

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CIV-2019-070-000455
[2020] NZDC 1353**

BETWEEN

DEGAN FARMS (BOP) LIMITED
Plaintiff

AND

JACK DANIEL WILLIAMS as trustee of
the JACK WILLIAMS and LAUREN
ANDREWS FAMILY TRUST
Defendant

Hearing: 5 December 2019

Appearances: T Refoy-Butler for the Plaintiff
D Weaver for the Defendant

Decision: 31 January 2020

**RESERVED DECISION OF JUDGE I D R CAMERON
ON APPLICATION FOR SUMMARY JUDGMENT**

[1] Degan Farms (BOP) Limited (Degan Farms) seeks summary judgment against Jack Williams as trustee of the Jack Williams and Lauren Andrews Family Trust (the Trust).

[2] That application is opposed by J Williams.

[3] The application relates to the sale by the Trust of an approximately 40 hectare vacant rural block in Te Puke to M Dodunski and T Degan. Approximately 20 of the 40 hectares is in bush. The land was apparently used for grazing of animals prior to its sale.

[4] On the front page of the written Agreement for Sale and Purchase dated 10 August 2018, the trustees as vendors had answered “no” to the question as to whether they were registered under the GST Act. In fact, the vendors were GST registered. The front page of the agreement also stated that the purchase price was \$900,000 “inclusive of GST (if any)”. The printed words on the form “plus GST (if any)” were crossed out. In schedule 1 of the agreement the question as to whether the purchaser was registered under the GST Act or would be so registered at settlement was answered “no”.

[5] Under clause 15.5 of the agreement, one working day before settlement M Dodunski and T Degan (the original purchasers under the agreement) gave notice to the trustees nominating Degan Farms (BOP) Limited as the purchaser. Any such notice ought to have been given no later than two working days prior to settlement. Degan Farms was registered for GST.

[6] The purchase proceeded, following which Degan Farms as purchaser sought an input credit from the Inland Revenue for the amount of GST applicable. This was initially paid by IRD. However, it was then discovered that the vendors were in fact GST registered. This meant that the transaction was zero rated and that there was no tax included in the purchase price for the purchaser to claim back from the IRD. IRD was repaid the money.

[7] In bringing the summary judgment claim, the purchaser relies on clause 15.1 of the Agreement for Sale and Purchase, which states:

The vendor warrants that the statement on the front page regarding the vendors' GST registration status in respect of the supply under this agreement is correct at the date of this agreement.

[8] The argument for the plaintiff as purchaser is that the warranty provided by the vendors that they were not registered for GST was incorrect, and that as a direct result of that breach of warranty the purchaser was unable to claim the input tax credit it would otherwise have received.

[9] A similar situation arose in *Holdaway v Ellwood*.¹ In that case, the vendor had incorrectly recorded that he was not registered for GST. Further, the purchaser answered "no" to the statement that he was registered for GST or would be so registered at settlement, but subsequently registered under the GST Act one week prior to settlement on the advice of his accountant.

[10] Settlement took place and the IRD declined the purchaser's claim for the input tax credit, as the vendor was registered under the GST Act.

[11] As the High Court stated in that case, at the time the vendor entered into the agreement he would have been liable to account for the GST component of the purchase price because he was registered for GST (even though he inadvertently said he was not), unless the purchaser became registered for GST between the date of the agreement and settlement. Once the purchaser had registered for GST, the transaction was zero rated. The vendor was not worse off because of the purchaser's failure to give notice that they had registered for GST.

[12] Importantly, the Court found that when the purchaser entered the agreement to purchase inclusive of GST with a warranty from the vendor that he was not registered for GST:

It was reasonably in contemplation at that time that if they registered for GST, as they were entitled to under the Agreement, then they would be able to claim an input credit for the GST component of that price.

¹ *Holdaway v Ellwood* [2019] NZHC 792.

[13] The Court went on to find that the vendor's breach of warranty meant the purchaser did not receive that credit as anticipated. Therefore, the Holdaways were worse off than they expected to be under the agreement.

[14] The principles as set out in that case are applicable to the current case.

[15] Mr Weaver also submits that the purchaser is not in fact carrying out or intending to carry out a taxable activity on the property, and as such the transaction ought not to be zero rated. However, there is ample material in the affidavits on behalf of the purchaser that the intention is to carry out taxable activities such as farming, growing kiwifruit for commercial use, hosting an ecolodge and/or camping. Also, in initially accepting the input credit claim by the purchaser, Inland Revenue was clearly satisfied that a taxable activity was anticipated in respect of the property. Further, the facts suggest that the vendor was using the property (or at least part of it) for grazing purposes, also a taxable activity.

[16] Mr Weaver for the vendors also indicates that the material advertising the property stated the price was "plus GST". However, apart from this general background, there is nothing to substantiate a claim that the purchaser knew the vendor was registered for GST, and that the agreed price of \$900,000 was meant to be "plus GST (if any)", as opposed to "inclusive of GST (if any)" as stated on the front page of the agreement.

[17] Further, Mr Weaver for the vendors queried the reasonableness of the curtilage calculation value as made by the plaintiff. Assessment of the curtilage value impacts on the amount of GST that the purchaser would have otherwise been able to claim from Inland Revenue and therefore it also affects any assessment of damages. The GST portion of the transaction claimed was \$106,956.52. This excluded one hectare of land intended for residential use. This assessment was made by the plaintiff's accountant who filed the GST return with IRD and payment was made on this basis before it was discovered that the vendor was in fact GST registered.

[18] The test is whether the assessment is fair and reasonable. In the accountant's affidavit evidence, he states that he calculated \$80,000 as the reasonable value for

the one hectare of land to be used for residential purposes, deducted that \$80,000 from the \$900,000 purchase price (see paras 12, 13 and 14 Mr Waine's affidavit 6 September 2019), and claimed the GST portion of \$106,956.52 on the balance of the land.

[19] On the face of it this appears to be a fair and reasonable assessment. The vendor has not provided any detail as to why he suggests otherwise.

[20] Finally, Mr Weaver points to material before the Court indicating that prior to the signing of the Agreement for Sale and Purchase the vendors agent Bayleys were specifically told that the vendors were GST registered. Nevertheless, this was not reflected in the agreement which Bayleys prepared. As such, Mr Weaver submits that there is a clear cause of action against Bayleys, and that they ought to be joined in the current proceedings as a third party.

[21] Against this, Mr Refoy-Butler for the purchaser submits that Bayleys should not be joined as a third party, as the dispute between the purchaser and the vendors, and the vendors and Bayleys, are separate from one another. Mr Refoy-Butler submits that the current claim before the Court is based solely on the breach of warranty with a discernible loss, and as such the plaintiff ought not to be denied judgment for what inevitably will be at the very least a further period of 12 months or more to accommodate claims against third parties.

[22] I agree with Mr Refoy-Butler. I do not regard it as being in the interests of justice for Bayleys to be joined in the current proceedings. The vendors may have a separate cause of action against Bayleys.

[23] In my view there is no serious arguable defence identified by the defendant. I note that the other trustee, Ms LE Andrews, acceded to summary judgment against her in an equivalent amount.

[24] Accordingly:

- (a) There will be judgment for the plaintiff against the defendant in the sum of \$106,965.52.
- (b) Judgment against the defendant for interest pursuant to s 10 Interest on Money Claims Act 2016 for the period beginning when the plaintiff's claim was declined by IRD on 20 January 2019 until the date of payment.
- (c) Costs on a solicitor/client basis in favour of the plaintiff; if there is no agreement as to that amount, then leave to apply to the Court is granted.

I D R Cameron
District Court Judge