IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 93/2022
[2022] NZSC 154

BETWEEN	JING JUN YU First Applicant
	ANDREW INVESTMENTS (2004) LIMITED Second Applicant
AND	DALE GORDON BRADLEY AND JILLIAN ANNE BRADLEY Respondents

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	L J Taylor KC and E J Watt for Applicants H M Z Lanham for Respondents
Judgment:	21 December 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondents costs of $2,500.

REASONS

[1] The applicants seek leave to appeal against a judgment of the Court of Appeal arising from a dispute between the applicants and the respondents in relation to an agreement for sale and purchase of land (the agreement).[1] Under the agreement, Mr Yu was the purchaser and the respondents were the vendors. The Court of

[1] *Yu v Bradley* [2022] NZCA 378 (Cooper P, Clifford and Goddard JJ) [CA judgment]. The agreement was in the form of the 9th edition of the REINZ/ADLS template. The first applicant nominated the second applicant as purchaser. For simplicity, we will refer to the first applicant, Mr Yu, only.

Appeal dismissed the applicants' appeal from a decision in favour of the respondents in the High Court.[2]

[2] The High Court Judge found that Mr Yu's purported cancellation of the agreement was ineffective and the respondents were entitled to treat it as a repudiation and cancel the agreement themselves. He entered judgment in favour of the respondents for $575,672.99, less deductions for the $230,000 deposit that had been retained by the respondents, plus interest.[3]

[3] The factual background is set out in some detail in the Court of Appeal judgment.[4] We will not repeat it here. It is sufficient to say that the dispute arose from the fact that a wedge-shaped part of what appeared to be the front lawn of the property that was the subject of the agreement was, in fact, on the title of a neighbouring property. Mr Yu claimed that the true position had been misrepresented, although he had signed a copy of a plan of the property in which the relevant boundary was clearly marked.

[4] Mr Yu argued that he had given a notice under cl 8 of the agreement claiming compensation or equitable setoff for the estimated value of the "encroached area" (the wedge). Clause 8 provided for a mechanism whereby a purchaser who alleges a breach of the agreement but does not cancel the agreement may settle on the basis that money is retained and a dispute resolution process is invoked. Mr Yu's case was that settlement should have occurred and the cl 8 procedure should have followed.

[5] An essential issue in the case was whether Mr Yu's purported claim under cl 8 for compensation or equitable setoff was valid. Mr Yu issued a settlement notice which was not acted upon by the respondents. The respondents then issued a settlement notice requiring settlement for the full price. This led Mr Yu to give notice of cancellation of the agreement. The respondents treated that cancellation as repudiation of the agreement entitling them to cancel, and cancelled the agreement on that basis.

---

2 *Yu v Bradley* [2020] NZHC 1822, (2020) 21 NZCPR 220 (Palmer J).
3 At [78], [79]–[88] and [89].
4 CA judgment, above n 1, at [4]–[44].

[6] The critical findings of the Court of Appeal were:

(a) Mr Yu's purported cl 8 notice was ineffective because it did not meet the requirements of cl 8 and was expressed on a conditional basis.

(b) The respondents had been in breach of the agreement by not allowing Mr Yu and a valuer on to the property, which meant that Mr Yu could have served a valid cl 8 notice on or before the last working day prior to the settlement date fixed by a valid settlement notice.

(c) However, Mr Yu did not serve a cl 8 notice that was not conditional, and thus no valid cl 8 claim was made. This meant the respondents were entitled to reject Mr Yu's settlement notice as he was not ready, willing and able to settle.

(d) Mr Yu did not have a freestanding ability to make a claim for equitable setoff outside the procedure established in cl 8.

(e) When the respondents subsequently issued a settlement notice, they were, the Court found, ready, willing and able to settle. Their subsequent cancellation on the basis of Mr Yu's repudiation was lawful.

[7] The applicants wish to raise five grounds of appeal in the event that leave is granted.

[8] The first proposed ground of appeal is the Court of Appeal was wrong to hold that the purported cl 8 notices given by Mr Yu were conditional and not valid claims under cl 8. This proposed ground does not give rise to any matter of public importance or commercial significance. Rather, it is in essence a challenge to the concurrent factual findings of the Courts below. We do not see any proper basis for what would be, in essence, a third attempt to establish that the requirements of cl 8 were met.

[9] The second ground is that the Court of Appeal erred in finding that Mr Yu was not ready, willing and able to settle when he issued a settlement notice on 16 February 2017. That argument was not sustainable in the face of the finding that no valid cl 8 notice had been given. We thus see no basis on which to grant leave on that point.

[10] The third proposed ground of appeal is that the Court of Appeal was incorrect to find that the respondents were ready, willing and able to settle when they gave their settlement notice and that that settlement notice was valid. Again, we see this as a challenge to matters of fact that were in issue below, and no point of public importance or commercial significance arises.

[11] The fourth ground of challenge is that the Court of Appeal was wrong to find that the respondents were ready, willing and able to settle when they issued their cancellation notice. The applicants wish to argue that neither party was willing to perform the agreement and in such circumstances the agreement is discharged and neither can sue for damages. This appears to be a new argument, and in the absence of findings in the Courts below we do not think it is appropriate to grant leave for it to be advanced at this stage.

[12] The last ground of appeal relates to the assessment of damages. Again, no point of principle arises and there is no obvious error in the way in which damages were assessed based on the particular facts of this case.

[13] We are not satisfied that the criteria for the grant of leave to appeal are made out.[5] No matter of public importance or commercial significance arises and there is no appearance of a miscarriage of justice.

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

[15] The applicants must pay the respondents costs of $2,500.

---

[5] Senior Courts Act 2016, s 74(2). The miscarriage of justice ground has limited scope in civil appeals: *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

Solicitors:
Carson Fox Legal, Auckland for Applicants
Powle & Hodson, Auckland for Respondents