IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 132/2021
[2022] NZSC 14

BETWEEN	ROBERT GRAHAM First Applicant
	PINE RIDGE TRUSTEE COMPANY LIMITED Second Applicant
AND	SHABOR LIMITED Respondent

Court:	William Young, Ellen France and Williams JJ
Counsel:	D M O'Neill for Applicants K M Quinn and C B Pearce for Respondent
Judgment:	1 March 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

Introduction

[1] The applicants, Robert Graham and Pine Ridge Trustee Company Ltd (collectively, Mr Graham), seek leave to appeal part of the judgment of the Court of Appeal allowing an appeal by Shabor Ltd (Shabor).[1] On the proposed appeal,

[1] *Shabor Ltd v Graham* [2021] NZCA 448, (2021) 16 TCLR 177 (Brown, Courtney and Collins JJ) [CA judgment].

Mr Graham seeks to raise various questions about the approach taken to a claim by Shabor under the Fair Trading Act 1986 (FTA) for misleading or deceptive conduct.

The Fair Trading Act claim

[2] Mr Graham advertised a farm for sale as "comfortably winter[ing] 7,500 plus stock units with capacity for more" (Capacity Representation). Mr Bob Sharp and Mr Steve Borland were interested in buying the farm and made an unconditional offer of $5,250,110. This figure was reached by multiplying the 7,500 stock units by $700, and then adding $110 in case another tenderer used the same method. The offer was accepted and Shabor, which was incorporated a few weeks later, was the nominated purchaser. The terms of the agreement for sale and purchase included a no-reliance clause deeming the purchaser to have purchased in reliance on its own judgment and not in reliance on any vendor warranty.[2]

[3] Despite efforts by Shabor to increase carrying capacity it became clear the farm could not carry 7,500 stock units over winter. It was in this context that Shabor brought proceedings against Mr Graham for misrepresentation and breach of s 9 of the FTA.

[4] In relation to the FTA claim, the High Court found the Capacity Representation was misleading as the actual carrying capacity was materially lower.[3] But the FTA claim failed because the Judge found that the no-reliance clause broke the chain of causation between the Capacity Representation and Shabor's loss. Fitzgerald J said that if she had not found the chain of causation was broken, the damages payable under s 43 would have been reduced by 40 per cent to reflect Shabor's contributory conduct.

[5] Shabor's appeal to the Court of Appeal against the finding the no-reliance clause broke the chain of causation was successful. In reaching that view, the Court of Appeal said the relevant legal framework was that set out in

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2 Clause 27.3 provided that "The Purchaser shall be deemed to have purchased the property acting solely in reliance on the Purchaser's own judgement and upon its own inspection of the property and all other information regarding the property, and not in reliance upon any representative [sic] or warranty made by the Vendor, the Vendor's Agent or Managers other than as expressly set out in this Agreement."

3 *Shabor Ltd v Graham* [2020] NZHC 507, (2020) 21 NZCPR 440 (Fitzgerald J) [HC judgment].

Red Eagle Corp Ltd v Ellis.[4] That involved considering, first, whether the conduct was misleading and deceptive for the purposes of s 9 of the FTA and, second, whether the loss or damage was sustained "by" the defendant's conduct for the purposes of s 43.[5] The Court noted that the first stage of the *Red Eagle* inquiry was satisfied as the "[High Court's] finding that the statement regarding carrying capacity was misleading and deceptive for the purposes of the FTA is not challenged".[6] Thus, the appeal turned on the second stage of the inquiry and the effect of the no-reliance clause. On that aspect, the Court said:[7]

> [49] It is plain that the correct approach to causation where a no-reliance clause forms part of the contract is that explained in *Kewside* and *Campbell* and approved by this Court in *David*. Therefore, the question for the Judge in this case was whether, as a matter of fact, Shabor had relied on the misrepresentation and whether that reliance caused loss as a result of Shabor purchasing the farm at the tendered price. Clause 27.3 [the no-reliance clause] formed part of the body of evidence to be considered but was not, in itself, determinative.

[6] Applying this approach to the facts, the Court took the view that in its finding on causation the High Court had not given proper consideration to the totality of the evidence. When all of the evidence was considered the Court of Appeal said it showed that Mr Sharp and Mr Borland had relied on the misrepresentation, notwithstanding the no-reliance clause.

[7] The Court of Appeal agreed with the High Court that Shabor's "failure to include some contractual protection in the tender justified a reduction" in damages.[8] However, the Court reduced the damages award under the FTA claim by 30 per cent on the basis the High Court put more weight on Shabor's conduct than was warranted.[9]

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4 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

5 CA judgment, above n 1, at [26]–[27].

6 At [28].

7 The Court of Appeal referred to the decisions in *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059 (FCA); *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304; and *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239.

8 At [76].

9 The Court considered "a due diligence clause would not have led Shabor to discover the correct position" but rather, just "the possibility" the carrying capacity was overstated: at [83].

The proposed appeal

[8] Mr Graham wishes to argue the following three points:

(a) First, the Court of Appeal erred in concluding that the no-reliance clause did not break the chain of causation.

(b) Second, the Court of Appeal erred in not considering the no-reliance clause and conduct of the parties at the first stage of the test in *Red Eagle*.[10] The argument is that no-reliance clauses can affect liability under both *Red Eagle* stages. The Court of Appeal accordingly erred in stating the first stage of the *Red Eagle* inquiry was satisfied and proceeding directly to the second stage.

(c) Third, the Court of Appeal erred in arbitrarily altering the percentage that should be deducted from the damages award from 40 per cent to 30 per cent.

[9] Mr Graham submits that leave ought to be granted as these issues raise matters of general commercial significance.[11]

[10] We agree with Shabor's submission that whether Mr Sharp and Mr Borland were misled by the Capacity Representation is a question of fact, as both the High Court and the Court of Appeal recognised.[12] The first proposed ground of appeal accordingly does not raise any matters of general commercial significance but, rather, the complaint is directed to the assessment of the particular facts.

[11] As to the second proposed ground of appeal, there was no challenge in the Court of Appeal to the finding that the Capacity Representation was misleading for the first stage of the *Red Eagle* inquiry. That is not a promising starting point for an argument that this Court should now consider broader questions about how to approach various types of disclaimer clauses. In any event, on the facts, the carrying

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10 *Red Eagle Corp v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.
11 Senior Courts Act 2016, s 74(2)(c).
12 HC judgment, above n 3, at [189]; and CA judgment, above n 1, at [42]–[43] and [49].

capacity representation was fundamental to the fixing of the price. It plainly was relied on. Wherever this Court comes to rest on disclaimer clauses it seems unlikely to be on a basis which would have excluded liability in a case such as this.[13] Accordingly, we do not consider the proposed appeal provides an appropriate vehicle for the Court to consider the place of disclaimer clauses in claims under the FTA.

[12] The final proposed ground challenges the Court of Appeal's assessment of the appropriate reduction in damages on the specific facts. We agree with Shabor's submission that no question of general commercial significance arises. Nor is there an appearance of a miscarriage of justice in the civil sense in the Court of Appeal's assessment of what Mr Sharp and Mr Borland could do to verify the carrying capacity within three days or a period of due diligence.[14]

[13] The criteria for leave to appeal are not met.[15]

Result

[14] The application for leave to appeal is dismissed. The applicants must pay the respondent costs of $2,500.

Solicitors:
Forgeson Law, Te Kuiti for Applicants
Cargill Stent Law, Taupo for Respondent

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13 On the approaches to disclaimer clauses in Fair Trading Act 1986 claims for misleading or deceptive conduct see, for example, Lindsay Trotman and Debra Wilson *Fair Trading: Misleading or Deceptive Conduct* (2nd ed, LexisNexis, Wellington, 2013) at 225–234.

14 Senior Courts Act, s 74(2)(b); see also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

15 It is therefore unnecessary for us to consider Shabor Ltd's application for leave to cross-appeal.