

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA499/2017
[2018] NZCA 133**

BETWEEN LOUISE LING
 Appellant

AND YL NZ INVESTMENT LIMITED
 Respondent

Hearing: 10 April 2018 (further submissions received 13 April 2018)

Court: Asher, Wylie and Thomas JJ

Counsel: R E Harrison QC and A Hur for Appellant
 J L Foster for Respondent

Judgment: 2 May 2018 at 3 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**
- C Funds held by the appellant’s solicitor for the total judgment debt and costs must be released to the respondent’s solicitor.**
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REASONS OF THE COURT

(Given by Thomas J)

[1] The appellant, Ms Ling, sold property to the respondent, YL NZ Investment Limited (YL), for a price inclusive of GST. In the sale and purchase agreement, Ms Ling warranted she was not registered under the Goods and Services Tax Act 1985 (GST Act) in respect of the transaction and would not be so registered

at settlement. YL was registered under the GST Act. After settlement, YL's claim for an input tax refund of \$365,869.57 was rejected by the Inland Revenue Department (IRD) on the basis the supply was from a registered person to another registered person and was therefore zero-rated under the GST Act.

[2] YL successfully applied for summary judgment against Ms Ling claiming breach of warranty resulting in YL's inability to claim the input tax refund.¹ Ms Ling appeals that decision.

Background

[3] On 2 July 2015, Ms Ling entered into an agreement to buy the property situated at 170 Station Road, Pukekohe (the Property). On 21 December 2015, prior to having settled her purchase, Ms Ling entered into an agreement to sell the Property (the Agreement). The Agreement used the form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society. The purchaser was recorded as WHC Holding Ltd, the director of which was recorded as Judson Jianjun Li, and/or nominee. The purchase price was recorded as \$3.5 million inclusive of GST.

[4] On the front page of the Agreement was the statement:

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.

“No” was circled beside that statement.

[5] Schedule 2 to the Agreement was headed “GST information — see clause 14.0” and said:

This Schedule must be completed if the vendor has stated on the front page that 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. Otherwise there is no need to complete it.

[6] Notwithstanding that, parts of the schedule were filled in. The vendor's registration number was left blank. Answers in the affirmative were given to

¹ *YL NZ Investment Ltd v Ling* [2017] NZHC 1793.

statements that the purchaser was registered under the GST Act and would be so registered at settlement, and that at settlement the purchaser intended to use the Property for making taxable supplies. The purchaser was identified as WHC Holding Ltd and its GST registration number was given. The answer “No” was given to statements as to whether the purchaser intended to use the Property as a principal residence under the GST Act. The rest of the schedule, which dealt with nomination and the provision of further information as to the nominee’s address and registration number, was left blank.

[7] Ms Ling became registered proprietor of the Property on 5 February 2016. Prior to that, on 30 October 2015, the then owner of the Property had granted a monthly tenancy of part of the Property to a company engaged in horse training and grazing. There is no evidence as to whether Ms Ling continued the lease on her purchase of the Property. However, the Agreement stated there were no tenancies.

[8] Although the Agreement provided for settlement on 31 May 2016, settlement took place on 13 June 2016. By deed dated 10 June 2016, WHC Holding Ltd nominated YL as nominee and notice to that effect was given to Ms Ling’s lawyers.

[9] On 15 July 2016, YL submitted a GST return to the IRD claiming the input tax refund of \$365,869.57 (the GST Refund) in relation to the purchase of the Property. The IRD queried the claim and was provided with further information.

[10] On 15 September 2016, the IRD wrote to Ms Ling (the Letter), giving her a GST registration number and saying:

You’re now registered for GST as from 8 May 2015. From this date, you need to charge and account for GST on all goods and services you supply in your taxable activity using the hybrid accounting basis.

[11] YL’s advisers asked the IRD about the GST Refund and were advised by email on 10 October 2016:

I can confirm the vendor for the property sale at 170 Station Road, Pukekohe is GST registered and should have been at the time of sale.

IRD sent a similar email to YL’s advisers on 26 October 2016.

[12] On 30 October 2016, YL's lawyers wrote to Ms Ling's lawyer setting out the background and noting the IRD had requested YL to respond. YL's lawyers sought the following information:

1. Whether or not the IRD is correct that your client was GST registered in respect of the transaction evidenced by the Agreement, in which case the supply should have been zero rated.
2. If the IRD is incorrect, please advise on what basis the IRD is incorrect.
3. If the supply was [a] zero rated taxable supply, our client will seek recovery from the vendor for her breach of the vendor's warranty in clause 14.1 of the Agreement and for the vendor's misrepresentation as to her GST position in respect of the supply.
4. Please confirm whether the house was occupied as a dwelling by any person during the period that the property was owned by the vendor.

[13] Ms Ling's lawyers responded to the effect they had forwarded the email to Ms Ling and awaited instructions. No substantive response was received.

[14] On 16 November 2016, the IRD wrote to YL's tax adviser saying:

This email is to confirm the supply of land at 170 Station Road, [Pukekohe] from Louise Ling to your client was made from a registered person to another registered person and was part of the vendors taxable supplies.

Therefore, the zero rating criteria under section 11(1)(mb) of the GST Act 1985 has been satisfied and accordingly it is proposed the GST refund claimed by your client will be disallowed.

[15] As a result, YL agreed to amend its GST assessment by excluding the claim for the GST Refund.

[16] On 14 February 2017, using the services of the estate agent who dealt with the sale and purchase of the Property, Ms Ling approached YL with a document headed "Variation To Sale and Purchase". As the incorrect address of the subject property was referred to in the variation, an amended version was sent on 15 February 2017. The document stated:

We the undersigned agree to the following Variation/s to the above Agreement:

- A Whereas the vendor and purchaser entered into an agreement dated 21/12/2015 for the property situated at 170 station road [sic] Pukekohe
- 1 The vendor is registered under the GST Act. The vendor GST registration number is 91-181-806.
 - 2 The purchaser nominated WHC Holding Ltd. This company is [sic] GST registration number is 92-394-999.
 - 3 The parties agree that the purchase price is now recorded as \$3,134,130.43 plus GST. Further the parties agree that transaction is zero rated for GST purpose.
 - 4 Louise Ling agreed to return GST \$365,869.57 before 31/5/17. The parties will arrange the se [sic] settlement letter.

[17] Ms Ling referred to this document in her affidavit opposing the application for summary judgment, saying she “provided an amended agreement for GST refund purposes”.

[18] Mr Li, director of YL, refused to sign the variation. He did so not only because it made no difference to his position as the transaction would still have been zero-rated but also because he was not comfortable altering an agreement which had already settled and been the subject of a GST return and review by the IRD.

Issues on appeal

[19] Ms Ling considers Associate Judge Bell erred in granting summary judgment and concluding there was a breach of the GST warranty in the Agreement. The appeal was advanced before us on the following grounds:

- (a) The Judge erred in his interpretation of the Agreement and warranty. Ms Ling claims that, as properly interpreted, she did not breach the warranty because she was not in fact registered under the GST Act at settlement.

- (b) The Judge erred in treating the Letter as proof that, as at settlement, Ms Ling was registered under the GST Act and therefore in breach of warranty.

Meaning of the GST warranty

[20] The warranty on which YL relied is contained in cl 14 of the Agreement. Clause 14 said:

14.0 Zero-rating

- 14.1 The vendor warrants that the statement on the front page regarding the vendor's GST registration status in respect of the supply under this agreement is correct at the date of this agreement.

[21] The statement on the front page of the Agreement, which is set out in full at [4] above, was to the effect that the vendor was not registered under the GST Act in respect of the transaction and/or would not be so registered at settlement.

[22] Ms Ling's case is that she was not in breach of warranty because, as at the date of the Agreement and as at the date of settlement, she was not in fact registered under the GST Act. She was subsequently registered with effect from a date prior to the Agreement. That subsequent registration, in Mr Harrison QC's submission on behalf of Ms Ling, does not mean, on a proper construction of the Agreement, that Ms Ling breached the warranty.

[23] The Judge relied on the fact that the Agreement incorporated definitions from the GST Act and, even had it not, reference to registration under the GST Act must mean registration in terms of the statutory definition.² He also identified the risk inherent in Ms Ling's argument and the impact of her interpretation of the Agreement on conveyancing transactions generally.³

[24] Clause 1.1 of the Agreement was a definitions clause and included the following:

² At [30]–[31].

³ At [33].

1.1 Definitions

- (1) Unless the context requires a different interpretation, words and phrases not otherwise defined have the same meanings ascribed to those words and phrases in the *Goods and Services Tax Act 1985*, the Property Law Act 2007, the Resource Management Act 1991 or the Unit Titles Act 2010.

...

- (8) “GST” means Goods and Services Tax arising pursuant to the Goods and Services Tax Act 1985 and “GST Act” means the Goods and Services Tax Act 1985.

...

- (28) The terms “going concern”, “goods”, “principal place of residence”, “recipient”, “registered person”, “registration number”, “supply” and “taxable activity” have the meanings ascribed to those terms in the GST Act.

(Emphasis added.)

[25] The GST Act provides:⁴

registered person means a person who is registered or is liable to be registered under this Act

[26] A person’s liability for registration is governed by s 51 of the GST Act. A person becomes liable to be registered if, in a 12 month period, he or she carries on taxable activities exceeding the relevant threshold (\$60,000 at the time) or there are reasonable grounds for believing that will occur.⁵ Subsection 4 provides two ways for a person to be registered:

- (4) Where any person has—
- (a) made application for registration pursuant to subsection (2), (3), or section 54B, and the Commissioner is satisfied that that person is eligible to be registered under this Act, that person shall be a registered person for the purposes of this Act with effect from such date as the Commissioner may determine; or
 - (b) not made application for registration pursuant to subsection (2), and the Commissioner is satisfied that that person is liable to be registered under this Act, that person shall be a registered person for the purposes of this Act with effect from the date on which that person first became liable to be registered under this Act: provided that the

⁴ Goods and Services Tax Act 1985, s 2.

⁵ Section 51(1).

Commissioner may, having regard to the circumstances of the case, determine that person to be a registered person from such later date as the Commissioner considers equitable.

[27] Therefore, if a person applies for registration, the person will be registered with effect from such date as the Commissioner may determine. If a person has not applied, and the Commissioner is satisfied a person is liable to be registered, he or she is registered with effect from the date on which that person first became liable to be registered, provided the Commissioner can determine that person to be a registered person from a date the Commissioner considers equitable.

[28] In Mr Harrison's submission, the front-page statement in the Agreement cannot be interpreted as a representation by Ms Ling that she was not liable to be registered under the GST Act. He submitted that cl 14.1 specifically limits the representation and warranty to the vendor's current GST registration status. That, he said, was logically inconsistent with providing for a future liability of being deemed to be registered for GST with retrospective effect. Mr Harrison contrasted other references in the Agreement at cl 14.3(1) and (2) and cl 15.1(1) which expressly used the expression "registered person". Furthermore, in his submission, "liable to be registered" in terms of the GST Act definition of registered person means liable in terms of s 51(1) which requires matters of law and fact to be established on evidence.

[29] The question is, therefore, whether "registered under the GST Act" as used on the front page of the Agreement means the same as "registered person", being a defined term used later in the Agreement. In our view, the terms "registered person" and "registered under the GST Act" as used in the Agreement are clearly synonymous. This is emphasised by cl 14.3 of the Agreement, which provided:

14.3 Where the particulars stated on the front page and in Schedule 2 indicate that:

- (1) The vendor is and/or will be at settlement a registered person in respect of the supply under this agreement;
- (2) The recipient is and/or will be at settlement a registered person;
- (3) The recipient intends at settlement to use the property for making taxable supplies; and

- (4) The recipient does not intend at settlement to use the property as a principal place of residence by the recipient or a person associated with the recipient under s 2A(1)(c) of the GST Act—

GST will be chargeable on the supply under this agreement at zero per cent pursuant to section 11(1)(mb) of the GST Act.

[30] Clause 14.3 demonstrates that the Agreement does not intend there to be two different GST registration concepts under the Agreement, that is, “registered under the GST Act” and “registered person”. It links the particulars on the front page (which logically refer to the GST statement) and Schedule 2 (which contains only GST information) with whether the vendor is and/or will be at settlement a registered person in respect of the supply made under the Agreement. Clause 14.3 reinforces that a positive response to the GST statement on the front page means the vendor is or will be a registered person at settlement. A registered person is a person registered or liable to be registered under the GST Act. If the criteria for registration are met, a person is a registered person whether or not they have applied to be registered under the GST Act.⁶

[31] By responding “No” to the statement on the front page of the Agreement, Ms Ling said she was not and would not at settlement be a registered person, that is, registered or liable to be registered under the GST Act. Clause 14.1 of the Agreement makes that statement a warranty.

[32] In support of this interpretation, the Judge referred to the purpose of provisions about the supply of a going concern in the GST Act and the need for agreement between a supplier and recipient in that regard.⁷ He noted this Court’s observation in *Fatac Ltd (in liq) v Commissioner of Inland Revenue* that the implied purpose was to remove confusion and uncertainty where a purchaser seeks an input tax credit and the vendor seeks to resist an output tax debit.⁸ He also noted this Court’s observation in *Starrenburg v Mortre Holdings Ltd* in relation to the clause which corresponds to cl 15 of the Agreement, the supply of a going concern.⁹ This Court said the provisions of

⁶ Section 51(4)(b).

⁷ *YL NZ Investment Ltd v Ling*, above n 1, at [22].

⁸ *Fatac Ltd (in liq) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 (CA) at [78]–[79].

⁹ *Starrenburg v Mortre Holdings Ltd* (2004) 6 NZCPR 193 (CA).

the standard agreement concerning GST and the supply of a going concern were for the purpose of avoiding any confusion as to the GST liability position of the parties.¹⁰

[33] The Judge identified that, while those comments applied to the supply of a going concern, they were equally applicable to the present case.¹¹ We agree.

[34] The purpose of a warranty in a commercial contract is to assign risk between the parties. A party provides a warranty in respect of matters which are or can be expected to be within that party's knowledge but not within the knowledge of the other party. This is plainly the situation in this case. YL could not know Ms Ling's GST status, that is, whether she was in fact registered or whether she was liable to be registered. YL could not challenge the Commissioner's decision as to Ms Ling's registration and its retrospective effect. In those circumstances, it is right that the risk as to GST registration lies with Ms Ling. The GST warranty was for the purpose of avoiding any confusion as to the GST liability position of the parties.

[35] We also agree with the Judge's analysis of the ramifications should Ms Ling's interpretation of the GST warranty be correct. It would introduce uncertainty on an essential term of agreements for sale and purchase of property, namely, the liability to pay GST and the impact that would have on the purchase price.

Did YL prove Ms Ling had no defence to the claim?

[36] On an application for summary judgment, the onus is on the plaintiff to show the defendant has no defence to the claim.¹² In light of that, Mr Harrison submitted the Judge incorrectly relied on inadmissible evidence in assessing the application. Specifically, Mr Harrison maintained the Letter was inadmissible hearsay and there was no onus on a defendant to a summary judgment application to answer inadmissible evidence.

[37] The issue of hearsay was not raised in the High Court, although Ms Ling had different counsel acting at the time. While we have some reservations as to whether

¹⁰ At [30].

¹¹ *YL NZ Investment Ltd v Ling*, above n 1, at [23].

¹² *Krukzeiner v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 (CA) at [26].

the Letter was indeed hearsay or whether it was a business record which would be admissible, we do not need to determine the issue.¹³ In our view, there was sufficient other evidence to establish Ms Ling was registered under the GST Act in relation to the transaction, or liable to be so, as at the date of settlement. The other evidence was:

- (a) The Agreement provided that the purchase price of \$3.5 million was inclusive of GST. In the Agreement, Ms Ling said she was not registered under the GST Act and would not be so registered at settlement. YL was GST registered as at settlement. On this basis, the transaction was not a supply which would be subject to zero-rating.
- (b) YL's claim for the GST Refund was rejected by the IRD. The irresistible inference in the circumstances is that the claim was rejected because Ms Ling was liable for GST registration as at settlement and the transaction was zero-rated.
- (c) The IRD informed YL's advisers the reason for its decision disallowing YL's claim for the GST Refund was that Ms Ling was GST registered and should have been at the time of sale. The IRD said the transaction was zero-rated.
- (d) YL, through its lawyers, then made Ms Ling aware of the position with the IRD and gave Ms Ling the opportunity to respond. They specifically asked Ms Ling to advise on what basis the IRD was incorrect. Ms Ling remained silent on the issue.
- (e) In her affidavit in response to YL's application for summary judgment, Ms Ling said:
 - 3. By way of explanation I wish to add that, while I was actually registered for GST on or about 15 September 2016, the [IRD] backdated my registration, for their internal assessment purposes, to an earlier date namely 8 May 2014 [sic]. In other words, the IRD deemed me to have been registered from a date that was much earlier than the date on which I was actually registered.

¹³ See Evidence Act 2006, ss 16, 17 and 19.

4. The backdating of my GST registration was partly to my advantage and partly to my disadvantage financially. It is, however, a situation that I could not have foreseen, and did not foresee, at the date on which I signed the agreement. At that date I was not registered for GST and did not intend to be. The need to register for GST arose because of circumstances that arose after the agreement was signed and settled.

Ms Ling therefore accepted she was registered for GST and the IRD had backdated her registration to 8 May 2015. She then said the backdating was partly to her advantage and partly to her disadvantage. The inference from that is she had been engaged in taxable activity in the period covered by the backdating which would enable her to obtain some advantage in being GST registered.

- (f) Ms Ling's claim that the need to register arose because of circumstances which occurred after settlement cannot be right. It is for the Commissioner to determine the date of Ms Ling's liability for registration, regardless of whether she herself applied to be registered or whether the Commissioner decided she was liable to be registered.¹⁴
- (g) In her affidavit, Ms Ling did not challenge the IRD backdating of her GST registration. Any information as to why the registration should not have been backdated was entirely within Ms Ling's knowledge. There was no evidence before the High Court and no application for leave to admit evidence before us to the effect the backdating was wrong. The date of backdating is immaterial and, as referred to at [27] above, the date of registration is for the Commissioner to determine. The only issue is whether Ms Ling was GST registered or liable to be so as at the date of settlement.
- (h) By proposing on two occasions that YL sign the "Variation To Sale and Purchase", Ms Ling confirmed she was registered for GST in relation to the transaction as at the settlement date. The proposed variation was in relation to the transaction. It recorded that Ms Ling was registered

¹⁴ Goods and Services Tax Act, s 51(4).

and advised her GST number. It proposed the parties agree the transaction was zero-rated. Zero-rating is mandatory if both parties are GST registered, pursuant to cl 14.3 of the Agreement.

[38] When assessing whether a defendant has no defence to the claim on a summary judgment application, the court is entitled to take a robust and realistic approach where the facts warrant it.¹⁵ In the civil jurisdiction, the court is entitled to draw an adverse inference where a party can reasonably be expected to provide information within that party's knowledge but fails to do so.¹⁶

[39] We are satisfied the Judge was correct to conclude, on the balance of probabilities, Ms Ling was liable to be registered for GST at the settlement date. She was therefore in breach of the GST warranty in the Agreement and there was no defence to the claim.

Result

[40] For the reasons given, the appeal is dismissed.

[41] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

[42] Without opposition, we order the funds held by Ms Ling's solicitor in respect of the total judgment debt and costs be released to the respondent's solicitor.

Solicitors:
Hong Hu Lawyers, Auckland for Appellant
Ben Liu & Co, Auckland for Respondent

¹⁵ *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA); and *Krukziener v Hanover Finance Ltd*, above n 12, at [26].

¹⁶ *Pepi Holdings Ltd v BMW New Zealand Ltd* CA22/97, 25 August 1997 at 23–24; and *Perry Corp v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA) at [153]–[155], cited with approval in *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [15].