

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA281/2023  
[2024] NZCA 205**

BETWEEN                      KUN LIU  
    Appellant  
  
AND                                ZHENGXI HU  
    Respondent

Hearing:                      7 March 2024  
  
Court:                            Courtney, Dunningham and Moore JJ  
  
Counsel:                      G P Blanchard KC and A West for Appellant  
    Respondent in person  
  
Judgment:                      4 June 2024 at 11.30 am

---

**JUDGMENT OF THE COURT**

---

- A     The appeal is allowed.**
- B     The summary judgment of the High Court is set aside.**
- C     The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.**
- 

**REASONS OF THE COURT**

(Given by Dunningham J)

[1]     The appellant, Ms Kun Liu, and the respondent, Mr Zhengxi Hu, entered into an agreement for the sale and purchase of a property in Papakura, Auckland for the purpose of developing six two-bedroom units. The deposit was payable in two tranches. Ms Liu paid the first but failed to pay the second.

[2] Before the settlement date, Ms Liu gave notice cancelling the agreement for breach of a condition relating to a resource consent, or avoiding it for the failure to comply with that condition, and cancelling it for misrepresentation relating to statements Mr Hu's agent had made about the nature of the units that could be built and the cost of the foundation work.

[3] Mr Hu applied for summary judgment for the outstanding deposit of \$128,000 plus interest and costs.<sup>1</sup>

[4] Although the application was opposed on several grounds, summary judgment was granted by Associate Judge Gardiner in Mr Hu's favour.<sup>2</sup>

[5] Ms Liu now appeals that decision. She asserts the Judge erred by failing to recognise her claims of breach and misrepresentation as providing an arguable defence to the claim for summary judgment.

### **The background facts**

[6] While the contract negotiations were not straightforward, the Judge set out the critical stages in her judgment and, for the purposes of summary judgment, these are not disputed by the parties.<sup>3</sup> The key facts are as follows.

[7] Ms Liu and her husband, Xiwen Gu, were looking for a property suitable for an intensive residential development. They were offered Mr Hu's property on Valentine Street in Papakura and they say that they were told that the vendor would obtain a resource consent to develop six units on the site prior to settlement. The real estate agent also sent them a plan for six two-bedroom units and said each unit would be 80 to 82 square metres in size. The plan showed the units would have two bedrooms and a small study, although the agent advised the size of these rooms would depend on whether there was one bathroom or two. Ms Liu and Mr Gu say it

---

<sup>1</sup> Mr Hu had abandoned an application for summary judgment on an alternative claim for the amount lost on resale.

<sup>2</sup> *Hu v Liu* [2023] NZHC 972.

<sup>3</sup> At [7]–[33].

was represented to them that the layout of the units for which resource consent would be sought would be similar to the layout shown on this plan.

[8] On 1 October 2021, Mr Gu sent a draft agreement for sale and purchase to the real estate agent. The agreement provided a purchase price and the following relevant further terms of sale:

#### 20.0 Due Diligence

This agreement is conditional upon the purchaser being satisfied with the results of a due diligence investigation of the property within 5 working days after the date of this Agreement. If the purchaser is dissatisfied with any aspect of this investigation the purchaser may at the purchaser's absolute discretion by notice in writing terminate this agreement. This clause is inserted for the sole benefit of the purchaser and the purchaser is under no obligation whatsoever to supply any reasons for the purchaser's dissatisfaction with any aspect of the investigation.

#### 21.0 Prior Agreement

The Purchaser acknowledges that the Vendor has entered into an unconditional sale and purchase agreement with Chia-Yu Chang and Andy Tzu-An Liu dated 21 August 2021 ("Prior Agreement"). Prior Agreement and Letter of Nomination dated 3 August 2021 are attached.

The Agreement is conditional on the Vendor has [sic] successfully purchased the property as per Prior Agreement.

#### 22.0 Resource Consent

The Agreement is conditional upon a Resource Consent granted in accordance with the site plan (attached) to the satisfaction of the Purchaser. The Purchaser shall use his best endeavour to satisfy this condition within 5 work [sic] days upon receipt of such Resource Consent. This clause is inserted for the sole benefit of the Purchaser.

#### 23.0 Purchase Price

The Purchase Price recorded in this agreement includes all costs in association with the Vendor's application of a Resource Consent referred in clause 22.0.

#### 24.0 Deposit

The Purchaser shall pay a deposit of \$50,000.00 upon satisfaction of Due Diligence Condition as per clause 20.0 above.

A further deposit of \$76,000.00 shall be payable immediately upon the Vendor's successful settlement of the Property in accordance with the Prior Agreement.

The deposit will be paid to the Vendor's Solicitor's Trust Account who will hold such deposit as stakeholder. The stakeholder will hold deposit received

on interest bearing on-call bank deposit (“stakeholder account”) established in the name of the Vendor until all conditions are satisfied (at which time the stakeholder will release the deposit to the Vendor) or this agreement is cancelled.

Any interest earned on the deposit (less any withholding tax, bank or stakeholder deduction or any other proper deduction) will follow the deposit.

[9] Later that day the real estate agent returned a copy of the agreement which was now signed by Mr Hu. While the purchase price had been amended, it remained otherwise as presented. The agreement was then signed by Mr Gu, on behalf of Ms Liu, confirming the change in purchase price.

[10] Discussions then ensued about changing cl 24 regarding payment of the deposit. It seems those resulted in an agreed change to cl 24 as follows:

#### 24.0 Deposit

The Purchaser shall pay a deposit of \$1.00 upon satisfaction of Due Diligence Condition as per clause 20.0 above.

A further deposit of 10% shall be payable immediately upon the Vendor’s successful settlement of the Property in accordance with the Prior Agreement.

The deposit will be paid to the Vendor’s Solicitor’s Trust Account who will hold such deposit as stakeholder. The stakeholder will hold deposit received on interest bearing on-call bank deposit (“stakeholder account”) established in the name of the Vendor until all conditions are satisfied (at which time the stakeholder will release the deposit to the Vendor) or this agreement is cancelled.

Any interest earned on the deposit (less any withholding tax, bank or shareholder deduction or any other proper deduction) will follow the deposit.

[11] Mr Hu also changed the wording of cl 22 to read as follows:

#### 22.0 Resource consent

The vendor warrants that Resource Consent granted in accordance with the site plan (attached) to the satisfaction of the Purchaser.

There is a dispute over whether this amendment was agreed.

[12] There were then further attempts to negotiate amendments to the agreement over 6 and 7 October 2021. These included to amend the purchase price and to amend

cl 22. These exchanges are set out in the High Court's judgment.<sup>4</sup> The last of these was an email sent on 7 October 2021 to Mr Hu's conveyancing lawyers which said:

Hi Jerome,

We understand both parties had discussion regarding the variations to Agreement again yesterday, they have principally agreed:

1. The Purchase Price shall remain at \$1,280,000.00 inclusive of GST;
2. Amend the clause 22.0 to as follows:

22.0 Resource Consent

The Agreement is conditional upon a Resource Consent granted in accordance with the site plan to the satisfaction of the Purchaser. The Vendor shall provide a copy of its planner's draft Resource Consent including full set of documents being submitted and seek the Purchaser's consent to this draft before lodging it to Auckland Council. The Purchaser shall within 5 working days after the receipt of the draft advise whether this condition is satisfied or not.

3. To delete point 3 and 4 outlined in my email dated 06 October 2021;
4. Your client shall consult with the Purchaser in relation to the design plan for the new dwellings.

Please take your instructions and revert.

[13] There is some dispute about which iteration of cl 22 prevailed, although for the purposes of summary judgment, Ms Liu says cl 22 was not satisfied whichever version prevailed.

[14] On 8 October 2021, Ms Liu advised the due diligence clause was satisfied and so the \$1 deposit was payable and it was paid on the same day.

[15] On 25 October 2021, Mr Gu and Ms Liu say they were provided with eight pages of concept plans for the development of the site which Mr Hu says Mr Gu approved before they were submitted to the Council for the resource consent. These plans showed the internal layout and elevations for units for the site. A resource consent application was then submitted to the Council on 28 January 2022. On 29 March 2022, Mr Gu and Ms Liu were provided with a copy of a letter from the Council requesting further information in relation to that application. The letter

---

<sup>4</sup> *Hu v Liu*, above n 1, at [15]–[17].

highlighted issues with the application and noted that the flooding hazard on the property was significant and the Council sought specified information in relation to that.

[16] Ms Liu and Mr Gu consulted their architect who advised them by email on 8 April 2022 that the site would require more expensive subfloor or concrete piles than shown on the concept plans. The architect also said that the front two units had only two-bedrooms which were not easy to sell<sup>5</sup> and in the rear unit there was only one bathroom which was “too small to be used at all”.

[17] In the meantime, though, on 7 April 2022, the prior agreement referred to in cl 21 settled, meaning the second tranche of the deposit, \$128,000, became payable. Mr Hu’s solicitors requested payment of the deposit in accordance with cl 24 of the agreement, but Ms Liu did not pay it.

[18] On 19 April 2022, pursuant to cl 2.2 of the agreement, Mr Hu issued a notice requiring payment of the deposit within three working days from the date of the notice.

[19] That same day Ms Liu, through her lawyer, purported to cancel the agreement, citing misrepresentations relating to the size and layout of the units to be developed at the property and in respect of the cost of the foundations required for the development. Ms Liu pointed out that the site plan originally provided by the real estate agent was for a different property and it had become apparent that the layout shown in the plan was not suitable for the property she had agreed to buy.

[20] Mr Hu’s lawyers responded on 10 May 2022 saying the resource consent had not yet been issued and the purported cancellation was premature. On 17 June 2022, the resource consent was issued. In accordance with the terms of the agreement, settlement was to take place on 24 June 2022. However, as that was a public holiday, Mr Hu’s solicitor suggested settlement take place on 27 June 2022. However, Ms Liu did not settle the property purchase on that date.

---

<sup>5</sup> While the units were always intended to have two bedrooms, this appears to be a reference to the fact that the plans initially shown to Ms Liu showed the units would also have a small study while the consented plans did not have one in the front two units.

[21] On 12 August 2022, Mr Hu, through his solicitor, issued a settlement statement for the property with a settlement date of 19 August 2022. On 19 August 2022, pursuant to cl 11 of the agreement, a settlement notice was served on Ms Liu. On 6 September 2022, the settlement notice expired. As Ms Liu had not settled the property in accordance with the settlement notice, Mr Hu then cancelled the agreement.

### **The High Court decision**

[22] The application for summary judgment was opposed on a number of grounds. Each of these is addressed in turn in the judgment.

[23] The Judge rejected, as “not tenable”, the argument that Ms Liu was not obliged to pay the deposit because the agreement was still unconditional as the condition in cl 22 was not satisfied, saying:<sup>6</sup>

*Payment of the deposit* was not conditional on the conditions in cl 22.0 concerning the resource consent. Rather, payment of the second tranche of the deposit was conditional on Mr Hu settling the prior agreement.

[24] The Judge went on to observe that Ms Liu had not avoided the agreement by the date the deposit fell due.<sup>7</sup> The Judge considered both the original wording of cl 22 and the revision of it which was “arguably agreed” on 6 October 2021, and observed that, either way, the contract “remained on foot and on 7 April 2022 the second tranche of the deposit became due”.<sup>8</sup>

[25] The next defence was that if cl 22 was amended, so that the obligation on Mr Hu to obtain the resource consent to her satisfaction changed to a warranty, she was entitled to cancel the agreement under cl 9.10(2) because Mr Hu had not obtained a resource consent to her satisfaction. However, the Judge said there was no evidence that this proposed amendment to cl 22 was agreed.<sup>9</sup> The only evidence was that cl 22 was “arguably” amended by agreement on 6 October 2021 to add an obligation on

---

<sup>6</sup> *Hu v Liu*, above n 1, at [40] (footnote omitted).

<sup>7</sup> At [42].

<sup>8</sup> At [44] and [45].

<sup>9</sup> At [47].

Mr Hu to obtain Ms Liu’s approval of the plans before they were submitted for resource consent.

[26] The Judge also expressed some scepticism that this argument could be advanced given that, on Ms Liu’s own evidence, she was provided with considerable information about the development plans before the application was submitted to Council and obtained her own expert evidence on them. However, the Judge acknowledged this was a factual dispute that could not be resolved in a summary judgment hearing.<sup>10</sup> She nevertheless held that it did not affect the obligation to pay the deposit on 7 April 2022. Again, the reason for that was because Ms Liu had not cancelled the agreement by that date. Her purported exercise of the right to cancel did not arise until, at the earliest, 19 April 2022, by which time the obligation to pay the deposit had already accrued.<sup>11</sup> In support of this, the Judge relied on the principle that “rights and liabilities, or any cause of action, accrued unconditionally prior to cancellation are not discharged by cancellation”.<sup>12</sup>

[27] The next argument the Judge addressed was the claim that Ms Liu was entitled to cancel for misrepresentation. The misrepresentations alleged were as to:

- (a) the size and layout of the units to be developed on the property (the Unit Representation);
- (b) the level above ground and cost of the foundations required for the development (the Foundation Representation).

[28] Ms Liu says it was represented to her that the site was large enough to accommodate six two-bedroom units in the layout shown on the site plan she and her husband were originally provided, but that layout was not able to be accommodated on the site. The size and layout of the consented plans was less attractive to her. She

---

<sup>10</sup> At [50].

<sup>11</sup> At [51 and [52].

<sup>12</sup> At [54], citing Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, Lexis Nexis, Wellington, 2022) at [18.4.1]; *Pendergrast v Chapman* [1988] 2 NZLR 177 (HC) at 186; *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA) at 176; *Garratt v Ikeda* [2002] 1 NZLR 577 (CA) at [20]; and *Hollister v Robertson* HC Auckland HC70/98, 22 July 1998.



also says that the advice given via the real estate agent that the foundations required to address the flooding problems would cost “about the same as a normal foam foundation” was a misrepresentation because she subsequently discovered, after consulting her architect, that the foundations required to deal with the flooding issue would be more expensive.

[29] While the Judge accepted she could not resolve the issue of whether there had been misrepresentations entitling Ms Liu to cancel, she said that as Ms Liu did not cancel until after her unconditional obligation to pay the deposit accrued on 7 April 2022, the obligation to pay the deposit “survives cancellation”.<sup>13</sup>

[30] Importantly, for the present proceedings, the Judge reached the following conclusion:<sup>14</sup>

[62] At best, Ms Liu has a counterclaim against Mr Hu for damages under s 35(1)(a) of the [Contract and Commercial Law Act 2017]. However, it is settled that such a counterclaim would not amount to a defence to an application for summary judgment although it may be relevant to an application for stay of execution of such judgment.

In support of this assertion the Judge relied on the decision in *Hollister v Robertson*, where Williams J rejected the defendants’ claim that the rights available to them for misrepresentation of the property constituted a defence to summary judgment for payment of the deposit.<sup>15</sup>

[31] The Judge also dealt briefly with other defences raised by Mr Liu, including whether the agreement was void for uncertainty, whether there was waiver of the requirement to pay the deposit and whether there was a breach of r 12.4(5) which requires the plaintiff to file and serve an affidavit verifying the allegations in the statement of claim and to depose their belief that the defendant has no defence to the allegations and set out the grounds of that belief.<sup>16</sup> However, because those issues do not arise on appeal, we need say no more about them.

---

<sup>13</sup> *Hu v Liu*, above n 1, at [61].

<sup>14</sup> Footnote omitted.

<sup>15</sup> *Hollister v Robertson*, above n 12, at 10.

<sup>16</sup> *Hu v Liu*, above n 1, at [63]–[68].

[32] As the Judge concluded Ms Liu had no arguable defence to the claim for payment of the deposit, she entered judgment in Mr Hu's favour for \$128,000, being the amount of the second tranche of the deposit owing under the agreement for sale and purchase, along with interest and costs.<sup>17</sup>

### **Appellant's submissions**

[33] Counsel for the appellant, Mr Blanchard KC, focused the appeal on whether Ms Liu had an arguable defence in the nature of an equitable set-off because of her:

- (a) cancellation for breach; and/or
- (b) cancellation for misrepresentation; and/or
- (c) avoidance for failure to satisfy a condition.

[34] Expanding on these claims, he submitted that Ms Liu was entitled to cancel the contract under s 37 of the Contract and Commercial Law Act 2017 (CCLA) because Mr Hu failed to comply with his obligations under cl 22 which required him to provide Ms Liu with the draft resource consent application documents and obtain her approval of them before they were submitted to Council. At the very least, as the Judge found, Ms Liu's position is arguable and the issue cannot be resolved on summary judgment.<sup>18</sup>

[35] Similarly, Ms Liu was arguably entitled to cancel the agreement for misrepresentation under s 37 of the CCLA. While the Judge expressed doubt about the misrepresentation claims, Mr Blanchard submits that both the Unit Representation and the Foundation Representation justified cancellation. Ms Liu was seeking a profitable development opportunity and the cost of construction and the market value of the units once completed were important to Ms Liu. Both the representations had had a material effect on Ms Liu's decision to enter into the agreement. In any event, for the purposes of summary judgment, Ms Liu's position on essentiality and substantiality of the representations was arguable.

---

<sup>17</sup> At [69].

<sup>18</sup> At [44] and [47].

[36] Finally, Mr Blanchard argues that, as the resource consent was not to Ms Liu's satisfaction and she gave notice to avoid the agreement prior to Mr Hu's purported cancellation, again, at the very least, Ms Liu's position in this regard is arguable and the issue cannot be determined at summary judgment.

[37] Whichever defence is pursued, Ms Liu asserts she would have a counterclaim in respect of the deposit payable, whether under cl 2.4(2) and (4) (whereby the deposit is only payable to the vendor when all conditions have been fulfilled) under cl 9.10(5) of the agreement (whereby the deposit is repayable if the agreement is avoided). Such a counterclaim is in the nature of an equitable set-off and therefore provides a defence to an application for summary judgment.

### **Respondent's submissions**

[38] Mr Hu was not legally represented on appeal. He presented submissions with the aid of an interpreter. Essentially, he submitted the Judge's decision was correct and should not be disturbed on appeal. He acknowledged he could not address the legal argument raised on behalf of the appellant.

### **Discussion**

[39] We pointed out, and it was accepted, that the submission that Ms Liu's counterclaims amounted to an equitable set-off which constituted an arguable defence to summary judgment and was not expressly raised in the High Court. Her defences were simply categorised as counterclaims which did not amount to a defence to an application for summary judgment.<sup>19</sup> At best the Judge considered they would be relevant to an application for stay of execution of such judgment.

[40] We consider, therefore, that the appellant has raised a new ground of opposition on appeal. This raises the question of whether we should allow it to be advanced, because, as was observed in *Buxton v The Birches Timeshare Resort Ltd*:<sup>20</sup>

---

<sup>19</sup> At [62].

<sup>20</sup> *Buxton v The Birches Timeshare Resort Ltd* [1991] 2 NZLR 641 (CA) at 646.

[t]o allow a ground of opposition to a summary judgment application to be raised for the first time in this Court would be contrary to the general intention of the summary judgment procedure ...

However, the Court in *Buxton* also went on to say:

... the Court may be willing to hear the new ground in special circumstances, for example where the point is purely one of law and could not be affected by further evidence which might otherwise have been obtained.

[41] In this case, we are satisfied that the question of whether any of Ms Liu's defences amount to an equitable set-off is purely a question of law. No further evidence needs to be adduced, and the Judge acknowledged that her claims were otherwise arguable. The real issue is whether these claims constitute an arguable defence to the application for summary judgment in respect of payment of the deposit. For the reasons below, we are satisfied this ground of appeal should be heard.

[42] In rejecting Ms Liu's arguments that she could resist the claim to pay the deposit or summary judgment, the Judge relied on the decision in *Hollister v Robertson*, where a claim for damages for misrepresentation was held to be a counterclaim, which was not a defence to summary judgment and did not amount to a set-off, equitable or otherwise, which would comprise a defence to the entry of summary judgment.<sup>21</sup> However, the decision in *Hollister* did not refer to the leading case of *Grant v NZMC Ltd*, which held that a defendant:<sup>22</sup>

... may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.

[43] In *Grant v NZMC Ltd*, summary judgment had been entered against the appellants for unpaid rent. In opposing the entry of summary judgment, the appellants raised misrepresentations by the lessor which affected the profitability of their business. Their loss of profitability was quantified and they sought to set-off these sums against the unpaid rent, rates and costs claimed by the lessor, even though the

---

<sup>21</sup> *Hollister v Robertson*, above n 12, at 10.

<sup>22</sup> *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 12-13.

sub-lease required them to pay rent “free and clear of exchange or any deduction whatsoever.”<sup>23</sup> The Court held that provision in the sub-lease was insufficient to exclude the ability to claim a set-off such as that raised by the appellants.<sup>24</sup> For those reasons, the appeal was allowed and summary judgment was set aside.

[44] In the present case, the claims arise out of the same contract. If Ms Liu was entitled to cancel or avoid the contract on any of the grounds raised, the deposit would be repayable pursuant to cl 24 which provides:<sup>25</sup>

The deposit will be paid to the Vendor’s Solicitor’s Trust Account who will hold such deposit as stakeholder. The stakeholder will hold deposit received on interest bearing on-call bank deposit (“stakeholder account”) established in the name of the Vendor until all conditions are satisfied (at which time the stakeholder will release the deposit to the Vendor) or this agreement is cancelled.

Any interest earned on the deposit (less any withholding tax, bank or stakeholder deduction or any other proper deduction) will follow the deposit.

[45] We are therefore satisfied Ms Liu has an arguable right to an equitable set-off in respect of the deposit and this constitutes a defence to the claim for payment of the deposit. In those circumstances, it would be unjust to allow judgment to be entered in Mr Hu’s favour without resolving the merits of Ms Liu’s claim that she is entitled to avoid or cancel the contract.

[46] Ms Liu is entitled to costs for a standard appeal on a band A basis. However, the appeal was straightforward so we do not certify for second counsel as requested.

## **Result**

[47] Accordingly, we make the following orders:

- (a) The appeal is allowed.
- (b) The summary judgment of the High Court is set aside.

---

<sup>23</sup> At 9.

<sup>24</sup> At 13.

<sup>25</sup> While similar provisions are found at cl 2.4(2) and (4) and cl 9.10(5), this is a special condition added by the parties and accordingly we rely on it as the prevailing clause.

- (c) The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
Ku & Partners Ltd, Auckland for Appellant