must explore all available alternatives.

[46] In Mr McBride’s submission:⁴⁴

Had the Court applied the correct standard, it would have examined whether [Murphys Park]:

- a. Explored acceleration options when the Appendix 1 programme became “obsolete”, to meet its contractual obligation to go on using reasonable endeavours to meet those deadlines, until all reasonable endeavours had been exhausted.
- b. Ever considered reasonable alternatives to its complex Stage 5A approach, to deliver the enabling works by the [programme] dates, and determined whether these alternatives were reasonable in the circumstances.
- c. Engaged with Green City about those solutions.

Ground two — Burden of proof

[47] In Mr McBride’s submission the Judge erred in concluding the onus was on Green City to show what alternatives were open to Murphys Park. He submitted that the focus should have been on what Murphys Park did so as to determine whether it made “all reasonable endeavours”, contending that simply “deciding on one course of action, which resulted in a 5 year delay, was patently inadequate”.

⁴³ Emphasis in original and footnotes omitted.

⁴⁴ Emphasis in original.

[48] Had such a course been followed there was no evidence to suggest Murphys Park made any attempts to identify other options when it knew the completion date under the variation agreement could not be met, and Murphys Park should also have advised Green City that the date was unable to be met.

Ground three — Failure to reconcile contradictory positions

[49] In Mr McBride’s submission:

A party cannot claim to have used all reasonable endeavours to meet a programme while simultaneously claiming that the programme was impossible from the outset.

[50] He submitted that this is what the Judge had allowed Murphys Park to do in this case, allowing it “to have it both ways”.

Ground four — Failure to consider expert evidence

[51] Mr McBride criticised the lack of any reference in the judgment to the evidence of Mr de Abreu and Mr El Chikhani, who gave expert evidence at trial on behalf of Green City and Murphys Park respectively, on delay analysis. In Mr McBride’s submission, this was “a profound omission” and “central to determining whether a contractor used reasonable endeavours”. In particular he submitted:

A careful and exacting analysis of what [Murphys Park] actually did is required to determine whether or not its conduct was an endeavour to comply with the obligation, and whether there were reasonable alternatives that it could and should have explored.

[52] In particular, Mr McBride suggested:

Here, the Court should have considered:

- a. Mr de Abreu’s evidence that with proper management the works could have completed works by August 2020.
- b. His criticism of [Murphys Park]’s project management practices, which he did not believe accorded with good industry practice.
- c. His identification of acceleration opportunities.
- d. The trigger for Mr McKenzie’s “obsolete programme” admission (responding to expert criticism).

[53] In Mr McBride’s submission:

Without considering the expert evidence, the Court lacked the technical foundation to assess whether [Murphys Park]’s approach was reasonable. In this case, the expert evidence directly contradicted the Court’s finding that Green City failed to identify alternative approaches: what [Murphys Park] “should have done”.

In any case, the answer to that question was provided by Mr Wei and Mr Turnbull. Green City would either not have carried out the land swaps, or it would have carried out the land swaps in a reconfigured manner, that allowed the enabling works to connect to the BAL as quickly as possible. There is no evidence that this would not have been achievable.

Ground five — Misunderstanding the meaning of completion

[54] Mr McBride submits the Judge erred in concluding Murphys Park’s responsibility concluded with the physical completion of the enabling works in August 2021, rather it was when title to the adjusted BAL land was issued in March 2024, having regard to the variation agreement’s commercial purpose. In Mr McBride’s submission:

Green City needed vested infrastructure to obtain title and settle its on-sale. Physical construction without vesting was commercially worthless.

Ground six — Interest on the second period of loss

[55] Mr McBride disputed the High Court finding that had Green City been successful in its claims against Murphys Park it was not able to prove it had suffered loss at eight per cent per annum compounding monthly. In support of his submission Mr McBride, while not disputing that no evidence was adduced by Green City on the interest rates, appears to rely upon the fact that the interest rates in the IMCA “are very low”, and the interest rates selected by Green City “aligned with the 8% prescribed in cl 7 of the [variation agreement]” and was “a fair market rate”.

Ground seven — Errors regarding the costs of filling the sediment control pond

[56] In relation to Murphys Park’s claim Mr McBride submits the High Court erred in finding Murphys Park could charge Green City for filling an existing pond when it always knew it would need to fill in the sediment. In Mr McBride’s submission,

completing the road to the adjusted BAL boundary was part of the enabling works.

He submitted:

It was always to [Murphys Park]’s cost. The farm pond’s temporary conversion to sediment control was [Murphys Park]’s construction methodology choice, which Green City contributed to. The cost of filling the farm pond, to build the road [Murphys Park] was obligated to provide, cannot be transferred to Green City.

Discussion

[57] We begin our analysis by considering the overall case advanced by Green City, specifically Grounds one to five. For the reasons identified by Blanchard J, it is clear there is no substance to any of the issues raised. On the contrary, and as Mr St John submitted on behalf of Murphys Park, the issues raised on behalf of Green City cannot succeed given the parties’ obligations under the various agreements, and the underlying factual position with regard to those agreements which determined when the enabling works could be completed.

[58] There can be no doubt that Murphys Park was unable to complete the enabling works by 1 October 2017 as had been originally provided for in the BAL agreement. No issue arises however, given the subsequent execution of the variation agreement. As noted, this extended the time for the anticipated completion of the enabling works to 20 August 2018 in accordance with Murphys Park’s Stage 5 work programme which formed Appendix 1 to the variation agreement.⁴⁵ It follows that from the execution of the variation agreement, it was no longer possible for Green City to seek to enforce the BAL agreement directly as it later suggested it could.

[59] Contrary to Green City’s submission in respect of Ground three of the appeal, that Blanchard J failed to reconcile Murphys Park’s “contradictory position”, there is in fact no suggestion in the evidence that Murphys Park considered the extended timeframe for completing the enabling works to be unrealistic at the time the variation agreement was signed. Indeed, as has been noted, the enabling works were in fact connected to the northern boundary of the original BAL by early 2019.⁴⁶

⁴⁵ See [10] above.

⁴⁶ See [20] above.

[60] Ground three is based on a fundamental misunderstanding of the factual position. In its submissions on appeal Green City consistently conflate the variation agreement and the land swap but, as Blanchard J observed, unless and until Green City elected to proceed with the land swap, the variation agreement required only that the enabling works be connected to the original BAL boundary.⁴⁷ As the Transpower agreement makes clear, whether the land swap would take place, or the form it would take if it did, was not known at the date the variation agreement was signed. It was ultimately dependent upon the satisfaction of the conditions of the Transpower agreement and in particular the finalisation of the location of the proposed underground power lines. It was uncertainty over the final alignment of the underground lines that underpinned cl 4.2 of the variation agreement which enabled the area in the land swap to be exchanged in the event the alignment of the underground cables was subsequently changed.

[61] As a result, while the evidence makes clear Murphys Park's commitment to complete the enabling works by 20 August 2018, it is also clear that the ability of Murphys Park to complete the enabling works by that date fundamentally changed when Green City elected to proceed with the land swap prior to the completion of the enabling works.

[62] It was the exercise of the land swap by Green City in early 2018 that meant that the completion date specified in the variation agreement was not able to be achieved.⁴⁸ Although the land swap could be exercised within 24 months after Transpower finalised the location of the underground power lines, Green City chose to proceed almost immediately with the land swap and indeed it was implemented even before the Transpower agreement went unconditional on 1 August 2018. At that point, as Mr McKenzie noted in his evidence:

... the shift in the boundary of the BAL land dramatically altered the scope of the Enabling Works required to service the Property. That in turn meant that the designs, plans, and consents prepared prior to the signing of the Variation Agreement became outdated, and the timeframes set out in the Variation Agreement became completely unrealistic because the criteria on which those estimates were based had changed.

⁴⁷ Judgment under appeal, above n 1, at [88]–[89].

⁴⁸ See [19] above.

[63] Contrary to Mr McBride’s submissions, this was not an admission that the completion date in the variation agreement was never intended to be met by Murphys Park but rather a recognition that the land swap fundamentally changed the position as to what was required to complete the enabling works although, as Blanchard J noted, this was not something that either party initially realised.⁴⁹

[64] As Mr McKenzie went on to explain:

Crucially, [the land swap] moved the boundary into the Transpower Corridor, which meant that to reach the BAL, the Enabling Works had to pass over the top of the proposed Transpower underground cables.

...

This meant:

- (a) [Murphys Park] had to wait for Transpower to finish [its] works, which were not expected to finish until early 2020. The agreement [Murphys Park] and [Green City] signed with Transpower on 15 December 2017 says only that Transpower would use “reasonable endeavours” to ensure the works finished by 28 May 2020. Thus, it should have been obvious to Mr Turnbull and [Green City] that, because of the land swap initiated by [Green City], the Enabling Works could not reach the new boundary of the BAL until mid-2020 at the earliest.
- (b) [Murphys Park] would have to apply for special permission from Transpower to cross the live cables. That application process could not begin until the new Transpower cables were laid and the location and precise depth of the cables ascertained. This created uncertainty as to how long it would take to obtain approval and finish the Enabling Works.

[65] It follows we are not satisfied there was any contrary position for Blanchard J to reconcile and Ground three therefore cannot succeed.

[66] We now turn to consider Green City’s Grounds one and two, namely did Murphys Park use “all reasonable commercial endeavours” and whether the onus was properly upon Green City to show that Murphys Park had not.

[67] As Mr St John pointed out, Green City’s argument on Ground two that the onus was on Murphys Park to identify what options it could have pursued to meet its

⁴⁹ Judgment under appeal, above n 1, at [91].

reasonable endeavours commitment is contrary to well-established case law. Mr St John says, as noted by Blanchard J in the judgment, that per *Stephen v Scottish Boatowners Mutual Insurance Assoc (The Talisman)* when assessing a claim for an alleged breach of an endeavours clause, the Court is required to ask what alternative steps the covenantor might reasonably have taken to complete the object of the endeavours.⁵⁰ This reflects the general principle in civil cases that the party who asserts must prove.⁵¹ As Blanchard J concluded, Green City has the burden of proof, and it is therefore incumbent on it to specify the steps that it says that Murphys Park should have taken and to explain how those steps would have sped up the works.⁵²

[68] In any event, and as Mr St John noted, in this case the issue of who carried the burden of proof had been determined by Associate Judge Gardiner (as she then was) some two years prior to trial, when the Judge directed Green City to provide particulars of its allegation that Murphys Park had not used all reasonable commercial endeavours, a decision which was not appealed.⁵³ We conclude there was no error in Blanchard J's conclusion that Green City had the burden of proof to show that Murphys Park had not used all reasonable commercial endeavours. As a result, Green City's Ground two cannot succeed.

[69] In a practical sense too, it is difficult to see why the burden should be on Murphys Park to justify it had used all reasonable commercial endeavours when Green City was not able to identify any particular issue with the approach taken by Murphys Park until trial.

[70] There is no dispute as to the approach taken by Murphys Park after Green City exercised the land swap and the parties belatedly realised the significance of both the land swap and the Transpower agreement on the completion of the enabling works. It is likewise clear from the evidence that once the gap had been identified Murphys Park

⁵⁰ *Stephen v Scottish Boatowners Mutual Insurance Assoc (the Talisman)* [1989] 1 Lloyd's Rep 535 (HL) at 539. Judgment under appeal, above n 1, at [67].

⁵¹ This principle is recognised in Andru Isac (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [2.3.2], citing *Currie v Dempsey* [1967] 2 NSW 532 at 539; and *Abil Property Taurarua Ltd v Cozzolino* HC Auckland CIV-2008-404-1800, 25 May 2010.

⁵² Judgment under appeal, above n 1, at [67].

⁵³ *Murphys Park Development LP v Green City Developments LP* [2022] NZHC 2727 at [30]–[36].

let Green City know how it proposed to complete the enabling works. Updates were thereafter provided at different points until the enabling works were completed.

[71] As Mr St John submitted, the adjusted BAL boundary fell outside the Murphys Park Stage 5 consent upon which the completion date specified in the variation agreement was calculated, a new resource consent was required to bridge the gap between the existing consent and the adjusted BAL boundary. Murphys Park's response was to seek this new consent through its Stage 5A, upon which work appears to have started some 12 months before, with the necessary additional resource consent applied for on 17 March 2019.

[72] The evidence is then clear that having reached the original BAL boundary prior to Transpower taking over the Transpower corridor Murphys Park obtained the requisite resource consents and engaged contractors necessary to complete the enabling works to the adjusted BAL boundary as soon as the land was returned by Transpower in March 2020. The evidence then shows the remaining enabling works were commenced and given priority as soon as the Transpower corridor was returned. Although further delays then arose as a result of weather and COVID-19, and in obtaining approval to enter onto and undertake works in the Transpower corridor, this did not mean that all reasonable efforts were not carried out by Murphys Park to complete the enabling works.

[73] On appeal Mr McBride criticised the fact that Stage 5A involved "a complex 65-lot residential subdivision". However, as Blanchard J found, there is no evidence to suggest that the necessary consent to connect up to the adjusted BAL boundary could have been obtained any earlier, nor how, if the consent had been obtained earlier, the enabling works could have been constructed over the Transpower corridor any earlier than they were, given the restrictions on the use of that land until the undergrounding of the power lines had been completed.⁵⁴

[74] Likewise, at no point did Green City attempt to exercise the "step in" right pursuant to cl 1.3 of the variation agreement to appoint its own contractor to complete the enabling works as it could have when the enabling works had not been completed

⁵⁴ Judgment under appeal, above n 1, at [73]–[81].

as at 30 April 2019.⁵⁵ Even more significantly, at no point outside these proceedings did Green City raise any specific issue with the approach taken by Murphys Park. Ultimately the only suggestions that different steps could have been taken that could have led to earlier completion of the enabling works were those made by Mr Turnbull and Mr de Abreu in their evidence in the High Court.

[75] As noted, Mr Turnbull raised the chimney proposal. This was a suggestion that the amended BAL boundary could be further adjusted such that it reverted to its original location at the point the enabling works originally connected to the BAL. We agree with Blanchard J that the chimney proposal did not amount to a genuine alternative for the following reasons:⁵⁶

- (a) The proposal was never developed beyond a black marker pen on a plan of the relevant land. It is not clear, for example, how implementation of the chimney proposal would have meshed with the Transpower agreement given the remainder of the BAL land would still be unable to be connected to the enabling works until after the Transpower corridor had been returned.
- (b) It was only suggested some six years after Green City had elected to proceed with the land swap resulting in the obligation on Murphys Park to take the enabling works to the adjusted BAL boundary.
- (c) It would, in any event, not have been open to Green City, after it exercised the land swap, to unilaterally impose the chimney proposal on Murphys Park. It would have also required the consent of the purchaser of the BAL who must have also agreed to the adjusted BAL boundary before the land swap took place.

[76] We likewise conclude that nothing in Mr de Abreu's evidence leads to a conclusion that Murphys Park did not use all reasonable commercial endeavours to complete the enabling works, and accept nothing turns on the fact the evidence of

⁵⁵ See [20] above.

⁵⁶ Judgment under appeal, above n 1, at [96].

Mr de Abreu on behalf of Green City (and Mr El Chikhani on behalf of Murphys Park) was not mentioned by Blanchard J in the course of his judgment (Ground four of the appeal).

[77] A Judge is not necessarily required to refer to any particular piece of evidence.⁵⁷ In this case there was no suggestion in the High Court that the evidence was critical to Green City's case. As Mr St John noted, there were in fact only four paragraphs that referenced Mr de Abreu's evidence in some 177 paragraphs of closing submissions presented on behalf of Green City.

[78] This is because the analysis of the completion of the enabling works required consideration of matters of fact and law arising from the parties' obligations under the various agreements and the actions taken by the parties. This was the analysis undertaken by Blanchard J in his judgment. As Mr de Abreu was purportedly reviewing the same evidential material otherwise before the Court, it is difficult to see to what extent Mr de Abreu's opinions with regard to the causes of any delay could be seen as substantially helpful in terms of s 25 of the Evidence Act 2006.

[79] It is in any event difficult to place any weight on Mr de Abreu's conclusion that the enabling works could have been completed by 4 August 2020 and Murphys Park was overwhelmingly responsible for the delay in the physical completion of the enabling works and the subsequent delay in issuing title.

[80] As the cross-examination of Mr de Abreu made clear, he had not considered all relevant documents and his lack of understanding of the facts fatally undermines the various conclusions he purported to draw with regard to Murphys Park's responsibility for delay in the completion of the enabling works.⁵⁸ Even more fundamentally, and in contrast to the evidence given by Mr El Chikhani, Mr de Abreu did not appear to fully appreciate the following matters that underpinned the judgment:

⁵⁷ *Kim v Ministry of Fisheries* [2014] NZHC 2440 at [57]–[58], citing *R v Allen* CA159/99, 27 July 1999; and *Cadman v Rensford* HC Auckland P3175/91, 14 March 1996 at 7. A related point is that the requirement for a Judge is only that the decision be supported by reasons that “can sensibly be regarded as adequate to the occasion”: *R v Awatere* [1982] 1 NZLR 644 at 649.

⁵⁸ For example, it is clear that he did not have access to all the programmes and programme certificates prepared by Murphys Park Development LP (Murphys Park) notwithstanding he asserted Murphys Park had failed to prepare and maintain proper programmes.

- (a) At the time the variation agreement was signed, the land swap was only an option which could be exercised in favour of Green City at any time up to 24 months after the alignment of the underground power lines had been confirmed by Transpower. Potentially, therefore, the option could have been exercised after the enabling works and indeed the Transpower works had otherwise been completed. Given this position, until the land swap was exercised and the exact boundary of the BAL confirmed, there was accordingly no need on the part of Murphys Park to obtain any new resource consent other than that specified in the variation agreement.

- (b) The Transpower agreement effectively precluded the completion of the enabling works until after the Transpower corridor was returned on 1 March 2020. The conditional nature of the Transpower agreement resulted in a long lead in time, while the only works that could be completed within the Transpower corridor prior to the construction of the underground power lines were the cutting and filling undertaken by Murphys Park. By the time the Transpower corridor was returned the necessary resource consents to complete the enabling works had been obtained, the sediment control pond had been filled in and Murphys Park's contractors were ready to commence completion of the enabling works. It follows that even if Murphys Park had sought and obtained the consent or filled in the sediment control pond, until the land was returned by Transpower the enabling works could not be connected.

- (c) There is no evidential basis for concluding the subsequent delays in completing the enabling works after the Transpower corridor was returned, caused by the weather, COVID-19 effects and delays in obtaining access over the power lines, were caused by Murphys Park.

[81] It follows we conclude there was no error on the part of Blanchard J in not referring to Mr de Abreu's evidence and Ground four cannot succeed.

[82] Our assessment of Mr de Abreu’s evidence also completes our analysis of Ground one as it confirms the lack of any practical alternative approach to completing the enabling works any earlier than they were completed by Murphys Park. Instead, having reviewed the evidence, we consider there is no basis to conclude that Murphys Park could have completed the enabling works any earlier once Green City elected to proceed with the land swap, as the combined effect of the land swap and the Transpower agreement to which both Murphys Park and Green City had committed took the scope of the enabling works well beyond the contractual programme set out in the variation agreement. In the absence of any reasonable alternative endeavours identified as being available to Murphys Park, Ground one of the appeal therefore fails.

[83] The last ground of appeal raised with regard to completion of the enabling works, Ground five, also cannot succeed. Ground five argued that Blanchard J misunderstood the meaning of “completion” for the purposes of completing the enabling works. As noted, Green City argued that rather than the physical completion of the enabling works on 6 August 2021, completion of the enabling works for the purposes of cl 1.1 of the variation agreement was the date a separate title for the BAL land was issued, namely 1 March 2024.

[84] This argument cannot withstand scrutiny. First, cl 1.1 under which the entirety of Green City’s claims against Murphys Park were based, does not refer to the issue of title, but rather requires only that:

[Murphys Park] will use all reasonable commercial endeavours to complete the enabling works to the Property by the anticipated completion date ...

[85] Likewise, any suggestion that the issue of title was delayed because Murphys Park failed to vest Green City’s land in the Auckland Council is similarly without foundation. This is because cl 10 of the variation agreement made each party responsible for the vesting of their respective parts of the road in the Council. Likewise, it is clear that when Green City requested documents to allow it to obtain a s 224(c) certificate, these were provided promptly within a month. In contrast, no explanation has been given by Green City as to the delays in obtaining title before and after that information was requested.

[86] As Green City's claims against Murphys Park with regard to the completion of the enabling works have failed on appeal as they did in the High Court, Green City's Ground six, which challenges Blanchard J's conclusion as to the interest rate that would have applied had Green City been successful, is now moot but for completeness can be dealt with briefly.

[87] Quite simply, as Blanchard J noted, Green City failed to prove the interest rate claimed was the "fair market rate" as Mr McBride submitted. In the absence of evidence as to what fair market interest rates were in the relevant period, it is difficult to see on what basis the eight per cent interest rate referred to in cl 7 of the variation agreement helps Green City, given it is for work carried out by Murphys Park, and in any event cl 7 does not provide for the interest to compound monthly.

[88] We therefore see no error in the Judge's approach on this issue with the result that Ground six too must be dismissed.

[89] Green City's final ground of the appeal, Ground seven, challenges the High Court's conclusion that Murphys Park was entitled to the costs of establishing and then filling in the sediment control pond. The sum of Green City's submissions on this issue are as follows:⁵⁹

The Court accepted [Murphys Park] could charge Green City for filling an existing pond that [Murphys Park] always knew it would need to fill, to build Picturesque Drive (at [142]). A photograph showing the farm pond at the end of Picturesque Drive is included in Mr de Abreu's brief of evidence.

Completing Picturesque Drive to the BAL boundary was part of the enabling works. It was always to [Murphys Park]'s cost. The farm pond's temporary conversion to sediment control was [Murphys Park]'s construction methodology choice, which Green City contributed to. The cost of filling the farm pond, to build the road [Murphys Park] was obligated to provide, cannot be transferred to Green City.

[90] Like the other grounds of appeal, Green City fails to engage with what the work entailed. It relies instead on a generalised proposition that because the road had to be constructed, it would necessarily include filling in the sediment control pond.

⁵⁹ Footnote omitted.

[91] As Mr McKenzie explained in evidence, the reality was more complex. The sediment control pond:

... was a condition of the relevant resource consents that there be a sediment control pond in the area. Sediment control ponds must be located at the lowest point in the area, to which runoff naturally flows. The farm pond was located at that lowest point.

...

The farm pond could not be removed until all of the contaminated material had been removed from the entire area that drained to the pond *and* the earthworks within the area of the Transpower corridor that relied on the pond had been completed.

...

In any event, the sediment control pond did not contribute to the delays to the Enabling Works, because it was filled in before Transpower handed back possession of site at the end of February 2020.

[92] It follows that the sediment control pond was addressed separately from the enabling works, and as Blanchard J concluded, it “was part of the earthworks that [Green City] was required to pay for, not the enabling works that [Murphys Park] was required to pay for”.⁶⁰ As a result, as with the other grounds of appeal, Ground seven must also fail.

Result

[93] The appeal is dismissed.

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

Solicitors:
Loo & Koo, Auckland for Appellant
Heritage Law, Auckland for Respondent

⁶⁰ Judgment under appeal, above n 1, at [142].

Annexe

