IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-004-001028
[2020] NZDC 13200

BETWEEN	KAREN ANN MILLS and GRAEME WILLIAM MILLS Plaintiffs
AND	CAROLINE DESIREE MARR Defendant

Hearing: 7 and 8 July 2020

Appearances: S Grant for Plaintiffs
S Keall and B Riley for Defendant

Judgment: 10 July 2020

DECISION OF JUDGE G M HARRISON

The purchaser

[1] Mr and Mrs Mills purchased at auction on 24 August 2014 the defendant's (Ms Marr) property at 592 Mt Albert Road, Royal Oak.

[2] The purchase price was $1,450,000 which was inclusive of GST if any. By clause 15.1 of the Agreement the vendor (Ms Marr) "warrants that the statement on the front page regarding the vendor's GST registration status in respect of the supply under this Agreement is correct at the date of this Agreement".

[3] On the front page of the Agreement the following appears:

> The vendor is registered under the GST Act in respect of the transaction evidenced by this Agreement and/or will be so registered at settlement. ~~Yes~~/No

[4] The vendors were described on the Agreement as Ms Marr and TCD Trustees Limited. That company ceased to trade and was removed from the Companies Register and Mr and Mills discontinued their claim against it.

[5] It transpired that the warranty given by Ms Marr was incorrect. As at the date of the auction she was registered for GST. That meant that the Mills could not claim the GST portion of the purchase price as an input tax, and they issued these proceedings claiming as damages, the GST refund of $121,610.86 and the costs of their valuer and accountants, incurred as a result of the breach of warranty.

[6] Ms Marr accepted that she had breached the warranty and on 24 October 2018, by consent I entered judgment against her on liability only, leaving the quantum of damages to be assessed at trial.

The property

[7] The property comprised an area of 829 square metres. It was used for residential and commercial purposes. It was located on Mt Albert Road which is a busy arterial road, and opposite the intersection of Hillsborough Road, also a busy arterial road. There was no roadside parking available.

[8] The buildings consisted of a shop located on the road frontage which was connected to a two-level residence, behind which was a separate workshop of 140 square metres. The buildings were serviced by a driveway with onsite parking for 10 vehicles.

GST implications

[9] Goods and services tax is not payable on the sale of residential property. It is however on commercial property. It was necessary therefore to determine what percentage of the purchase price related to the commercial use onsite.

[10] It had been Mr and Mrs Mills' intention to register for GST before the settlement of 1 December 2014, either personally or through the nomination of a purchaser. However, on 12 September 2014 the solicitors for Ms Marr wrote to the

solicitors for Mr and Mrs Mills advising that there was an error in the Agreement for Sale and Purchase and that the vendors were registered for GST.

[11] This meant that the Mills could not claim a refund of GST because if they had become registered for GST as intended both parties would have been so registered in which case the sale and purchase would have been zero-rated.

The proposed business

[12] Mrs Mills explained in evidence that she and her husband intended to operate two businesses from the site. Her business involved the manufacture of lamps, using imported materials, and a toy museum which her husband intended to operate from the workshop. Although Ms Marr attempted to describe the toy business as a hobby only, its stock was insured for $200,000 and it was intended to operate that business from the workshop, and the lamp manufacturing and sale business in the shop area at the front of the property.

[13] Mrs Mills explained in evidence that they were reliant on recovering the GST to fund the setup and operation of both businesses. While they had some surplus funds they did not wish to incur the risk that the businesses might require further funding and they did not wish to borrow more money than had already been necessary to complete the purchase.

[14] It was intended to commence the businesses within a few months of taking occupation of the premises. Understandably, it was impossible for Mrs Mills to estimate what the turnover of the businesses might have been before they had commenced operation.

The valuations

[15] Mr M Tooman of AIM Valuation Limited was instructed to prepare a valuation for mortgage purposes for the Mills. He valued the property at $1,400,000 inclusive of GST (if any).

[16] Mr A Keung of Property Valuations Limited was instructed to prepare a valuation for Ms Marr. He valued the land and buildings at $1,450,000 as at 14 November 2014.

[17] Mr Tooman was then requested to provide a value apportionment between various components of the property. He did so on the basis of his initial valuation of $1,400,000. It seems that as at the date of his apportionment on 4 September 2014 he was unaware of the actual purchase price. His apportionment was:

Valuation	$1,400,000
Value apportionment	
Shop	$ 380,000
Garage and amenities	$ 100,000
Workroom	$ 420,000
Residential	$ 500,000
Value	$1,400,000

[18] Mr Tooman said in evidence that in making this apportionment he had taken into account the use of the property that was being made by Ms Marr at the time of his inspection in August immediately following the auction.

[19] In the promotional material for the auction various photographs were produced confirming the use being made of the shop, and the rear workroom, just prior to the auction.

[20] Mr Tooman's apportionment assessed the commercial portion of the site as having value of $900,000, which was 64.3% of his valuation of the property at $M1.4. 64.3% of the purchase price of $M1.45 amounts to $932,350. The GST component assessed at 15% equates to $121,610.86 which is the amount claimed in the amended statement of claim.

[21] Ms Marr called Mr P Bates to give valuation evidence. Mr Bates did not inspect the site as Mr Tooman had done and it seems was unaware of the commercial use that Ms Marr was making of the property.

[22] Mr Bates completed a number of reports.

[23] His essential conclusion appears in his report of 3 September 2019 where he assumed that the rear of the property could be used for commercial use. He assessed the commercial component at 35.86% resulting in a GST component of $67,826.09. I accept that the rear of the property could be used for commercial use and so I do not regard Mr Bates' assessment of the commercial component excluding the workshop at the rear of the property as of any relevance.

[24] Ms Grant's criticism of Mr Bates' valuation is that he did not include the lunchroom, associated bathroom and the garage as being used for commercial purposes. She was also critical that Mr Bates had allocated the greater part of the land at 550 square metres to the residents and 279 square metres to the commercial premises.

[25] At paragraph 2.15 of his report of 19 June 2020 Mr Bates said:

> For GST attribution, in this context, residential and commercial use area attribution is best to be a clear and separate step which might be adjudged by a judicial finder of fact in due course. If the valuer provides reliable component areas, a Court could find on the likely use as between residential and commercial, but still have the actual areas measured by the valuer as a useful and complete point of reference.

[26] He then said:

> 4.8 It might be best that the Court decide if any and to what extent business use would have been claimable. That might be a matter of hearing evidence and weighing credibility for the Court, which is beyond the role of a valuer. Nonetheless, a valuer is entitled to check sources and weigh up the reliability of information available to inform the valuation process (or have doubts).

[27] In my view those are valid observations. Mr Tooman took into account the use that Ms Marr was making of the premises at the date of sale. There was no evidence that the Mills would use the commercial areas of the property any differently. Mr Tooman's assessment proceeded on the basis of the commercial use of the entire premises by Ms Marr. It ill behoves her now to claim that any lesser commercial use of the premises would be made by the Mills than she herself was using.

[28] I therefore adopt Mr Tooman's assessment as the correct one.

What is recoverable?

[29] In *Ling v YL NZ Investment Limited*[1] the Court of Appeal considered issues similar to the present case.

[30] In that case Ms Ling purchased a farm property in July 2015, and onsold it to the respondent in December 2015 prior to settling the initial purchase. In the Agreement of Sale and Purchase she warranted that she was not registered for GST, but the Inland Revenue Department later deemed that she was so registered as at the date of the agreement to sell. In those circumstances she was held liable to pay the purchasers the GST they were otherwise unable to claim as an input credit.

[31] The Court said:

> [34] The purpose of a warranty in a commercial contract is to assign risk between the parties. A party provides a warranty in respect of matters which are or can be expected to be within that party's knowledge but not within the knowledge of the other party. This is plainly the situation in this case. YL could not know Ms Ling's GST status, that is, whether she was in fact registered or whether she was liable to be registered. YL could not challenge the Commissioner's decision as to Ms Ling's registration and its retrospective effect. In those circumstances, it is right that the risk as to GST registration lies with Ms Ling. The GST warranty was for the purpose of avoiding any confusion as to the GST liability position of the parties.
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> [35] We also agree with the Judge's analysis of the ramifications should Ms Ling's interpretation of the GST warranty be correct. It would introduce uncertainty on an essential term of agreements for sale and purchase of property, namely, the liability to pay GST and the impact that would have on the purchase price.

[32] This decision was followed in 2019 by *Holdaway v Ellwood.*[2]

[33] The Holdaways purchased a rural property from Mr Ellwood who warranted that he was not registered for GST when in fact he was. The Holdaways claimed damages for the GST input credit they would have been entitled to if Mr Ellwood was

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[1] *Ling v YL NZ Investment Limited* [2018] NZCA 133.
[2] *Holdaway v Ellwood* [2019] NZHC 792.

not registered for GST. They also claimed fees charged by their accountants following the Inland Revenue's advice rejecting their GST input credit.

[34] The District Court had declined to grant summary judgment and the Holdaways appealed from that decision. Mallon J held that there was no defence to the claim and that summary judgment for the amount of GST should have been awarded.

[35] The Judge said:

> [17] When a contract is breached by one party to a contract the other party is entitled to be compensated for that breach. The usual measure of compensation is the amount in money terms that restores the party to the position they would have been in if the breach had not occurred. The usual rule is that damages are assessed at the time the breach occurred. (Authorities omitted)
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> [18] Focussing first on Mr Ellwood's breach, he breached his contractual warranty on the date he signed the Agreement. At that time he warranted he was not registered for GST when in fact he was. Putting to one side for the moment whether the Holdaways also breached the Agreement, they were entitled to be put in the position they would have been in if the breach of warranty had not occurred. That is, as was the case in *Ling*, they would have been entitled to claim an input tax credit for the GST component of the sale price if they became GST registered before settlement under the Agreement.

[36] In my view that is entirely the situation in this case. While the Holdaways did register for GST, in this case the Mills did not, although they had intended to do so and use the GST refund to finance the setup and operation of the businesses. When they were notified that Ms Marr was registered for GST they accepted professional advice not to register for GST.

[37] I do not see that that affects in any way the right of the Mills to damages for breach of warranty by Ms Marr.

The defence

[38] As previously noted judgment has already been entered on liability. The defences were based upon the valuation evidence which I have dealt with and accepted Mr Tooman's assessment in preference to that of Mr Bates.

[39] The other defence raised was that the Mills had suffered no loss. Mr Keall submitted that their decision not to commence business meant that there was no loss. But there clearly was a loss as confirmed in the *Holdaway* and *Ling* decisions. It was the breach of warranty by Ms Marr that caused the loss. The decision not to commence the businesses was brought about by the breach of warranty, and so I do not accept that there was no loss.

[40] There was also reference to the Mills having subsequently subdivided the site and sold the resultant front section with road frontage.

[41] That does not provide a defence. I adopt the reference by Ms Grant to *Hutt Group Ltd v Nobahar-Cookson*[3] to the effect that:

> If the promisee is able to sell the property later at a profit, this is irrelevant to a claim for breach of warranty, not least because the promise assumes both the risk of downside and the possibility of upside.

Conclusion

[42] The Mills claim the costs incurred for the property valuation reports, and the cost of advice from the Mills' accountants at the time of the breach, that being $4506.41. I would have thought that the valuation reports prepared for the Court proceeding would be recoverable pursuant to an award of costs, as a claim for an expert witness' costs. The cost of the valuation prepared for mortgage finance purposes is not recoverable.

[43] Interest is also claimed either at the default rate in the Agreement for Sale and Purchase being 14% or pursuant to the Interest on Money Claims Act 2016 from the settlement date down to the date of payment of the GST refund.

[44] In my view interest is not claimable for late settlement, because settlement did occur on the agreed date, and that the appropriate amount for interest is that calculated according to the Act which at 7 July 2020 would be $25,614.

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[3] *Hutt Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 at [185].

[45] The Mills are also entitled to costs on a category 2B basis which I consider to be appropriate for a simplified trial intended to be completed within one day but which extended to a further half day.

[46] At settlement $45,000 was retained in the Trust Account of APLS Lawyers, the solicitors for Ms Marr. I direct that that amount plus any accrued interest be released to the solicitors for the Mills and setoff against the total amount owing according to this decision.

[47] Judgment is therefore entered against Ms Marr in favour of the Mills in the sum of $121,610.86, plus interest of $25614 calculated to 7 July 2020, plus accountants fees of $4092.01.

[48] I reserve leave for memoranda to be filed in respect of costs if agreement cannot be reached, or in respect of any other unresolved issue.

G M Harrison
District Court Judge