

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 96/2022
[2022] NZSC 153

BETWEEN XIEYAN MAO
Applicant
AND HARGUN SINGH
Respondent

Court: Glazebrook, O'Regan and Williams JJ
Counsel: D Zhang and E Tie for Applicant
M G Locke for Respondent
Judgment: 21 December 2022

JUDGMENT OF THE COURT

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

[1] The applicant applies for leave to appeal against a judgment of the Court of Appeal dealing with a dispute about an agreement for sale and purchase (the agreement) under which the applicant agreed to sell a property in Auckland to the respondent for a price of \$1.555 million.¹ The Court of Appeal dismissed an appeal from a judgment of the High Court, in which that Court made an order for specific performance of the agreement for sale and purchase in favour of the respondent.² The

¹ *Mao v Singh* [2022] NZCA 390, (2022) 23 NZCPR 477 (Kós P, Cooper and Courtney JJ) [CA judgment].

² *Singh v Mao* [2021] NZHC 1959 (Associate Judge Bell) [HC judgment].

High Court ruled that the applicant's purported cancellation of the agreement was ineffective.

[2] The facts are set out in some detail in the Court of Appeal judgment, and it is not necessary to repeat them here.³ The essence of the dispute was that the agreement provided for the applicant to transfer the property with vacant possession, but the house on the property was, in fact, subject to a fixed term tenancy that did not expire until almost a year after the date of the agreement. As the property was marketed as a development site, a failure to deliver the property with vacant possession was a significant issue for the respondent. The tenants agreed to vacate early but only on payment of \$18,000.

[3] There were exchanges between the parties' respective solicitors in relation to the problem caused by the tenancy, which included offers by the respondent to defer settlement to allow the applicant to arrange vacant possession. However, the applicant insisted on settlement, even though she could not deliver the property with vacant possession. She did not accept any obligation to deal with the tenants and arrange for them to vacate the property. She issued a settlement notice, requiring settlement without vacant possession.⁴

[4] The respondent thereupon served a settlement notice on the applicant, requiring settlement *with* vacant possession, as required by the agreement.

[5] The applicant then purported to cancel the agreement for non-compliance with her settlement notice. Some months later the respondent commenced proceedings in the High Court for specific performance of the agreement.

[6] The applicant argued in the Court of Appeal that the respondent had effectively elected to affirm the agreement and, once he had done so, he was required to settle and

³ CA judgment, above n 1, at [3]–[26].

⁴ In the Court of Appeal she conceded she was, in fact, required to give vacant possession, but she had maintained the opposite position until then, including in argument in the High Court: at [52] of the CA judgment, above n 1.

make a claim under cl 10 of the agreement for compensation.⁵ It was argued that, in the absence of a notice under cl 10, the respondent was obliged to settle without vacant possession and, because he did not tender settlement, the applicant was entitled to issue a settlement notice and, subsequently, cancel the agreement.

[7] The Court of Appeal rejected this argument. It found that the tender of settlement by the respondent would have been futile because of the intransigent position adopted by the applicant in insisting that settlement take place notwithstanding the fact that the property remained subject to a tenancy and there was, therefore, not vacant possession as the agreement required.⁶

[8] The futility finding endorsed a finding to similar effect by the High Court.⁷ Accordingly, there are concurrent factual findings on this crucial aspect of the case.

[9] The applicant advances the application for leave on the basis that the appeal engages a matter of general or public importance and/or general commercial significance.⁸ She wishes to argue, if leave is given, that the analysis of the Court of Appeal is wrong in law, on the basis that it is inconsistent with the minority judgment of Tipping J in *Holmes v Booth*⁹ and the judgment in this Court in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*.¹⁰

[10] The applicant also wishes to argue that the Court of Appeal's decision in the present case is inconsistent with its decision in an appeal decided just before the Court's decision on the present case, *Yu v Bradley*.¹¹

[11] We have considered these arguments and have reached the conclusion that, in the face of the concurrent factual findings of the High Court and the Court of Appeal

⁵ The agreement was in the form of the 10th edition of the REINZ/ADLS template. The relevant provisions of cl 10 are set out at [57] of the CA judgment, above n 1. It provides a process for resolution of claims by a purchaser for breach in circumstances where the purchaser has not purported to cancel the agreement.

⁶ CA judgment, above n 1, at [60]–[62].

⁷ HC judgment, above n 2, at [48]–[49].

⁸ Senior Courts Act 2016, s 74(2)(a) and (c).

⁹ *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA).

¹⁰ *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231, which adopted the approach taken by Tipping J in *Holmes v Booth*.

¹¹ *Yu v Bradley* [2022] NZCA 378.

that the applicant was not ready, willing and able to settle when she gave her settlement notice, the proposed appeal has insufficient prospects of success to justify the grant of leave. Given the somewhat extreme position taken by the applicant in relation to her insistence on settlement despite the property being tenanted (where it was clear she could have arranged to give vacant possession, given the tenants' preparedness to vacate in exchange for \$18,000), that factual finding appears to have been inevitable. While the interpretation of the agreement, in particular the operation of cl 10, may give rise to a matter of commercial significance in a future case, we do not consider it would be appropriate to address it in this case in what would be an inappropriate factual setting.

[12] In those circumstances we do not consider that the criteria for leave set out in s 74 of the Senior Courts Act 2016 are met.

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

[14] The applicant must pay the respondent costs of \$2,500.

Solicitors:
Advent Ark Lawyers, Auckland for Applicant
Gandhi Lala Lawyers, Auckland for Respondent