

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 30/2024
[2024] NZSC 79

BETWEEN

ZHENLIN (ROBERT) LUO
First Applicant

KC BROTHERS LIMITED
Second Applicant

ANG (ANNY) YIP
Third Applicant

MAN FEI COMPANY LIMITED
Fourth Applicant

AND

XIAOLING (ANNIE) SHIU
First Respondent

CSR POKENO LIMITED
Second Respondent

Court: Ellen France, Kós and Miller JJ

Counsel: J E Hodder KC for Applicants
D R Bigio KC and Y Y Mortimer-Wang for Respondents

Judgment: 24 July 2024

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay the respondents one set of costs of \$2,500.**
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REASONS

Introduction

[1] The applicants, Robert Luo, Anny Yip and associated entities, entered into joint venture agreements with the respondents, Annie Shiu and an associated company, CSR Pokeno Ltd. The applicants claimed in the High Court that they were induced to enter into the joint venture agreements because of two misrepresentations made by Ms Shiu.¹ Their claim succeeded in the High Court.² Whata J found the misrepresentations had been made in breach of s 9 of the Fair Trading Act 1986, causing the applicants loss justifying monetary compensation. The respondents appealed successfully to the Court of Appeal.³ The Court found that the key representation had never been made.

[2] The applicants have filed an application for leave to appeal to this Court from the decision of the Court of Appeal. They say that the Court of Appeal in quashing the judgment of the High Court has impermissibly ignored the advantages of the trial Judge in assessing the evidence and making credibility findings; erred in its assessment of the evidence; and limited the protective reach of the Fair Trading Act. The application for leave is opposed by the respondents on the basis that the criteria for leave to appeal are not met.

Background

[3] The applicants in their submissions describe the factual background as involving “some complexity”. The narrative is set out fully in the High Court judgment⁴ and in the judgment of the Court of Appeal.⁵ For present purposes it is sufficient to identify the following matters.

¹ Compensation was sought on the alternative bases of contractual misrepresentation under s 35 of the Contract and Commercial Law Act 2017, and misleading and deceptive conduct under s 9 of the Fair Trading Act 1986.

² *Luo v Shiu* [2021] NZHC 3564 (Whata J) [HC judgment].

³ *Shiu v Luo* [2024] NZCA 48 (French, Gilbert and Mallon JJ) [CA judgment]. The present applicants’ cross-appeal in relation to costs was dismissed. The Court of Appeal subsequently issued a stay of part of the judgment on conditions pending determination of this application: *Shiu v Luo* [2024] NZCA 277 (French, Gilbert and Mallon JJ).

⁴ HC judgment, above n 2, at [7]–[39].

⁵ CA judgment, above n 3, at [7]–[43].

[4] Ms Shiu is a property developer. She saw a development opportunity in the fast-growing Pōkeno West area where consideration was being given to rezoning land from rural to residential. She bought a number of individual properties in the area on terms providing for prices above market value, delayed settlements and deposits which were larger than the norm. Ms Yip and Mr Luo were enlisted as investors to help fund some of the acquisitions under joint venture agreements. Ms Shiu said that what she had taken to the investors was the opportunity of the proposed rezoning. That was risky but it was, as the Court of Appeal put it, “a calculated risk because of the known council sympathy for expanding residential development in the area”.⁶

[5] Mr Luo and Ms Yip said Ms Shiu made two misrepresentations. The first was that commission was payable to a real estate agent (the commission representation). This was admitted in the statement of defence, by which point Ms Shiu had been convicted in the District Court of obtaining money by deception by falsely advising each of Mr Luo and Ms Yip that certain moneys were required to be paid to her to meet real estate commission fees.⁷

[6] The second misrepresentation, which was the primary focus in the Court of Appeal, is that the respondents would be profit-sharing partners across the whole development, rather than just the properties subject to the joint venture agreements that Mr Luo and Ms Yip had signed (the Pōkeno West representation).

[7] The High Court found that the Pōkeno West representation was made by Ms Shiu. In reaching that finding, the Judge heard evidence from Mr Luo and Ms Yip. Ms Shiu did not give evidence. Amongst other matters, the Judge said an adverse inference could be drawn from Ms Shiu’s failure to give evidence.

[8] The Court of Appeal concluded the evidence did not support the finding that the Pōkeno West representation had been made. The matters relied on by the Court of Appeal can be summarised in this way:

⁶ At [3].

⁷ *R v Chen* [2020] NZDC 25807 (Judge Rollo).

- (a) The Pōkeno West representation was only raised explicitly by both Ms Yip (in the third iteration of her statement of claim) and Mr Luo (in his brief of evidence for trial) very late in the piece.
- (b) The Pōkeno West representation was inconsistent with the terms of the joint venture agreements and was not recorded in any of the other associated documentation.
- (c) The evidence from Ms Yip and Mr Luo as to the terms, timing and circumstances of the making of the Pōkeno West representation was vague, or lacking in specificity, and (in the case of Ms Yip) internally inconsistent. Nor was the claim supported by evidence from third parties such as the consulting lawyers or accountants.
- (d) Weight placed by the High Court on one of the other witnesses was not justified, given the witness did not have knowledge of the parties' discussions.

[9] The Court's finding that the Pōkeno West representation was not made meant the remaining issue was whether the Judge was right to conclude that, although the commission representation was not an inducement to contract, it meant Ms Shiu was liable for losses in addition to the commission payments. The Court of Appeal concluded the High Court was wrong in this respect.

The proposed appeal

[10] The applicants submit that the proposed appeal involves matters of general importance and a substantial miscarriage of justice.⁸ Specifically, the applicants' submissions wish to raise three primary points:

- (a) that the Court of Appeal's assessment of the evidence and its credibility findings were seriously flawed, resulting in a miscarriage of justice;

⁸ Senior Courts Act 2016, s 74(2)(a)–(b).

- (b) that the Court of Appeal’s decision to quash the High Court’s judgment was a serious error, in that it failed to respect the trial Judge’s advantages and the customary caution associated with the proper appellate role; and
- (c) that the Court of Appeal’s judgment limited the protective scope of the Fair Trading Act by:
 - (i) applying a higher threshold of proof to s 9 of the Fair Trading Act than is approved in the authorities; and
 - (ii) adopting a strict test for causation in terms of s 43 of the Fair Trading Act which effectively required the conduct be the only effective cause of the loss.

Our assessment

[11] We are satisfied that the proposed appeal does not raise any questions of general or public importance or of general commercial significance. Amongst other matters, the applicants submit it is necessary for the Court to restate the acknowledgment by this Court in *Austin, Nichols & Co Inc v Stichting Lodestar* of the “‘customary’ caution appropriate when seeing the witnesses provides an advantage because credibility is important”, and that the failure to apply this principle in this case involves a point of law of general importance.⁹

[12] The Court of Appeal in the present case undertook a review of the facts as contemplated by *Austin, Nichols & Co Inc v Stichting Lodestar*. The Court in that decision made it clear that:¹⁰

⁹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13] (footnote omitted). The Court cited in this context *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA); and *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 129 (PC).

¹⁰ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 9 (footnote omitted).

[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the [appellate] Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[13] The Court of Appeal explicitly acknowledged the advantages of the High Court in assessing the evidence of the witnesses and provided a reasoned approach for taking a different view of that evidence. We see the applicants' challenge as essentially an argument about the application of the principles in *Austin, Nichols & Co Inc v Stichting Lodestar* to these particular facts.

[14] Nor do we see any appearance of a miscarriage of justice, as that term is used in the civil context, in the Court of Appeal's exercise of its judgment.¹¹ The applicants would challenge the basis for various aspects of the Court of Appeal's reasoning on the evidence, for example, as to the times at which they made reference to a representation; they raise the importance of contemporaneous WeChat messages; and they also refer to their relative lack of experience and a degree of discomfort with use of English.

[15] As we have indicated, we see the Court's approach as an orthodox one in terms of *Austin, Nichols & Co Inc v Stichting Lodestar*. The Court undertook a careful and reasoned analysis of the evidence noting the advantages of the trial Judge in assessing overall credibility. It is also relevant that, although finding in favour of the applicants, the High Court noted the absence of contemporaneous documentation supporting the claimed representation.¹² The Judge also said there were doubts about the "robustness and credibility" of Mr Luo and Ms Yip's evidence.¹³

[16] Nor do we consider the approach adopted by the Court of Appeal to the Fair Trading Act raises any questions of general or public importance or of general

¹¹ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

¹² HC judgment, above n 2, at [61].

¹³ At [61].

commercial significance. On the basis that the Pōkeno West representation was not made, this proposed ground largely falls away. In any event, in its focus on the commission representation the Court of Appeal applied the decision of this Court in *Red Eagle Corp Ltd v Ellis*.¹⁴ The Court accepted that if Mr Luo and Ms Yip had known that Ms Shiu was lying about the commission, they would not have gone into business with her. The difficulty was that, knowing of the deception, both elected to affirm the contract. For example, it was not until some three years after finding out about the deception that Mr Luo first sought cancellation. The Court of Appeal saw the “likely inference to be drawn from” their conduct was that “they still considered Pōkeno West as a good commercial opportunity and were keen to remain involved”.¹⁵ Ultimately, the Court said it was not reasonable to conclude that the claimed losses were the consequences of the representation: “The representation was neither the effective cause nor an effective cause.”¹⁶ Nothing raised by the applicants gives rise to the appearance of a miscarriage of justice in the Court’s approach to this topic.

[17] For these reasons, the criteria for leave to appeal are not met. We decline to admit the applicants’ reply submissions as they do not add to the material already before the Court.

Result

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

[19] The applicants must pay the respondents one set of costs of \$2,500.

Solicitors:
Righteous Law Ltd, Auckland for Applicants
Heritage Law, Auckland for First Respondent
Tompkins Wake, Auckland for Second Respondent

¹⁴ *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29].

¹⁵ CA judgment, above n 3, at [118].

¹⁶ At [126]. The Court also noted that in his evidence Mr Luo said he had accepted a full refund of the commission payments plus interest in full settlement: at [130].