IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 87/2024
[2024] NZSC 183

BETWEEN	TADD MANAGEMENT LIMITED Applicant
AND	RUTH RENTON WEINE AND MICHAEL DAVID HOFMANN-BODY AS TRUSTEES OF THE RUTH WEINE FAMILY TRUST Respondents

Court: Williams and Miller JJ

Counsel: F B Q Collins for Applicant
M Freeman for Respondents

Judgment: 20 December 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

[1] The applicant, Tadd Management Ltd (Tadd), seeks leave to appeal a decision of the Court of Appeal on the issue of common mistake under s 24 of the Contract and Commercial Law Act 2017 (CCLA).[1] The factual background is not in dispute and we adopt the Court of Appeal's summary of the facts.[2]

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1 *Weine v Tadd Management Ltd* [2024] NZCA 323, (2024) 16 TCLR 855 (Ellis, Gault and Cull JJ) [CA judgment].

2 At [2]–[14].

[2] In essence, the dispute arose after Tadd bought a commercial property in Lower Hutt at auction from the Ruth Weine Family Trust. An Initial Seismic Assessment (ISA) was undertaken by New Zealand Consulting Engineers Ltd (NZCE) at the trustees' request and disclosed to Tadd before auction. The ISA rated the building at 60 per cent of the New Building Standard (NBS), but this turned out to be a considerable overestimate. After completion of the purchase, Tadd obtained two Detailed Seismic Assessments (DSAs) from two different engineering firms, which assessed the NBS at 10 per cent and 30 per cent respectively.[3] A post-purchase valuation considered the property should be valued as bare land.

[3] Tadd brought proceedings in the High Court against the trustees of the Ruth Weine Family Trust in misrepresentation and common mistake. Tadd argued it was induced to purchase the building by the trustees' misrepresentations as to the NBS rating, or alternatively, both parties acted under the common mistake that the building had a 60 per cent NBS rating in entering the contract for sale and purchase. The trustees argued the ISA was simply an accurate statement of the engineer's reasonable opinion, by way of an *initial* assessment only. As it contained appropriate caveats, it was not a misrepresentation. It followed that there was no mistake that went to the essential nature of the contract. The trustees also raised affirmative defences and, in the alternative, brought a third-party claim against NZCE.

The Courts below

[4] In the High Court, Tadd succeeded in both causes of action.[4] Gwyn J found both parties were influenced to enter into the contract by a mutual mistake that the building was 60 per cent NBS at the date of sale, when subsequent DSAs demonstrated this rating was incorrect.[5] She considered the trustees could not argue they had no belief that the building was 60 per cent NBS:[6]

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3 A rating below 34 per cent means the building is "earthquake prone" while a rating below 67 per cent means the building is "earthquake risk": Ministry of Business, Innovation and Employment and others *The Seismic Assessment of Existing Buildings: Technical Guidelines for Engineering Assessments* (July 2017) at [A1.6] and [A6.5]; and see Building Act 2004, s 133AB.

4 *Tadd Management Ltd v Weine (as trustees of the Ruth Weine Family Trust)* [2023] NZHC 764, (2023) 24 NZCPR 1 (Gwyn J) [HC judgment] at [364].

5 At [157]–[167] and [233].

6 At [226].

> … when their marketing campaign for the Property featured that very fact. Although, as Ms Weine says, the ISA may initially have been obtained because the real estate agent said that is what the vendors should do, it was Ms Weine's decision then to ask Mr Johnstone for a letter about the possibility of the NBS rating being higher than 60 per cent NBS and it was Ms Weine who proposed to Bayleys that the Covering letter be provided to prospective purchasers. In any event, Ms Weine gave evidence that she had no reason not to believe the represented rating of 60 per cent NBS. Although Ms Weine said she could not recollect the circumstances or detail of her conversation with Mr Johnstone, I infer that she made a specific request to Mr Johnstone to write the letter in order to give prospective purchasers further comfort that the building had a good seismic rating of at least 60 per cent and probably higher.

[5] The mutual mistake was essential to the contract and the purchaser was not responsible for its content.[7] Tadd was awarded damages of $592,000 plus the cost of an additional DSA and interest.[8]

[6] The High Court's decision was unanimously overturned on appeal.[9] The Court of Appeal found the ISA rating was neither a misrepresentation nor a mistake. Rather, the relevant factual representation was that, in an ISA, an expert engineer rated the building at 60 per cent NBS—a rating that was an opinion rather than a statement of fact.[10] Indeed, the ISA and the 6 October 2017 covering letter said so. The Initial Evaluation Procedure Assessment (IEP) used to prepare the ISA contained a warning that a detailed inspection and the calculations and judgments based on them had not been undertaken.[11] If they were, the material warned, a different seismic grade may result.

The parties' submissions

[7] The applicant seeks leave to appeal only on the ground of common mistake. The applicant submits that the Court of Appeal's decision on this issue is "fundamentally unsound and sets an undesirable precedent in an area where there is no settled law". The submission is that the true mistake was not as to the NBS rating (as the High Court had found) but its effect, which was to cause both parties to believe the building was not earthquake prone when in fact it was. That was the underlying

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7 At [232].
8 At [257]–[259].
9 CA judgment, above n 1, at [51] and [58]–[61].
10 At [44].
11 See below at [10].

mistake which produced a substantially unequal exchange of value. Further, relying on this Court's decision in *Melco Property Holdings (NZ) 2012 Ltd v Hall*, the applicant suggests the trustees cannot take advantage of their own action in marketing the property on the basis that its NBS rating was good.[12] The applicant also submits that, by applying its reasoning on misrepresentation to the separate question of mistake, the Court of Appeal has unduly narrowed the ambit of the common mistake cause of action.

[8] The trustees argue in response that the appeal brings no challenge to the well-established principles relating to contractual mistake and so no issues of law or interpretation arise for further consideration by this Court. The finding in the High Court had been that the ISA was a statement of expert opinion that was not wrong on its own terms and within its own limitations. That determination, it is submitted, is not challenged head-on in this Court. The trustees submit that the applicant is not permitted to reframe its case by now suggesting that the real message of the ISA and covering letter was that the building was not "earthquake prone". That was not a matter raised in the Court of Appeal and was not a determination or finding made in the High Court.

Our assessment

[9] For the purposes of this application, s 24 of the CCLA relevantly provides as follows:

> **24 Relief may be granted if mistake by one party is known to another party or is common or mutual**
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> (1) A court may grant relief under section 28 to a party to a contract if,—
>
> (a) in entering into the contract,—
>
> …
>
> (ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; [and]
>
> …
>
> (b) the mistake or mistakes resulted, at the time of the contract,—

[12] *Melco Property Holdings (NZ) 2012 Ltd v Hall* [2022] NZSC 60, [2022] 1 NZLR 59.

(i) in a substantially unequal exchange of values; or

(ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation; and

(c) in a case where the contract expressly or by implication provides for the risk of mistakes, the party seeking relief (or the party through or under whom relief is sought) is not obliged by a term of the contract to assume the risk that that party's belief about the matter in question might be mistaken.

(2) The relief may be granted in the course of any proceeding or on application made for the purpose.

…

[10] Tadd's argument in this Court would be that both parties mistakenly interpreted the engineer's conditional opinion as establishing a fact—that the building was not earthquake prone. But, unlike the potentially influential mistakes in *Magee v Mason*[13] and *Shen v Ossyanin (No 2)*,[14] the ISA was initial only, subject to important reliability caveats and (as the High Court found) undertaken with reasonable care. The disclaimer that appeared on every page of the IEP to the ISA provided:[15]

> **WARNING!!** *This initial evaluation has been carried out solely as an initial seismic assessment of the building following the procedure set out in the New Zealand Society for Earthquake Engineering document "Assessment and Improvement of the Structural Performance of Buildings in Earthquakes, June 2006". This spreadsheet must be read in conjunction with the limitations set out in the accompanying report, and should not be relied on by any party for any other purpose. Detailed inspections and engineering calculations, or engineering judgements based on them, have not been undertaken, and these may lead to a different result or seismic grade.*

[11] A letter from the engineering firm[16] provided further comfort to the trustees by suggesting that NBS ratings often increased following a full DSA, and this was made available to bidders without the engineer's knowledge. But the evidence at trial was that this statement about past experience was true.

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13 *Magee v Mason* [2017] NZCA 502, (2017) 18 NZCPR 902 at [34]; and see the subsequent discussion of that case in David McLauchlan "Misrepresentation? Or was it a case for relief on the ground of common mistake?" [2018] NZLJ 13.

14 *Shen v Ossyanin (No 2)* [2019] NZHC 2430, (2019) 20 NZCPR 590 at [1].

15 Emphasis in original.

16 This letter was referred to as the "covering letter" in the High Court and the "NZCE letter" in the Court of Appeal. We have called it the "covering letter" for ease of reference.

[12] We recognise the ISA and letter gave Tadd a sense of comfort in proceeding with the purchase and the trustees certainly emphasised the "good" NBS rating at auction as an attractive aspect of the property. We also accept that the auction format meant there was no time to organise a DSA and probably no ability to require one as a post-contract condition—although that additional uncertainty is likely to have been factored into price. In other circumstances it might well be argued that the broad wording of s 24 should result in a sharing of risk between an equally mistaken vendor and purchaser, but the present case is primarily about a distinctive set of facts in which that question of principle does not squarely arise.

[13] On balance, we are not satisfied that the proposed appeal raises a matter of general or public importance, the appearance of a substantial miscarriage of justice,[17] or a matter of general commercial significance, such that it is necessary in the interests of justice to grant leave.[18] Nor are we persuaded that the proposed appeal has sufficient prospects of success to warrant granting leave.

Result

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

[15] The applicant must pay the respondents one set of costs of $2,500.

Solicitors:
Braun Bond and Lomas Ltd, Hamilton for Applicant
Thomas Dewar Sziranyi Letts, Lower Hutt for Respondents

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17 As that term is used in the context of civil proceedings: *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

18 Senior Courts Act 2016, s 74(1)–(2).