IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-1299
[2020] NZHC 3004

IN THE MATTER	of an appeal against a decision of the District Court dated 10 July 2020 in CIV-2018-004-1028
BETWEEN	CAROLINE DESIREE MARR Appellant
AND	KAREN ANN MILLS and GRAEME WILLIAM MILLS Respondents

Hearing: 22 October 2020

Appearances: S A Keall for the appellant
S A Grant for the respondents

Judgment: 12 November 2020

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 12 November 2020 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel:
S A Keall Barrister, Auckland
S A Grant Barrister, Auckland

[1] Caroline Marr appeals against the decision of Judge G M Harrison in the District Court at Auckland on 10 July 2020,[1] holding her liable to the Mills in an amount equivalent to a GST refund argued claimable by them and associated expenses.

Background

[2] At auction, the Mills acquired a property – comprising a house, shop, workshop, and on-site parking in Auckland's Royal Oak – from Ms Marr for $1.45 million (inclusive of GST, if any), on terms otherwise set out in a sale and purchase agreement dated 24 August 2014.

[3] The terms of the agreement included Ms Marr warranted the following statement regarding the vendor's GST registration status in respect of the supply under the agreement was correct at the date of the agreement:

> 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

In fact, Ms Marr was so registered. The warranty thus was breached, and judgment on liability entered against Ms Marr.

[4] The Mills contemplated operating a lamp manufacturing and sale business from the shop, and a toy museum business from the workshop. Their plans were, to use Ms Mills' word, "rudimentary": little more than the Mills' thoughts to commence commercial use of part of the premises some months after settlement, and acquisition of some of the resources necessary to conduct the businesses. Still, in reliance on Ms Marr's warranty, they anticipated becoming GST-registered, to use a refund of the GST paid on the purchase price as working capital in the businesses' first months.

[5] But, if both Ms Marr and the Mills were GST-registered, supply under the agreement would be charged "at the rate of 0%", meaning there would be nothing to be refunded. If the Mills were not GST-registered, they would not be entitled to any refund. Acting on professional advice, the Mills decided not to commence the intended

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1 *Mills v Marr* [2020] NZDC 13200.

businesses. They did not register for GST. Subsequently, they subdivided the property, and sold the shop with its road frontage.

[6] The Judge referred to Court of Appeal authority (followed in this Court) to the effect the warranty was "to assign risk between the parties", to hold "there clearly was a loss", and awarded damages in the amount of the anticipated refund.[2]

[7] Ms Marr's counsel, Steve Keall, argues on appeal "as a matter of construction of s 21B" of the Goods and Services Tax Act 1985 (the "Act"), the Mills suffered no loss because they never registered for GST, and "GST registration is a necessary pre-condition for filing a GST return and therefore claiming the benefit of a GST input credit". Without GST registration, "they never would have received any input credit".

Approach on appeal

[8] Appeals to this Court from the District Court are general appeals conducted by way of rehearing,[3] in which Ms Marr bears the onus of satisfying me I should differ from the District Court's decision. I only am justified in interfering with that decision if I consider the decision is wrong – in other words, the Judge erred.[4]

[9] I then am to come to my own assessment of the merits of the case afresh, without deference to the District Court (save for some caution in differing on witness credibility, if I have not had the advantage of observing witnesses).[5] I may rely on the Judge's reasons in reaching my own conclusions, but the weight I give those reasons is a matter for me.[6]

[10] After hearing the appeal, I may make any decision I think should have been made, or (with reasons) direct the District Court to rehear the proceeding or to consider and determine any matter or enter judgment for any party, or make any other order I consider appropriate.[7]

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2 At [39] and [47], citing *Ling v YL NZ Investment Ltd* [2018] NZCA 133, (2018) 28 NZTC 23-057 at [34]–[35] and *Holdaway v Ellwood* [2019] NZHC 792 at [17]–[18].
3 District Court Act 2016, ss 124 and 127; High Court Rules 2016, r 20.18.
4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].
5 At [13].
6 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].
7 District Court Act 2016, s 128; High Court Rules 2016, r 20.19.

Relevant law

[11] On a finding of contractual liability, damages will be awarded in the amount of money (so far as money can do it) necessary to put the plaintiff in the same position as if the contract had been performed.[8] The usual measure of loss is "the difference between the value contracted for and the value obtained",[9] to put the plaintiff in "as good a financial position as if the contract had not been broken",[10] by reference to "the value to the party injured of the loss of the promised performance":[11]

> In cases of awards for damages for misrepresentation in contracts for the sale of land, the difference in value between the land as transferred, and had the representation been true, is normally the measure of the loss.

Those principles apply as much in assessing damages for breach of a warranty.[12] Nonetheless, they only are damages within the parties' contemplation at the time they contracted,[13] or perhaps within their then presumed contemplation.[14]

Discussion

[12] Section 21B entitles a person, who becomes registered after acquiring goods or service on which GST has been charged, to make an adjustment in the amount of tax payable to reflect actual use of those goods and services in making taxable supplies. Such adjustment may give rise to a corollary GST refund.

[13] Mr Keall's arguments on appeal focus on the contingent nature of the Mills' eligibility to become a "registered person" (defined at s 2 as "a person who is

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8 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [23], citing *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA) at 539.

9 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 8, at [27].

10 At [157], citing *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 (Exch) at 365 and *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) at 1273.

11 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 8, at [187], citing *Stirling v Poulgrain*, above n 8, at 422; and [191], citing John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ, Wellington, 2007 [presently, 6th ed, Lexis Nexis, Wellington, 2018]) at [11.2.6].

12 *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139 at [63] and note 7.

13 *Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590, [2008] 3 NZLR 31 at [32], citing at [30] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] 3 WLR 354 (HL) at [215] in restating the rule in *Hadley v Baxendale* (1854) 9 Ex 341 (Exch) (previously restated in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*, above n 8).

14 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 at [24], further restating the rule in *Hadley v Baxendale*, above n 13.

registered or is liable to be registered") for the purposes of the Act. Their ability to recover a GST refund is claimed dependent on their raising "an input credit linked to the conduct of and the taxable activity of a business that never existed". The Mills' inchoate intention to commence in business subsequently is argued insufficient to support either their eligibility to register, or then to claim an input credit in the amount of any GST payable on the property's acquisition.

[14] The construction argument raised by Mr Keall only is to undermine the certainty of that anticipated benefit to the Mills. But it does not exclude the prospect. The Mills' evidence is far from speculative as to their intentions, and grounded in their prior acquisitions of collateral required for the businesses. Most compelling is the Mills' post-auction instruction of the property's apportioned valuation for GST purposes. That instruction was given in advance of notice of Ms Marr's breached warranty. The instruction was not opportunistic, on the Mills knowing of the breach.

[15] The Mills were advised, if commencing the businesses, they risked being found liable to be registered under the Act at the time of the property's acquisition, with the result the transaction again would be zero-rated. The advice was confirmed by expert evidence before the Judge. Whether or not that advice was correct, Ms Mills' evidence was they had "borrowed money to buy the property and were not in a position to take further risk to set up the businesses without the GST refund".

[16] 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 allocation of risk by the GST warranty means such was within the contemplation of the parties at the time of the property's acquisition. That is the financial position the Mills were denied by Ms Marr's breach of the warranty.

[17] As a prospective benefit denied by Ms Marr's breach of warranty, the GST refund in context was sufficiently foreseeable to warrant its award in damages. The Judge did not err.

Result

[18] The appeal is dismissed.

Costs

[19] In my preliminary view, as the successful parties, the Mills are entitled to 2B costs and disbursements on steps taken in the appeal. That is because, so far as I can tell, no step in this averagely complex appeal required other than a normal amount of time.

[20] If that is not accepted by the parties, or they cannot otherwise agree, I reserve costs for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by the Mills within ten working days of the date of this judgment, with any response and reply to be filed within five working day intervals after service.

—Jagose J