IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1514
[2015] NZHC 2382

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER OF	an application for a declaratory judgment
BETWEEN	KIWI FAMILY GROUP LIMITED Plaintiff
AND	GOLDEN CONCEPT GROUP (NEW ZEALAND) LIMITED Defendant

Hearing: 15 September 2015

Appearances: L A Andersen for Plaintiff
D W Grove for Defendant

Judgment: 30 September 2015

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **30 September 2015** at **5:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Alistair D Paterson, Dunedin, for Plaintiff
Dawsons, East Tamaki, Auckland, for Defendant

Counsel:
Leonard A Andersen, Barrister, Dunedin, for Plaintiff
Daniel W Grove, Barrister, Auckland, for Defendant

[1] Kiwi Family Group Ltd carried on a rest home business at Coronation Street, Belmont, North Shore, Auckland. Under an agreement of 11 August 2014 it sold the business to Golden Concept Group (NZ) Ltd. That sale was completed in May 2015, but not entirely smoothly. Differences between the parties have led to the present proceeding. Those differences did not arise out of the provisions of the agreement for sale and purchase, but out of arrangements made on the eve of settlement.

The arrangements made before settlement

[2] As the rest home premises were leased, the sale required the consent of the landlord, Belmont Lifestyle Village Ltd. Mr Kirkland, director of Kiwi Family Group Ltd, says that difficulties arose before settlement when Belmont Lifestyle Village Ltd claimed that Kiwi Family Group Ltd was responsible for fixing up drainage problems experienced when there was heavy rainfall. Mr Kirkland says that the cause was tree roots blocking sewer pipes. Kiwi Family Group Ltd and Belmont Lifestyle Village Ltd could not agree whether the landlord or the tenant was required to repair the drainage system. Notwithstanding those differences, Belmont Lifestyle Village Ltd allegedly exerted pressure, threatening not to provide the assignment of the lease unless it had a guarantee that the purchaser, Golden Concept Group (NZ) Ltd, would accept responsibility for fixing the drainage problem. Golden Concept Group (NZ) Ltd in turn required Kiwi Family Group Ltd to carry out various works, including drainage, before it would take responsibility for the drainage. This led to Kiwi Family Group Ltd and Golden Concept Group (NZ) Ltd making an arrangement for Kiwi Family Group Ltd to carry out repairs, not only to the drainage system, but also to guttering. These arrangements were made shortly before settlement to ensure that the purchase would be completed.

[3] Golden Concept Group (NZ) Ltd also contends that Kiwi Family Group Ltd agreed to carry out repairs to cracks on the outside walls, and says that those have not been attended to. That position on cracks is arguable, but is not decisive for this summary judgment application.

[4] Kiwi Family Group Ltd and Golden Concept Group (NZ) Ltd agreed through their lawyers that while the sale of the business was to be completed, $100,000 of the sale proceeds received by the plaintiff's solicitor would not be disbursed, but would be held in her trust account under an undertaking. The undertaking the solicitor gave on 1 May 2015 said:

> Undertaking in relation to the sum of $100,000 to be held in my trust account
>
> In consideration of settlement taking place today, 1 May 2015, I undertake to hold the sum of $100,000 in my trust account for the purposes of ensuring the agreed repairs to the spouting and drainage are completed.
>
> The vendor will have access to the monies held in my trust account to pay for repairs as they are completed.
>
> The vendor and its contractors, agents and servants have full access to the property for the purpose of:
>
> (1) Erecting the scaffolding and replacing the guttering in accordance with the attached quote (called "the guttering works").
>
> (2) Repairing the drainpipe in accordance with the attached quote and as may, by independent expert advice, be deemed necessary to ensure that the premises drain properly (called "the drainage works").
>
> The vendor shall have the right to pay for the drainage works or the guttering works from the $100,000 retained in my trust account once they have been completed in accordance with the quotes (and any additional drainage works required, as above).
>
> Once the guttering works and the drainage works have been completed and the drainage repairs signed off by an independent drainlayer, the balance of the $100,000 shall be paid to the vendor.
>
> Should the guttering works and the drainage works not be completed within two months from the date of settlement, then the balance of $100,000 shall be paid to the purchaser's solicitor's trust account and the purchaser shall be entitled to that money to complete the guttering works and/or the drainage works. The balance shall be paid by the purchaser's solicitor to the vendor once the works are completed.

[5] The drainage quote referred to in the undertaking is an estimate dated 24 April 2015 given by Hydrotech Ltd, a drainage contractor. The estimate contemplated that the work required would be no more than eight hours. It was qualified as subject to a number of contingencies, including:

no allowance for unforeseen pipe damage …

no allowance for adverse weather conditions out of Hydrotech's control …

no allowance for permanent obstructions.

[6] While the solicitor's undertaking does not refer to work on cracks, the defendant refers to emails passing between the parties' lawyers under which it was agreed that the plaintiff would also carry out repair work on cracks and that the costs of those repairs would also come out of the $100,000. The parties disagree whether the cracks have been repaired.

[7] There are also differences between the parties as to plant and equipment left on the premises at handover, and as to occupancy levels. But those differences are not relevant to the present application. The undertaking does not refer to those matters.

[8] The sale settled late on 1 May 2015. It is common ground that Kiwi Family Group Ltd had the guttering repaired and those costs have been paid from the $100,000 held in the solicitor's trust account.

The dispute over drainage repairs

[9] Aside from the dispute about repairs to cracks, there have been difficulties with the drainage repairs. The case for Kiwi Family Group Ltd is that it engaged Hydrotech Ltd, the contractor who provided the estimate, to go to the rest home on 21 May 2015 to carry out the work in the estimate. It gave notice to Golden Concept Group (NZ) Ltd on the afternoon before that the contractor would be coming. Golden Concept Group (NZ) Ltd gave notice it would not allow the contractor to come on site. When the contractor arrived, Golden Concept Group (NZ) Ltd would not allow it access. Hydrotech Ltd left the site and charged Kiwi Family Group Ltd $708.40 (including GST) for its wasted efforts.

[10] Kiwi Family Group Ltd's lawyer wrote to the lawyers for Golden Concept Group (NZ) Ltd on 22 May 2015. That letter records what had happened the day before, including the following:

The contractor was not permitted to carry out the work by the landlord and was required to leave the site.

The agreement between our clients that the work be carried out has been frustrated by the landlord's refusal to allow the contractor on the site.

Please confirm that the money held pursuant to my undertaking can be released to my client.

The issue of the drainage is now the landlord's responsibility and that is appropriate as my client had no legal obligation to repair the drains.

[11] In its statement of claim Kiwi Family Group Ltd seeks these declarations:

[a] That the agreement between the parties whereby the plaintiff agreed to carry out specified drainage work on the property situated at 12 Coronation Street, Belmont was cancelled by notice given on 22 May 2015;

[b] A declaration that the plaintiff's solicitor is entitled to pay the plaintiff the sum of $76,823.78 together with any interest, being the balance of the $100,000 held pursuant to the undertaking of 1 May 2015.

[12] The plaintiff's solicitor has continued to hold the sum in the trust account and will not release it without the agreement of Golden Concept Group (NZ) Ltd or an appropriate declaration of the court. By this proceeding, Kiwi Family Group Ltd hopes to be relieved of the expense of undertaking the drainage repairs. It has applied for summary judgment.

[13] While the sums in issue are much less than $200,000 and are within the jurisdiction of the District Court, Kiwi Family Group Ltd has filed in the High Court. Mr Andersen explained that he had doubts whether the District Court could give only declaratory relief, that the High Court's jurisdiction in respect of solicitors' undertakings is inherent and that there is nothing in the District Courts Act 1947 conferring such a jurisdiction on that court.

[14] There is no dispute between the parties as to the principles to be applied in summary judgment applications. They are familiar and do not need to be set out again.

[15] The case for Kiwi Family Group Ltd involves these propositions:

[a] It was a term of the agreement that Golden Concept Group (NZ) Ltd would allow access to the drainage contractor to carry out the work at 12 Coronation Street, Belmont.

[b] In refusing access, Golden Concept Group (NZ) Ltd repudiated or breached the agreement.

[c] That breach or repudiation entitled Kiwi Family Group Ltd to cancel the contract, and it did.

[d] As the contract is cancelled, it is no longer required to carry out the drainage works and is entitled to have the funds released to it.

[16] Mr Andersen submitted that each declaration sought by Kiwi Family Group Ltd stood alone. To the contrary, I regard them as linked. I cannot see how Kiwi Family Group Ltd can be entitled to the second declaration, if either it has not carried out the drainage works or it has not repaired the drainage system without obtaining the first declaration.

[17] The evidence shows bona fide attempts by the parties to try to resolve their differences. They were unsuccessful and accordingly are not material. That aside, it is unnecessary for this summary judgment application to go into events after 22 May 2015 in any detail. Kiwi Family Group Ltd's entitlement to cancel turns on circumstances as at 22 May, not afterwards.

[18] I add some further detail about the events of 20 and 21 May.

[19] There is no evidence that the parties had appointed an independent expert under the undertaking to check that the work to be carried out by Hydrotech Ltd was fit to ensure that the premises drained properly.

[20] On 20 May 2015 Mr Hou of Golden Concept Group (NZ) Ltd emailed Kiwi Family Group Ltd asking to be told when the tradesmen were to repair the stormwater downpipe. In response, the Kiwi Family Group Ltd's manager replied that the contractors were waiting for the scaffolding (for the guttering work) to come down. Mr Hou asked to be sent the quotes first so that he could get landlord approval. He stated that the job could not start without the landlord's approval.

[21] On the afternoon of 20 May, Kiwi Family Group Ltd's lawyer advised the lawyer for Golden Concept Group (NZ) Ltd that the drainlayers would be doing the job on 21 and 22 May 2015. Late in the afternoon of 20 May 2015 there was further email traffic involving not only the parties' lawyers, but also the landlord's lawyer. The landlord's lawyer expressed concern because the quote for the repair work involved using a digger close to building foundations. His client wanted to approve that first. The landlord's lawyer also expressed concern that the Hydrotech quote did not include reinstatement of a manhole said to have been damaged by flooding caused by a broken pipe. The lawyer for Golden Concept Group (NZ) Ltd passed that on to Mr Hou, who renewed his request for copies of the quotes. He advised Kiwi Family Group Ltd not to send the contractor to the site without approval from the landlord beforehand.

[22] In a further email by the lawyer for Golden Concept Group (NZ) Ltd to Kiwi Family Group Ltd's lawyer, some understanding or support is expressed for the landlord's position. Later, Kiwi Family Group Ltd's manager advised that that no digger was involved and work would be done by hand. There was further email traffic on 21 May but without further agreement. It is common ground that when the contractor appeared on site on that day, it was turned away.

Was Golden Concept Group (NZ) Ltd entitled to refuse access to the drainage contractor on 21 May 2015?

[23] The parties accept that, except for the matter of cracks, the solicitor's undertaking sets out the work the parties agreed would be carried out. Kiwi Family Group Ltd undertook to carry out that work in consideration of the settlement taking place. A potential difference between the parties which may have prevented the purchase being completed had been resolved.

[24] Clearly, Kiwi Family Group Ltd required access to the premises for its contractor to repair the drains. While that is so obvious that it goes without saying, the parties did say it in the undertaking. In an email of 30 April 2015, Golden Concept Group (NZ) Ltd's lawyer said:

> Our client is being told that it will, as the new land occupier, have to allow whatever access is required to ensure (speedy) completion, similarly the sensible proviso for a drainlayer to be the final arbiter, if required.

[25] After settlement and assignment of the lease took effect, Golden Concept Group (NZ) Ltd, as assignee of the lease, had exclusive possession of the premises, including both the right to occupy the premises and the right to allow or prevent entry onto the site. The landlord did not have exclusive possession of the site. The landlord may have had rights under the lease to enter onto the site for certain purposes such as inspection, but no one suggests that the landlord had the power under the lease to bar entry to the premises. The matter of access to the premises was within the control of Golden Concept Group (NZ) Ltd alone.

[26] The undertaking provided that the drainage contractor engaged by Kiwi Family Group Ltd was to complete the required work within two months. Correspondingly, throughout those two months, any contractor appointed by the plaintiff to carry out the work was entitled to access so much of the premises as was required to repair the drains.

[27] Both on 20 and 21 May and in opposition to the summary judgment application, Golden Concept Group (NZ) Ltd tried to hedge that right of access with further conditions: the need to obtain the landlord's approval, the need to sight quotes, the need for earlier notice than the day before. It noted the contingencies in the Hydrotech estimate, which it now submitted required resolution before work started. This attempt to add further qualifications to the right of access is a belated attempted to re-write the contract.

[28] Under the contractual arrangements, there was no provision for the landlord to dictate what work should be done or when it should be carried out. The parties had already agreed on the scope of work. There were two parts: first, to carry out the work in accordance with the Hydrotech quote and, second, to the extent that independent expert advice required, to carry out any further work to ensure that the premises drained properly. The provision for an independent expert gave Golden Concept Group (NZ) Ltd the assurance that the work would be carried out properly. If the defendant required further assurances - such as approving contractors, vetting their work methods, obtaining the landlord's approval - the defendant should have stipulated for them at the time the parties made their agreement. The agreement can stand on its own, without requiring these further terms to be inserted into it. It is workable without them.

[29] The email of Kiwi Family Group's lawyer of 22 May 2015 suggested that the landlord frustrated access. The evidence does not support that, but even if that were the case, it was the responsibility of Golden Concept Group (NZ) Ltd under the agreement to secure access for the contractor. It did not do so.

[30] Kiwi Family Group Ltd has satisfied me that under the contract, Golden Concept Group (NZ) Ltd was not entitled to turn the contractor away on 21 May 2015 for any of the reasons suggested, including the need for landlord approval, need to sight invoices, need to check the scope of work and the like. Kiwi Family Group Ltd has proved that Golden Concept Group (NZ) Ltd breached the access term by refusing to allow the drainage contractor to come onto the site on 21 May 2015.

Was Kiwi Family Group Ltd entitled to cancel the agreement for drainage and other work?

[31] Hydrotech's charge for coming on site on 21 May 2015 is an expense Kiwi Family Group Ltd incurred as a result of Golden Concept Group (NZ) Ltd barring access, which Kiwi Family Group Ltd would not have incurred otherwise. Kiwi Family Group Ltd accordingly has a claim against Golden Concept Group (NZ) Ltd for damages for the breach of contract. In this proceeding it does not seek damages but says that it was entitled to cancel the contract.

[32] In its lawyer's letter of 22 May 2015 Kiwi Family Group Ltd made known to Golden Concept Group (NZ) Ltd its intention to cancel. No particular form of words was required.[1] The statements in the letter asking for confirmation that funds held under the undertaking could be released and that the issue of drainage was now the landlord's responsibility informed Golden Concept Group (NZ) Ltd that the arrangements for Kiwi Family Group Ltd to carry out works on the rest home premises were now at an end.

[33] The question is whether Kiwi Family Group Ltd was entitled to cancel on 22 May 2015. That is decided according to the circumstances on that day, although Kiwi Family Group Ltd may now rely on matters not known to it at the time.[2]

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1 Contractual Remedies Act 1979, s 8(2).

2 *Thompson v Vincent* [2001] 3 NZLR 355 (CA) at [82]-[89].

Did Golden Concept Group (NZ) Ltd repudiate the agreement?

[34] Under s 7(2) of the Contractual Remedies Act, a party repudiates a contract by making clear that it does not intend to perform its obligations under it or, as the case may be, to complete such performance. Kiwi Family Group Ltd says that Golden Concept Group (NZ) Ltd repudiated when it refused access to Hydrotech on 21 May 2015. No other act of repudiation is alleged. Kiwi Family Group Ltd gave notice of cancellation straight away without giving Golden Concept Group (NZ) Ltd the opportunity to reconsider its position. For Golden Concept Group (NZ) Ltd it is arguable that it misunderstood its obligation under the contract, and that it was entitled to more information and to put the works on hold until the landlord approved them. Such a bona fide misunderstanding of the access term does not by itself amount to repudiation.

[35] In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* the High Court of Australia said:[3]

> No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise this heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him.

[36] The High Court attached importance to the fact that no attempt had been made to persuade the alleged repudiating party of the error of its ways or to give it any opportunity to reconsider its position in the light of an assertion of the correct interpretation. The court could therefore not infer that that party was persisting in its interpretation willy nilly in the face of a clear enunciation of the true meaning of the agreement. In New Zealand the Court of Appeal applied this approach in *Starlight Enterprises Ltd v Lapco Enterprises Ltd.*[4]

[37] The requirement to provide access was Golden Concept Group (NZ) Ltd's main, if not sole, obligation under the agreement. It was in its interests to have the stormwater drain repaired. The suggestion that it would repudiate the contract, under which it had so much to gain, is surprising. The position it took in its dealings with Kiwi Family

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3 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 432.

4 *Starlight Enterprises Ltd v Lapco Enterprises Ltd* [1979] 2 NZLR 744 (CA).

Group Ltd leading up to the cancellation arguably shows a misunderstanding of its duty to give access, but does not show an intention to bar access regardless of the correct interpretation of the agreement. Particularly as Kiwi Family Group Ltd did not give it the chance to reconsider its position.

[38] Kiwi Family Group Ltd has not shown that Golden Concept Group (NZ) Ltd does not have a defence to the repudiation allegation.

Did Golden Concept Group (NZ) Ltd breach an essential term?

[39] Kiwi Family Group Ltd relies on the right to cancel the contract for breach of an essential term. Section 7(4)(a) allows a party to cancel if:

> The parties have expressly and impliedly agreed that... the performance of the term is essential to him.

[40] The contract does not expressly state that access was essential, but clearly the access term was a very important part of the contract. In the absence of an express term as to essentiality, it is necessary to decide whether the parties impliedly agreed that performance of the access term was essential. The term required Golden Concept Group (NZ) Ltd to provide access on every working day for two months following settlement to so much of the premises as was required to carry out the drainage repairs, including access over the premises to the work area. The result of making that an essential term is that any breach, no matter how trifling, gives a right to cancel. Only strict performance of the term will avoid cancellation; substantial performance will not be good enough. At common law the courts leaned against too readily finding such essentiality.

[41] Bramwell B in *Tarrabochia v Hickie* said:[5]

> No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it. Since, however, they could have done it, those who construe the instrument should be chary in doing for them that which they might, but have not done for themselves.

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5 *Tarrabochia v Hickie* (1856) 1 H & N 183, 156 ER 1168 (Exch) at 188.

[42] In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, Upjohn LJ said:[6]

> Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" for service. Thus, to take examples from the judgments in some of the cases I have mentioned above, if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.

[43] At common law the access term would not have been held to be essential. As with the seaworthiness term in the *Hongkong Fir Shipping* case, it is unlikely that the parties intended that even a minor breach could allow Kiwi Family Group Ltd to cancel. The position is no different under the Contractual Remedies Act. In *Mana Property Trustee Ltd v James Developments Ltd*, the Supreme Court said of the test for an implied essential term under s 7(4)(a):[7]

> The latter category, of implied agreement on the essentiality of a term which appears in the contract, may sometimes be more difficult to establish. But, again, it will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made. *Of particular importance will be what must then have been in the contemplation of the parties concerning the likely effect of a breach of the term.* It will include whether a term of the same kind has customarily been treated as a condition or as an essential term under the Act, such as, in relation to a land sale agreement, a requirement for payment of a deposit within a particular time. It will also include a consideration of the type of contract and whether it is one, like a mercantile contract, which normally requires strict performance. The court must ask itself whether, without expressly stating that the term is essential – that is, using a form of words equivalent to the expressions of which we have given instances – the parties can be seen, in context, to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied.
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> (Emphasis added)

[44] Clearly Kiwi Family Group Ltd required access to the site for the drainage contractor, but that does not make the term essential, given that the contract may still be capable of performance notwithstanding that access might be restricted or barred on

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6 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA) at 62-63.

7 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [24] (footnotes omitted).

isolated occasions. In these circumstances Kiwi Family Group Ltd has not shown that the access term was essential.

Was the effect of the breach within s 7(4)(b) of the Contractual Remedies Act 1979?

[45] Under s 7(4)(b) a party may cancel if:

> the effect of the… breach is, or, in the case of an anticipated breach, will be,—
>
> (i) substantially to reduce the benefit of the contract to the cancelling party; or
> (ii) substantially to increase the burden of the cancelling party under the contract; or
> (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[46] Kiwi Family Group Ltd had about 40 working days in which to carry out the drainage works and to repair the cracks to the walls. Its drainage contractor was denied access on one day. This refusal to allow access added to the cost to Kiwi Family Group Ltd in carrying out that work, because of the extra charge of $704 it had to pay Hydrotech. For that it could be compensated by damages. For Golden Concept Group (NZ) Ltd, it is arguable that that extra cost is not so large as to be a substantial increase under s 7(4)(b)(ii). Similarly the reduction in benefit to Kiwi Family Group Ltd (less money to be received under the solicitor's undertaking) is arguably not substantial under s 7(4)(i). Equally it is arguable for Golden Concept Group (NZ) Ltd that the one day denial of access did not make the benefit or burden of the contract substantially different from what the parties contracted for under s 7(4)(iii). Kiwi Family Group Ltd has not shown that Golden Concept Group (NZ) Ltd does not have a defence to a claim to cancel under s 7(4)(b).

[47] I find that Golden Concept Group (NZ) Ltd has an arguable defence to Kiwi Family Group Ltd's claim that it was entitled to cancel on 22 May 2015: because Golden Concept Group (NZ) Ltd had arguably not repudiated the contract, the access term was not essential and the substantiality test under s 7(4)(b) was not satisfied.

Was Golden Concept Group (NZ) Ltd required to continue offering access?

[48] Kiwi Family Group Ltd contended that there was an ongoing breach by Golden Concept Group (NZ) Ltd, because it failed to offer access to the site after 22 May 2015.

That submission goes outside the scope of the relief Kiwi Family Group Ltd is seeking, which relies on its cancellation of the contract on 22 May 2015. Even so, once Kiwi Family Group Ltd gave notice of its cancellation on 22 May 2015, Golden Concept Group (NZ) Ltd was no longer required to offer access. The letter of cancellation showed Kiwi Family Group Ltd's repudiation of the contract: it no longer intended to perform. On foot of that, Golden Concept Group (NZ) Ltd was no longer required to offer access.[8]

Outcome

[49] For the above reasons, Kiwi Family Group Ltd has not shown that Golden Concept Group (NZ) Ltd does not have a defence to the claim for the declaration as to cancellation of the contract. As there is an arguable defence to the termination of the contract, it is likewise arguable for Golden Concept Group (NZ) Ltd that the funds must continue to be held by the solicitor under her undertaking. Accordingly, I dismiss the summary judgment application. I reserve costs, following *NZI Bank Ltd v Philpott*.[9] I direct a telephone first case management conference. I invite the parties to confer to see whether the plaintiff's claim can be re-fashioned so as to bring it within the jurisdiction of the District Court, given that the amounts in issue are less than $100,000.

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Associate Judge R M Bell

8 *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433.

9 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).