IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 152/2021
[2022] NZSC 36

BETWEEN	BISCUIT CREEK FOREST LIMITED Applicant
AND	SIMON FREDERICK VALLANCE AND ROSA VALLANCE Respondents

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	W A McCartney for Applicant M G Colson QC and M C McCarthy for Respondents
Judgment:	1 April 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

[1] The applicant (Biscuit Creek) seeks leave to appeal against a decision of the Court of Appeal relating to an agreement under which the respondents agreed to sell to Biscuit Creek the right to a 44.7 per cent share in the proceeds of logs felled under a registered forestry right.[1] The right was described in the Court of Appeal judgment as "the Owner's share" and the agreement as "the OS Agreement". We will use the same terminology.

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[1] *Biscuit Creek Forest Ltd v Vallance* [2021] NZCA 577 (Miller, Brown and Collins JJ) [CA judgment].

[2] The factual background is set out in some detail in the judgment of the Court of Appeal.[2] Some of the matters in dispute have been resolved, and, given the scope of the present application, a truncated summary is all that is required.

[3] At the time the OS Agreement was entered into, the respondents were unsure as to whether the owners of the Owner's share were the respondents in their personal capacity or the trustees of a trust associated with the respondents (the Trust).[3]

[4] Biscuit Creek is a company controlled by a relative of the respondents, Andrew Vallance. At the time the OS Agreement was entered into, the respondents told Andrew Vallance that they understood that the Trust held the Owner's share. However, as a result of a discussion with Andrew about the history of transactions relating to the Owner's share, he persuaded the respondents that they owned the Owner's share in their personal capacities. The Courts below found that the Trust was, in fact, the owner, and this is no longer challenged.[4]

[5] The outcome of this was that the OS Agreement was entered into by the parties under a common mistake (that the respondents were the owners of the Owner's share, rather than the Trust).

[6] The significance of the mistake relates to the GST treatment of the OS Agreement. The price for the Owner's share was a GST inclusive price, based on the assumption that no GST was payable because the respondents were not registered for GST. However, the Trust was registered for GST. Thus, the Trust would have been liable to account for GST of almost $175,000.

[7] The Court of Appeal found that the mistake resulted in a substantially unequal exchange of values that was disproportionate to the consideration offered, upholding a finding to similar effect made in the High Court.[5]

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2 CA judgment, above n 1, at [7]–[24].
3 The respondents are trustees of the Trust, along with a third trustee.
4 *Biscuit Creek Forest Ltd v Vallance* [2021] NZHC 640 (Mallon J) [HC judgment] at [129]; and CA judgment, above n 1, at [38].
5 At [39].

[8] This meant that s 28 of the Contract and Commercial Law Act 2017 was engaged. That section sets out the power of the court to grant relief in relation to a contract entered into under a mistake. The power is expressed in general terms, but four specific possibilities are set out in s 28(2): declare the contract to be valid, cancel the contract, grant relief by way of variation of the contract, or grant relief by way of restitution or compensation.

[9] The Court of Appeal determined that the appropriate remedy was to make an order cancelling the contract under s 28(2)(b), which although different in nature from the remedy granted in the High Court, was to the same effect.[6] The outcome was that the parties were restored to their respective legal positions as at the time the OS Agreement was executed. The Court said this was an appropriate response "where but for the mistake a substantially different bargain, or none, would have been struck".[7]

[10] Biscuit Creek wishes to challenge on appeal to this Court, if leave is granted, the Court of Appeal decision as to the appropriate remedy under s 28 of the Contract and Commercial Law Act. Biscuit Creek highlights what it says are three errors in the Court of Appeal's analysis:

(a) the Court's conclusion that the appropriate remedy was cancellation because, but for the mistake, a substantially different bargain, or none, would have been struck;

(b) the Court's rejection of the proposition that s 21 of the Contract and Commercial Law Act requires the respondents to be held in some degree to their mistaken bargain (this takes issue with the concurrent findings that Andrew Vallance directly caused the mistake); and

(c) the Court's finding that cancellation was appropriate because it was unlikely the transaction would have been entered into at all but for the mistake.

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6 At [47].
7 At [47].

[11] We see all of these issues as being particular to the facts of the present case. We do not consider that they raise any point of general or public importance as to the application of the contractual mistakes provisions of the Contract and Commercial Law Act.[8] In effect, Biscuit Creek is seeking to challenge concurrent findings of the Courts below.

[12] Biscuit Creek also argues that a miscarriage of justice will arise if leave is not granted.[9] However, as this Court has pointed out on many occasions, there is little scope for the miscarriage ground in civil cases.[10] We are not persuaded that there is any risk of a miscarriage in the present case.

[13] We conclude that it is not in the interests of justice to grant leave to appeal.

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

Solicitors:
Carson Fox Legal, Auckland for Applicant
Thomas Dewar Sziranyi Letts, Lower Hutt for Respondents

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8 Senior Courts Act 2016, s 74(2)(a).
9 Section 74(2)(b).
10 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 197, (2006) 18 PRNZ 369 at [4]–[5].