

IN THE SUPREME COURT OF NEW ZEALAND

**SC 97/2006
[2007] NZSC 20**

BETWEEN EDGAR ALAN MORAY BURNS AND
 YVONNE JOY BURNS
 Applicants

AND ANZ NATIONAL BANK OF NEW
 ZEALAND
 Respondent

Court: Elias CJ, McGrath and Anderson JJ

Counsel: D F Dugdale and K F Crossland for Applicants
 D Chan and S Dalziell for Respondent

Judgment: 17 April 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] Mr and Mrs Burns apply for leave to appeal against a judgment of the Court of Appeal in a proceeding in which they sought to have set aside a settlement of earlier litigation between them and the respondent Bank. The Court of Appeal held that a misrepresentation by the Bank in the course of discovery had not induced the Burns to enter into the settlement agreement, so that there was no basis under s 7(3)(a) of the Contractual Remedies Act 1979 for the Burns to cancel the contract. It is submitted on behalf of Mr and Mrs Burns in support of their application that the Court of Appeal decision is based on errors of law.

[2] The earlier litigation arose from the failure of a company called Horticultural Contact Ltd to which the Burns had supplied tree seedlings. Horticultural Contact had an account with the Bank. The Burns claimed that the monies held in this

account, to the extent they represented proceeds of sale of the seedlings, were held on trust for them. To succeed in the claim it was necessary for the Burns to show that the relationship between them and Horticultural Contact was one of agency or brokerage, and not one of vendor and purchaser. During the trial of the earlier litigation the Burns had agreed to settle their claim. They had received counsel's advice that they were at risk of not being able to prove the necessary relationship.

[3] Fresh proceedings were issued by the Burns when they subsequently learnt that certain documents which were relevant to the earlier proceedings had not been disclosed in the course of discovery by the Bank in the earlier litigation. The Burns contended that they had been induced to enter into the settlement agreement in 1996 by a misrepresentation by the Bank that it had disclosed all relevant documents. In the fresh proceedings they sought to cancel the contract under s 7(3)(a), which relevantly provides:

7 Cancellation of contract

...

(3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—

(a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract.

...

[4] The Court of Appeal accepted that the inadequacy of discovery in the earlier proceeding amounted to a misrepresentation, but did not accept that the misrepresentation had induced the Burns to enter into the settlement agreement. The key finding of the Court of Appeal was that the additional documents, which should have been discovered, would not have assisted the Burns to establish that the relationship between them and Horticultural Contact was in the nature of brokerage. They were not material to the considerations that caused the Burns to enter into the settlement and accordingly the misrepresentation had not induced the settlement.

[5] Mr Dugdale seeks to raise two points of law on behalf of the applicants in this Court. The first is whether materiality is a necessary element of inducement.

The answer to that question is clearly in the negative, because it is well established that the materiality of a representation is no more than a consideration for the Court in determining whether the representation did induce entry into the contract. The real point is whether, as Mr Dugdale argues, the Court of Appeal decided that there had been no inducement by referring to a materiality test, as the sole or governing criterion, rather than one of the relevant considerations.

[6] We do not accept that it is arguable that the approach in the Court of Appeal's judgment can be read as being as restrictive as Mr Dugdale would contend. It was common ground in the Court of Appeal that ability to prove agency was the critical issue.¹ The Court of Appeal reasoned that, in 1996, the factor which caused the Burns to settle was the perceived absence of evidential material to support a brokerage relationship. If that were due to incomplete discovery, then the Bank could be said to have induced the settlement by the misrepresentation concerning relevant documents. If, however, the documents that should have been discovered did not provide such support nothing would have changed, and the position would remain that the lack of available evidence, rather than the Bank's misrepresentation, caused the settlement. It is not arguable in these circumstances that the Court of Appeal, in focusing on the content of the documents that should have been discovered, erroneously confined itself to a test of materiality in deciding whether the misrepresentation induced the agreement to settle.

[7] The other issue that the Burns wish to argue is whether, in determining whether the substantiality requirement under s 7(4) of the Act is met, it is legitimate to consider how the representees would have acted in the absence of any misrepresentation. But the problem the Burns always faced was that they could not prove there was a brokerage arrangement. The benefit derived in the settlement was that they did not have to do so. The question concerning the impact of the misrepresentation on that benefit was whether it cured the problem of lack of evidence. If, as the Court of Appeal decided, the documents had no bearing on the brokerage point, they were not capable of having a substantial effect on the benefit

¹ See para [44] of the Court of Appeal judgment.

derived from the agreement or, for that matter, the burden. There is no point in those circumstances in considering the proposed question. It does not arise.

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

Solicitors:

Stace Hammond, Hamilton for Applicants

Minter Ellison Rudd Watts, Wellington for Respondent