IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 4/2020
[2020] NZSC 21

BETWEEN	Y&P NZ LIMITED Applicant
AND	YANG WANG AND CHEN ZHANG Respondents

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	B P Rooney for Applicant G P Blanchard QC and J A Zwi for Respondents
Judgment:	18 March 2020

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondents.

REASONS

Introduction

[1] The applicant seeks leave to bring a second appeal. It says it was entitled to cancel an agreement for sale and purchase of land when, contrary to the terms of the agreement, the purchaser insisted on treating the transaction as zero-rated for GST purposes. The High Court and the Court of Appeal took a different view.

Background

[2] On 2 May 2016, the applicant (the vendor) entered into agreements to sell to the respondents (the purchasers) four adjoining properties in Henderson, Auckland.

Settlement date was agreed to be 28 July 2016. Each agreement recorded the purchase price to be "Plus GST (if any)".

[3] Section 11(1)(mb) of the Goods and Services Tax Act 1985 (GST Act) provides that sales of land "must be charged at the rate of 0%" (that is, zero-rated) where the vendor and purchaser are both GST-registered, the purchaser intends to use the property for making taxable supplies and the purchaser does not intend to use the land as a principal place of residence. The time at which these factors are to be assessed is "at the time of settlement of the transaction".[1]

[4] The sale and purchase agreements were standard-form ninth edition ADLS/REINZ[2] agreements for sale of land. Clause 14.3 reflected s 11(1)(mb) of the GST Act.

[5] When the agreements were entered into, the vendor indicated on each cover page that it was GST-registered, and would be at the date of settlement. The purchasers indicated in sch 2 of each agreement that they were not, and would not be at the date of settlement. They also indicated that they did not intend to use the properties for making taxable supplies.

[6] In late June 2016, however, the purchasers changed their minds. They decided to build apartments on all properties with a view to selling them. They were informed by their accountant that the purchase could be zero-rated as a result because they were intending to use them to make taxable supplies.

[7] On Monday 25 July, three days before the settlement date, the vendor sent the purchasers settlement statements showing GST payable at the standard rate of 15 per cent.

[8] On Wednesday 27 July, the day before the settlement date, the purchasers informed the vendor by phone that the purchasers were registered for GST, and asked that settlement statements be prepared on a zero-rated basis. The vendor sent the

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1 Goods and Services Tax Act 1985, s 11(8B).
2 Auckland District Law Society and Real Estate Institute of New Zealand.

purchasers amended settlement statements accordingly and asked for the purchasers' GST numbers, which were provided.

[9] Then, on Thursday 28 July (settlement day), the vendor had a change of heart. The vendor advised the purchasers that it did not accept settlement should be zero-rated.[3] It insisted on the agreed price on settlement plus 15 per cent GST.

[10] The vendor's position was that because the purchasers had not notified it of their change in circumstances "no later than two working days" before the settlement date as it considered was required by the agreement, the purchasers' notice that GST should be zero-rated must be ignored. This, it said, meant settlement had to proceed based on the information the purchasers provided in sch 2 of the agreement and the purchasers had to pay GST at 15 per cent.

[11] Emails were exchanged in which each party firmly maintained their respective positions.

[12] On 4 August 2016, the purchasers lodged caveats over the properties. The vendor applied to lapse the caveats, and the purchasers applied to sustain them. On 17 August 2016, the vendor purported to cancel the agreements.[4] The purchasers responded by commencing proceedings for summary judgment.

[13] On 21 December 2016, Associate Judge Sargisson declined the application for summary judgment but sustained the caveats.[5] The vendor appealed that decision to the Court of Appeal and then applied for leave to appeal to the Supreme Court, in both instances without success.[6]

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3 The High Court's finding suggested that the director and shareholder of the vendor company mistakenly thought that if the sale proceeded without GST, the vendor company would have to pay GST out of its own pocket: *Wang v Y&P NZ Ltd* [2019] NZHC 2112 (Palmer J) [HC decision] at [19].

4 The vendor then purported to conclude separate agreements with a third party for the sale and purchase of the properties. Those agreements lapsed when the vendor was unable to complete the transaction by the appointed settlement date.

5 *Wang v Y & P New Zealand Ltd* [2016] NZHC 3173, (2016) 7 NZ ConvC ¶96-016 at [32]–[33].

6 *Y&P NZ Ltd v Wang* [2017] NZCA 280, (2017) 28 NZTC ¶23-021 [CA caveat decision]; *Y&P NZ Ltd v Wang* [2017] NZSC 126, (2017) 28 NZTC ¶23-027 [SC caveat decision].

[14] In the meantime, the purchasers sought specific performance in the High Court. During this proceeding, it was discovered that the purchasers were not in fact registered for GST. The purchasers applied to be re-registered in February 2018, and Inland Revenue granted both applications with retrospective effect from 1 April 2016; that is, prior to the proposed settlement date of 28 July 2016.

Lower Court judgments

[15] In the High Court, Palmer J held that the vendor's purported cancellation was not valid even though the purchasers' notice of a change in circumstances did not comply with the requirements as to notice in s 78F of the GST Act and s 14C of the Tax Administration Act 1994.[7] This was because s 78F(2) of the GST Act only required the purchaser to notify the vendor "[a]t or before settlement". As the transactions never settled at all, the final occasion for giving notice under s 78F never arose.[8]

[16] The Judge held further that by issuing revised settlement statements on a zero-rated basis and asking for the purchasers' GST numbers, the vendor had waived the two-day notice requirement in the agreement.[9] But in any case, even if the vendor had insisted on the notice requirement, that would only have entitled it to delay settlement by a day.[10] It would not have entitled the vendor to cancel.

[17] As the purchasers were retrospectively deemed to be GST-registered at the date of settlement, the sale should have been zero-rated.[11] This meant, the Judge found, the vendor's purported cancellation was not valid.[12]

[18] The Judge ordered specific performance of the agreement plus interest on the late settlement.[13]

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7 HC decision, above n 3, at [52]–[55].
8 At [52], citing the caveat decisions of the Court of Appeal and Supreme Court: CA caveat decision, above n 6, at [25]; and SC caveat decision, above n 6, at [5].
9 At [53].
10 At [53].
11 At [54]
12 At [55].
13 At [56].

[19] The High Court order was then stayed by consent, pending determination of the vendor's appeal to the Court of Appeal. The Court of Appeal subsequently affirmed the High Court's decision.[14] In particular, it noted:

(a) Whether a supply is zero-rated is determined at the time the transaction actually settles, regardless of whether that occurs on the agreed settlement date.[15]

(b) The GST position is determined by the GST Act, not by agreement: if the elements of s 11(1)(mb) of the GST Act are met at the time of settlement, the transaction *must* be zero-rated.[16]

[20] As the transactions still had not settled, notice of altered circumstances could still be given under s 78F of the GST Act.[17] And as the purchasers were GST-registered with retrospective effect, intended to use the properties for making taxable supplies, and did not intend to use them as a principal place of residence, settlement had to proceed on a zero-rated basis.[18] The Court therefore upheld the orders for specific performance and payment of penalty interest for late settlement.

Summary of submissions

[21] The vendor argues that it was correct to insist on settlement with 15 per cent GST because:

> … the only information provided by the purchasers, which the purchasers warranted to be correct, meant that the transaction could only have been standard rated, not zero-rated, such that it was the purchasers who defaulted on settling, because they refused to settle in accordance with the Act or the agreement.

[22] The vendor also argues that the purchasers were not GST-registered on the agreed date of settlement, so the transaction could not have been zero-rated.

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14 *Y&P NZ Ltd v Wang* [2019] NZCA 659 (Gilbert, Dobson and Whata JJ).
15 At [31].
16 At [33].
17 At [32].
18 At [34].

[23] Finally, the vendor argues that leave should be granted because:

(a) there is a substantial miscarriage of justice, arising from the vendor having to pay $1,155,747.96 in interest;

(b) "Holding parties to transactions involving the sale of land to statements made in an agreement, particularly statements which they warrant to be correct", is a matter of public and commercial importance;

(c) the treatment of GST in property transactions is a matter of public and commercial importance; and

(d) the gathering of revenue is a matter of public and commercial significance.

Analysis

[24] We are satisfied that the issues arising in this appeal are not of general, public or commercial importance to warrant granting leave.[19] As is apparent from the narrative above, the facts in this case have a number of unusual features. The decisions of the Courts below involved the application of established authority to the facts of the case in determining that it was not necessary for the purchasers to tender payment before they could be considered ready, willing and able to settle.[20]

[25] Relatedly, we are not satisfied that the appeal has sufficient prospects of success to warrant the grant of leave in any event. The fact that Inland Revenue deemed the purchasers to be GST-registered at all times relevant to this appeal, and that the GST status of any transaction is governed by the relevant taxation legislation, present the vendor with formidable obstacles on the merits. It must follow therefore that there are also insufficient prospects of success with respect to the vendor's liability for late settlement interest. We do not therefore consider a substantial miscarriage of justice will arise if leave is not granted.[21]

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19 Senior Courts Act 2016, s 74(2)(a) and (c).
20 *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577.
21 Senior Courts Act, s 74(2)(b).

[26] Further, as the vendor did not seek a stay of the orders in the Court of Appeal, the purchasers are now the registered proprietors of the properties in question. The vendor seeks an order in this Court that the purchasers re-convey the properties to it. No submission was made as to whether or how the exceptions to indefeasibility of title under the Land Transfer Act 2017 might permit the Court to grant such an order in the absence of fraud.[22]

Result

[27] The application for leave to appeal is dismissed.

[28] The applicant must pay costs of $2,500 to the respondents.

Solicitors:
Park Legal Barristers & Solicitors, Auckland for Applicant
Yang Lawyers, Auckland for Respondents

[22] See Land Transfer Act 2017, ss 51 and 52.