IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA75/2024
[2024] NZCA 436

BETWEEN	WEI XU First Appellant
AND	JUNHUI ZHANG Second Appellant
AND	XING MENG First Respondent
AND	HUIMIN GUAN Second Respondent

Hearing:	1 August 2024
Court:	French, Jagose and Grice JJ
Counsel:	Z Chen for Appellants E St John and L Liu for Respondents
Judgment:	11 September 2024 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents one set of costs on a standard appeal on a band A basis, including for preparation of the case on appeal, and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Jagose J)

[1] The appellants appeal the 18 December 2023 decision of Woolford J in the High Court at Auckland,[1] allowing the respondents' counterclaim for return of a deposit paid to the appellants and otherwise dismissing all claims and counterclaims between the parties.[2]

Background

[2] The appellants — Wei Xu and Junhui Zhang, married to each other — owned a residential property in Auckland's Browns Bay (the property). The respondents — Xing Meng and Huimin Guan, also married to each other — agreed with the appellants to buy the property. Mr Xu and Mr Meng were longstanding friends since attending high school together in China.

[3] The following was agreed:

(a) The appellants would sell the property to the respondents.

(b) The purchase price was $1.78 million.

(c) A 20 per cent deposit ($356,000) would be payable by the respondents on the sale of a property they owned in Torbay.

(d) The purchase was conditional on the respondents obtaining finance.

(e) Until settlement of the purchase, the respondents would be liable for all costs associated with the property, a liability they would be entitled to meet by using any rental income obtained from the property.

[4] No date for settlement was fixed.

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1 *Xu v Meng* [2023] NZHC 1899 [judgment under appeal].

2 At [75]–[79]. At [76], under s 43 of the Contract and Commercial Law Act 2017, the Judge also required the respondents to pay the appellants $16,520.20 in respect of mortgage interest accrued while the respondents occupied the appellants' property, in respect of which order there is no cross-appeal.

[5] The respondents took possession of the property on 7 May 2018. At that time, the property secured the appellants' loans totalling $1.6 million loans with ANZ Bank. The annual interest rate on the loans was 5.79 per cent.

[6] The appellants stipulated a weekly amount the respondents were to pay during their occupation of the property pending settlement. This was calculated to cover the appellants' mortgage repayments (comprising the principal and interest), partially to be offset against the purchase price and otherwise in payment of mortgage interest and other outgoings.

[7] The respondents' sale of their Torbay property settled on 10 October 2018. The sale proceeds were not sufficient to enable the respondents to pay the $356,000 deposit to the appellants. The parties agreed to reduce the deposit payable to $200,000, which the respondents paid on 15 October 2018. The Browns Bay property's sale did not settle. Nonetheless, the respondents remained in possession of the property.

[8] On 30 November 2018, the appellants refinanced the ANZ loans secured over the property with Westpac Bank. They took out two loans totalling $1.78 million, with annual interest rates of 3.95 per cent (on $980,000) and 3.99 per cent (on the $800,000 balance).

[9] In preparation for the respondents obtaining finance for their purchase of the property, on 14 February 2020, Ms Guan enquired of Mr Xu by text message as to the balance of the purchase price payable on settlement, given the respondents' weekly payments. Mr Xu responded he would "deduct the part of the loan principal for you from the settlement date". The respondents ceased their weekly payments with effect from 24 February 2020.

[10] Ms Guan understood from her subsequent enquiry of BNZ that the respondents would need to obtain a written agreement for the purchase of the property before that bank would consider financing it. Ms Guan's evidence was, when she asked Mr Xu in a 3 March 2020 telephone call to sign a sale and purchase agreement, he said he was not in a position to settle the purchase at the agreed price, because it would not cover his borrowing over the property.

[11] After taking legal advice, on 6 March 2020, the respondents lodged a caveat on the property's title to protect their interest as purchasers in possession. Correspondence ensued between the appellants' and respondents' respective lawyers. The appellants' lawyers proposed an increased purchase price to incorporate the appellants' mortgage and other expenses incurred prior to settlement. The respondents rejected this proposal.

[12] There were High Court proceedings regarding the caveat. The Court ordered the caveat would remain in place until 2 December 2020 to enable the respondents to obtain finance. The respondents did not obtain finance and the caveat accordingly lapsed on that date.[3]

[13] The appellants then succeeded in obtaining an order from the High Court on 29 July 2021 granting them vacant possession.[4] The respondents did not however vacate the property until 21 September 2021 having made no payments since 24 February 2020.

[14] The appellants since have sold the property, at a price substantially greater than that for which the respondents contracted.

Judgment under appeal

[15] The Judge first noted the appellants' pleadings and evidence acknowledged they had agreed to return the deposit (if any remained, after deduction of amounts contended payable).[5]

[16] The Judge also noted the appellants had not pleaded the respondents' repudiation of the agreement, which may have enabled their cancellation of the agreement and retention of the deposit.[6] Neither had they pleaded the respondents had failed to make reasonable efforts to secure finance.[7] On the latter point, the Judge was

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3 *Meng v Zhang* [2021] NZHC 131 [costs judgment].
4 *Xu v Meng* [2021] NZHC 1936 [possession judgment].
5 Judgment under appeal, above n 1, at [26]–[28].
6 At [30].
7 At [31].

satisfied, in any event, given the COVID-19 circumstances affecting Mr Meng's airline pilot salary, "nothing more could have been done" by the respondents.[8]

[17] The Judge accordingly ordered the appellants return the deposit to the respondents.[9]

[18] The Judge then turned to consider the respondents' weekly payments to the appellants, noting Mr Xu's agreement, in so far as the payments comprised a component representing repayment of the principal, that was to be deducted from the settlement amount.[10] The Judge held "[p]rincipal repayments are therefore refundable as payments made towards the property when a contract is avoided. Interest payments are not refundable as they are costs associated with the property."[11]

[19] The Judge noted the difficulty for the appellants was they had not demonstrated what proportion of the payments made by the respondents constituted repayment of principal versus interest.[12] The Judge then calculated the amount refundable.

[20] The Judge adopted Mr Xu's evidence that banks generally would not lend on investment properties if the loan-to-value ratio was above 60 per cent.[13] The Judge noted that, while the property was purchased in 2015 for $1.388 million, it was to be sold to the respondents in 2018 for $1.78 million. Sixty per cent of $1.78 million is $1.068 million The Judge then took the known interest rates charged by ANZ (5.79 per cent) and Westpac (3.95 per cent) to calculate the mortgage interest incurred by the appellants for the relevant period, 7 May 2018 to 21 September 2021, as follows:[14]

Start date	End date	Days	Rate	Principal	Interest
07/05/2018	30/11/2018	207	5.79%	$1,068,000	$35,069.32
30/11/2018	21/09/2021	1026	3.95%	$1,0068,000	$118,583.11
				Total	**$153,652.43**

8 At [31].
9 At [32] and [75].
10 At [38].
11 At [39].
12 At [39].
13 At [46].
14 At [46].

[21] The Judge noted — at the time the respondents stopped making mortgage payments, 24 February 2020 — they had paid a total sum of $137,132.23, which, when taken away from the interest sum, left $16,520.20 owing to the appellants.[15] The Judge ordered the respondents' payment of that amount to the appellants.[16]

[22] The Judge rejected any suggestion the respondents' weekly payments to the appellants were in payment of rent for the property pending settlement. That was not agreed,[17] and was contradicted by the admitted pleading the respondents were liable for all costs associated with the property until settlement,[18] as evidenced by Mr Xu's spreadsheet to calculate the respondents' weekly payments.[19] Moreover, the appellants were estopped from asserting the respondents rented the property due to Associate Judge Andrew's order giving possession of the property to the appellants. The order was made on the basis the respondents were only purchasers in possession who had remained in possession without the appellants' consent and with no right to remain.[20]

[23] Last, the Judge found the appellants had not established the foundational facts for any claim of unjust enrichment by reason of the respondents' use of revenue from boarders or use of the property for commercial purposes. Both claims were dismissed.[21]

Grounds of appeal

[24] On this appeal, the appellants essentially contend the Judge erred in:

(a) ordering they return the deposit to the respondents;

(b) finding they were not entitled to rent for the unpaid balance of the respondents' occupation of the property;

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15 At [47].
16 At [49] and [76].
17 At [52].
18 At [53].
19 At [54].
20 At [57]; and see possession judgment, above n 4, at [37] and [49].
21 Judgment under appeal, above n 1, at [66]–[67], [69], [74] and [78]–[79].

(c) determining the respondents should only be liable to pay them $16,520.20; and

(d) concluding the respondents were not required to account to them for income obtained from the property.

They seek the Judge's orders be set aside, and substituted with orders the appellants pay damages as rental and account for income obtained from the property.

Discussion

[25] As happened at trial, the appeal was also brought on a basis substantially removed from the pleadings and prior findings of the High Court.

[26] The pleadings are a mess. On their initial statement of claim, the appellants sought only recovery of the property from the respondents. The respondents put the appellant to proof as to their lawful right to occupy the property and counterclaimed for return of their deposit. The appellants replied they: "agreed to return the deposit (if any remained) after calculations were done in regards to rent etc due from the [respondents]"; asserted "an equitable set off in regards to a commercial matter where they are owed money by the [respondents]"; and raised those commercial matters as a "counterclaim" against Ms Guan in this proceeding (but then pleaded to include additional corporate plaintiffs and a defendant), contending each such matter to be conditional on the respondents' purchase of the property.

[27] Woolford J held those 'commercial matters' were "immaterial" to the present proceeding and declined the appellants' application for joinder of the additional corporate parties.[22] The appellants then 'counterclaimed' for the respondents' payment of $162,916.19 as "rental" for their occupation of the property from 7 May 2020 to 20 September 2021. The respondents denied they paid rental and stated the appellants were estopped by Associate Judge Andrew's decision, noted above at [22]. The respondents amended their initial counterclaim to include a claim for repayment of their payment to the appellants for "unverified mortgage and outgoings", and the appellants then amended their 'counterclaim' to include claims in "unjust enrichment"

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22 *Xu v Meng* [2022] NZHC 3496 at [31] and [34].

for the respondents' account of income allegedly received from tenants or from using the property for commercial purposes during their occupation of it. The respondents admitted receiving income from tenants, but otherwise denied the appellants' 'counter-counterclaim'. A further round of second amended defence, counterclaim and reply in mid-November 2023 sought to crystallise matters for trial.

[28] Critically, the appellants pleaded in their first statement of claim the original agreement with the respondents for sale and purchase of the property provided no settlement date; until settlement, the respondents "were liable for all costs associated with the property"; and "[t]he agreement was conditional on [the respondents] obtaining finance". Those terms were expressly admitted by the respondents. Also pleaded and admitted was further agreement between the parties that the respondents would pay weekly to the appellants the amount of the appellants' mortgage payments and "the portion that represented principal [would] be offset against the purchase price, but the portion that represented interest would not". Finally, the appellants pleaded and the respondents admitted all such payments "ultimately" were made until 24 February 2020.

[29] In the High Court, in determining costs on the respondents' caveat proceeding, Lang J recorded:[23]

> [2] Following a hearing on 2 September 2020 I made an order that the caveat was not to lapse until 2 December 2020. The purpose of the order was to give the [respondents] the opportunity to complete the sale and purchase of the property. Ultimately, however, they were unable to arrange finance to enable them to complete the purchase. The agreement accordingly came to an end and the caveat lapsed on 2 December 2020.

[30] Subsequently, on the appellants' application to recover their land from the respondents as "unlawful occupiers",[24] Associate Judge Andrew relied precisely on Lang J's record to hold the respondents initially were purchasers in possession but, since the agreement came to an end, remained in possession without the appellants' consent and with no right to remain, rather than as tenants at any time.[25]

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23 Costs judgment, above n 3.
24 High Court Rules 2016, r 13.2.
25 Possession judgment, above n 4, at [37].

[31] In so far as the theory of the appellants' case relies on any entitlement to obtain relief on cancellation or as damages for unpaid rent or on any accounting, they cannot succeed.

[32] First, the appellants' pleading did not seek relief on cancellation. In any event, relief on cancellation only is available "[w]hen a contract is cancelled by any party",[26] which the agreement between the parties for sale and purchase of the property was not. Rather, its condition for the respondents to obtain finance was not met by the 2 December 2020 date to which their caveat was maintained and the agreement then came to an end. To that extent, Woolford J erred in his determination that "[t]he contract [was] cancelled".[27] (But there is no cross-appeal against that finding or the Judge's consequent award of relief to the appellants.)

[33] Secondly, the appellants are estopped from asserting any claim to damages for unpaid rent, as was held by Woolford J in reliance on Associate Judge Andrew's decision.[28] A party is precluded from "contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him".[29] As noted at [30], the Associate Judge granted possession of the property to the appellants exactly on the ground the respondents were unlawful occupiers, and expressly not tenants (as the respondents asserted in their defence). There being no appeal against the Associate Judge's decision the respondents were not tenants and ordering possession of the property to the appellants, it is not open now to the appellants to 'contend the contrary'.

[34] Thirdly, the mere fact of the respondents' receipt of income from the property does not convert into an unjust enrichment, even if offering a standalone cause of action,[30] as it merely satisfied their entitlement to obtain consideration for others' use of the property of which they were in possession.[31] A claimant for unjust enrichment's

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26 Contract and Commercial Law Act 2017, s 43(1).

27 Judgment under appeal, above n 1, at [48].

28 At [57].

29 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 41; affirmed in *Haines v Bassett-Burr* [2024] NZSC 57 at [11].

30 See, for example: *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [140] per Tipping J, where unjust enrichment was discussed as being where someone receives an amount in excess of the true value.

31 *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [65], citing

restitutionary remedy must establish "the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust".[32] As Woolford J found, these claims failed on their facts, because the appellants expressly permitted the respondents to use any rental income obtained from the property,[33] and only evidenced the bare assertion the respondents "operated their business" from the property, which address also was the registered address for a company (of which Ms Guan was sole director) from 11 March 2020 to 24 August 2021.[34] Nothing more substantial is identified on appeal. Even if, notwithstanding its 'consideration' nature as we have explained, the respondents' receipt is a qualifying 'enrichment', there is no basis on which to conclude such otherwise would have enured to the appellants. There is thus no foundation on which to assess any injustice.

[35] Properly comprehended on the pleadings and prior decisions of the High Court, the appellants' only real ground for appeal is if Woolford J erred in ordering the deposit's return in whole or part. Settled principles of vendor and purchaser law provide a deposit is "a security to the vendor against the purchaser's unlawful repudiation of the contract".[35] The contract here, being conditional on the respondents obtaining finance, was avoided when that condition went unmet by the time for its performance on 2 December 2020. As the agreement under which the deposit was paid came to an end without the respondents' unlawful repudiation, but with no provision for what was to occur to the deposit in such circumstances, there was no basis on which the appellants were entitled to retain it. The Judge was right to order its return.

[36] Given the paucity of evidence as to any loss suffered by the appellants, including as to mortgage interest payments, they may consider themselves fortunate to have obtained the Judge's associated order the respondents pay them "the shortfall

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David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 at 392.

32 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [1.09], as cited in *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140 at [92].

33 Judgment under appeal, above n 1, at [61]–[66].

34 At [70]–[71].

35 *Otago Station Estates Ltd v Parker* [2005] NZSC 16, [2005] 2 NZLR 734 at [21], citing *Soper v Arnold* (1889) 14 App Cas 429 (HL) at 435.

in the mortgage interest payments over 40 months the [respondents] were in possession of the property".[36] The Judge clearly was motivated to make such order as being what justice required in connection with "the parties' agreement that the [respondents] would be liable for all costs associated with the property".[37] Even then, the Judge could not be sure the entirety of the loans was attributable to the property.[38] His calculation of that shortfall was despite the absence of evidence as to its actual sum. It cannot be criticised.

[37] The appellants contend on appeal the Judge's calculation should have included the mortgage principal payments — as such only were agreed to offset the sum of settlement payment, which the respondents never paid — is unsound. Mortgage principal payments are a borrower's repayment of amounts borrowed from a lender. Here, the appellants obtained the benefit of that lending and were obliged to repay it. The mortgage principal was not a "cost" associated with the property (which the respondents were liable to pay), as Mr Xu's agreement to deduct their sum of payment by the respondents on settlement recognised, even while obtaining the benefit of that payment in the interim. The Judge did not err in disregarding that sum in ordering the respondents' payment to the appellants.

[38] We will dismiss the appeal.

Costs

[39] As the successful parties, the respondents are entitled to an award of costs for a standard appeal. They seek a 25 per cent uplift on grounds the appellants failed to comply with the Court of Appeal (Civil) Rules 2005, took or pursued unnecessary steps or meritless argument and failed to accept legal argument. Such grounds only afford a basis for increased costs if they "contributed unnecessarily to the time or expense of the appeal".[39]

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36 Judgment under appeal, above n 1, at [49].
37 At [46].
38 At [42]–[43].
39 Court of Appeal (Civil) Rules 2005, r 53E(2)(b).

[40] No such unnecessary contribution is identified, except to the extent the respondents also seek costs for preparation of the case on appeal in substitution for that non-compliant bundle filed by the appellants. We will allow the respondents costs on a standard appeal, including for preparation of the case on appeal and second counsel.

Result

[41] The appeal is dismissed.

[42] The appellants must pay the respondents one set of costs on a standard appeal on a band A basis, including for preparation of the case on appeal, and usual disbursements. We certify for second counsel.

Solicitors:
Righteous Law, Auckland for Appellants
Heritage Law, Auckland for Respondents