IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA224/2021
[2021] NZCA 505

BETWEEN	CAROLINE DESIREE MARR Applicant
AND	KAREN ANN MILLS AND GRAEME WILLIAM MILLS Respondents

Court:	Clifford and Goddard JJ
Counsel:	S A Keall for Applicant S A Grant for Respondents
Judgment: (On the papers)	4 October 2021 at 2.00 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay costs to the respondents for a standard application on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Goddard J)

Background

[1] Ms Marr sold a property to Mr and Mrs Mills. The purchase price was $1,450,000.00 inclusive of GST (if any). In the agreement for sale and purchase (ASP)

Ms Marr warranted that the statement on the front page of the ASP regarding the vendor's GST registration status was correct at the date of the ASP. On the front page of the ASP the following statement appeared:

> The vendor is registered under the GST Act in respect of the transaction evidenced by this Agreement and/or will be so registered at settlement.
>
> ~~Yes~~/No

[2] However at the date the property was sold Ms Marr was registered for GST. The warranty was therefore breached.

[3] The Mills intended to live in part of the property, and to operate two businesses from part of the property. At the time they bought the property they were not registered persons under the Goods and Services Tax Act 1985. But they planned to register for GST in connection with setting up their proposed businesses. If Ms Marr had not been registered for GST, and the Mills had become registered for GST, they would have been able to claim a GST input tax credit in respect of part of the purchase price. The Mills planned to use the GST refund they would obtain in this way to fund the set up and operation of the proposed businesses.

[4] However a sale of commercial property by one registered person to another is zero rated for GST purposes, so the purchaser cannot claim any input tax credit in connection with the purchase. Because Ms Marr was registered for GST, the Mills would not have been able to claim the GST portion of the purchase price as an input tax credit if they became registered for GST.

[5] The Mills did not want to put further funding into the proposed businesses, and did not want to borrow more money than had already been necessary to complete the purchase. Once they became aware that Ms Marr was registered for GST, so they would not be able to claim a GST input credit if they registered for GST, they decided not to commence the businesses, and not to become GST registered.

Claim for breach of warranty

[6] The Mills issued proceedings against Ms Marr claiming damages for breach of warranty. The amount they claimed was the GST refund they were unable to obtain of $121,610.86 plus costs incurred by them in paying their accountants and a valuer.

[7] Ms Marr accepted that she had breached the warranty. Judgment on liability was entered by consent, leaving the amount of damages to be assessed at trial.

District Court judgment

[8] The trial took place in July 2020 before Judge Harrison.[1]

[9] The Mills gave evidence that they intended to operate two businesses from the property, and that they were reliant on recovering a GST refund in respect of the purchase price to fund the set up and operation of both businesses. If Ms Marr's warranty had been correct the businesses would have been established, the Mills would have registered for GST, and the Mills would have obtained a GST input credit of $121,610.86.

[10] The Judge referred to a decision of this Court, *Ling v YL NZ Investment Ltd*, in which a similar claim was made by the purchaser of a property.[2] The vendor had warranted that she was not registered for GST. But the Inland Revenue Department later deemed her to be registered for GST as at the date of the purchase. In the High Court the purchaser recovered damages equal to the GST input credit they were unable to claim as a result of the vendor being GST registered.[3] This Court upheld that decision.[4]

[11] The Judge also referred to the decision of the High Court in *Holdaway v Ellwood*.[5] The District Court had declined to grant summary judgment on a similar claim by the purchasers of a property for breach of the vendor's warranty

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1 *Mills v Marr* [2020] NZDC 13200 [District Court judgment].
2 At [29]–[31], referring to *Ling v YL NZ Investment Ltd* [2018] NZCA 133, (2018) 20 NZCPR 830.
3 *YL NZ Investment Ltd v Ling* [2017] NZHC 1793, (2017) 28 NZTC 23-026 at [44].
4 *Ling v YL NZ Investment Ltd*, above n 2, at [39]–[40].
5 District Court judgment, above n 1, at [32]–[36], referring to *Holdaway v Ellwood* [2019] NZHC 792, [2019] NZAR 680.

that they were not GST registered.[6] The purchasers appealed. Mallon J held that there was no defence to the claim, and that summary judgment for damages equal to the amount of GST should have been awarded in order to put the purchasers in the position they would have been in if the warranty had been correct.[7]

[12] The Judge considered that these cases could not be distinguished. It was irrelevant that the Mills had not registered for GST once they were notified that Ms Marr was a registered person. That did not affect the right of the Mills to recover damages for breach of warranty by Ms Marr.[8]

[13] In particular, the Judge did not accept Ms Marr's defence that the Mills had suffered no loss, as a result of their decision not to commence their businesses. The Judge considered that there was clearly a loss, as confirmed in the *Ling* and *Holdaway* decisions. It was the breach of warranty by Ms Marr that caused that loss. The decision not to commence the businesses was brought about by the breach of warranty.[9]

[14] The Judge recorded that reference was also made to the Mills having subsequently subdivided the site and sold a section. The Judge considered that did not provide a defence. It is irrelevant to a claim for breach of warranty in connection with a sale of property that the promisee was subsequently able to sell the property at a profit.[10]

[15] Judgment was entered against Ms Marr in favour of the Mills in the sum of $121,610.86 plus interest of $25,614, plus accountants' fees of $4,092.01.

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6 *Holdaway v Ellwood* [2018] NZDC 18487.
7 *Holdaway v Ellwood*, above n 5, at [27].
8 District Court judgment, above n 1, at [36]–[37].
9 At [39].
10 At [40]–[41], citing *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB), [2014] All ER (D) 215 (Nov) at [185].

High Court judgment

[16] Ms Marr appealed to the High Court. The appeal was unsuccessful.[11]

[17] On appeal Ms Marr emphasised that the Mills were not registered persons. Their eligibility to become GST registered, and recover a GST refund, depended on them raising "an input credit linked to the conduct of and the taxable activity of a business that never existed".[12] The claim was speculative, and had not been made out.

[18] Jagose J did not accept that argument. The Mills' evidence was far from speculative as to their intentions. It was grounded in their prior acquisition of collateral required for the businesses. After the purchase they had instructed a valuer to prepare an apportioned valuation of the property for GST purposes. That instruction was given in advance of notice of the breach of warranty. Once they discovered the breach, the Mills were advised that if they commenced the businesses, they risked being found liable to be registered under the GST Act at the time of the property's acquisition, with the result the transaction would be zero rated. Their decision not to commence the businesses resulted from that advice. The value to the Mills of the loss of Ms Marr's promised performance was the GST refund to provide start-up working capital for the businesses. The amount of that refund was recoverable as damages.[13]

Threshold for leave to appeal

[19] Section 60(1) of the Senior Courts Act 2016 provides that the decision of the High Court on appeal from the District Court is final unless a party obtains leave to appeal against the decision to this Court. Leave may be granted by the High Court or by this Court if leave is refused by the High Court.[14]

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[11] *Marr v Mills* [2020] NZHC 3004, (2020) 29 NZTC 24-081.
[12] At [13].
[13] At [14]–[17].
[14] Senior Courts Act 2016, s 60(2).

[20] Ms Marr applied to the High Court for leave to appeal to this Court. Leave was declined.[15]

[21] Ms Marr now applies to this Court for leave to appeal under s 60 of the Senior Courts Act. As this Court said in *Butch Pet Foods Ltd v Mac Motors Ltd*:[16]

> [4] The test for leave to bring a second appeal to this Court is well established. The proposed appeal must raise some question of law or fact capable of bona fide and serious argument, in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal. On a second appeal this Court is not engaged in the general correction of error. Its primary function is to clarify the law and to determine whether it has been properly construed and applied by the Court below. Not every alleged error of law is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a court.

Ms Marr's application for leave to appeal

[22] Ms Marr wishes to argue on appeal that the Mills received the value of a GST input credit as damages, but without carrying out any corresponding economic activity that would give rise to an obligation to pay GST. She submits that a claimant-purchaser in this situation should have to establish they would actually have received a GST refund for the sum claimed, if the warranty had not been breached. The "overarching submission" for Ms Marr is that where the subject matter of a claim is missing out on a GST refund, there must be satisfactory evidence of what the GST refund would have been. The Court must be satisfied that any GST refund would not have been subject to any later challenge even if paid initially. The Court must approach such claims as "loss of a chance" cases.

[23] Ms Marr also wishes to argue that because the Mills sold part of the property before trial, they did not suffer any loss. If they had been GST registered, they would have had to pay GST on sale of the property. Ms Marr argues that it is one-sided for a common law claimant to receive a damages award reflective only of input credits without any corresponding adjustment for output credits. She says that issue has not been considered by the courts to date.

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15 *Marr v Mills* [2021] NZHC 603.

16 *Butch Pet Foods Ltd v Mac Motors Ltd* [2018] NZCA 276, (2018) 24 PRNZ 500 (footnotes omitted).

[24] The application for leave to appeal is opposed by the Mills. They say that the proposed appeal relates mostly to issues of fact. The relevant law is settled and was correctly applied to the facts as found. The prospect of success on appeal is low. There is no interest, public or private, that would outweigh the cost and delay of a second appeal.

Discussion

[25] The assessment of damages is a matter of fact. As Tipping J said in *Marlborough District Council v Altimarloch Joint Venture Ltd*:[17]

> There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of [cases] to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff.

[26] Ms Marr's argument that the Mills did not establish with sufficient certainty that they would have established their businesses, and obtained a GST input credit, does not raise any arguable question of law or fact. The legal position is clear: it was necessary for the Mills to establish that, but for the breach of warranty, they would have established their businesses and would have obtained a GST input credit. Both the District Court and High Court found that this had been established on the evidence before the Court. Ms Marr has not identified any arguable basis for challenging those factual findings. In the light of those findings, it is not arguable that the "loss of a chance" authorities are relevant.

[27] Ms Marr's second argument is that the subsequent sale of part of the property was relevant to the assessment of damages in this case. She wishes to argue on appeal that it was incumbent on the Mills to establish that they would have ended up in a "net" better off position, taking that sale into account. She says that it is not for a defendant in a claim of this kind to establish that the plaintiff would not have ended up better off on a net basis.

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[17] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [156].

[28] Damages are usually assessed at the time of breach. It is well established that in assessing damages it is necessary to balance loss and gain.[18] So it is in principle possible for a benefit to a plaintiff that results from a breach to be relevant when assessing damages for that breach. But it is also well established that where a defendant claims that a plaintiff has derived a benefit which should be taken into account when assessing damages, the defendant must prove the extent of that benefit.[19] Ms Marr's argument that the burden was on the Mills to show that if the warranty had not been breached they would have ended up in a net better off position, after taking the subsequent sale into account, is plainly wrong as a matter of law.

[29] If Ms Marr had established at trial that as a result of the breach of warranty, and the Mills' decision not to register for GST, the Mills had received more for the sale of part of the property than would otherwise have been the case, that benefit could in principle have been taken into account in assessing damages. But in order to do so Ms Marr would have needed to establish, by evidence called at the trial, that if the Mills had become registered for GST the subsequent sale of part of the property would have resulted in the Mills receiving a reduced benefit from that sale. That might have been the case if the evidence established that the sale would have taken place at the same price, but the Mills would have had to account for GST. That might also have been the case if the evidence established that if the Mills had been GST registered, the section would have sold for a lower (GST-exclusive) price.

[30] These are factual issues in respect of which the burden of proof fell on Ms Marr. We have not been referred to any evidence about the existence, or extent, of any benefit to the Mills as a result of not being GST registered at the time of the subsequent partial sale. No evidence to support a finding that there was such a benefit is referred to in the judgments of the District Court or High Court, or in Ms Marr's submissions in support of her application for leave to appeal. In the absence of such evidence, there is no foundation for an argument that damages should have been reduced to take into account a benefit associated with the subsequent sale.

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[18] *Pickering v Detection Services Ltd* [2021] NZCA 382 at [58], citing *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) at 688–689.

[19] At [59].

[31] In these circumstances we do not consider that the proposed appeal raises any question of law or fact that is capable of serious argument.

[32] There is also considerable force in the Mills' submission that a second appeal would result in cost and delay which is unjustified in this case. The sale took place in 2014. There have already been hearings in the District Court in July 2020, and in the High Court in October 2020. The amount in issue is relatively modest. None of the issues raised by Ms Marr could justify further pursuit of this litigation.

Result

[33] The application for leave to appeal is declined.

[34] Costs should follow the result in the normal way. The applicant must pay the respondents costs for a standard application on a band A basis, with usual disbursements.

Solicitors:
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Daniel Overton Goulding, Auckland for Respondents