Employment Court of New Zealand

Butt v Attorney-General [2022] NZEmpC 183 (12 October 2022)

Last Updated: 21 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 183
EMPC 317/2020

IN THE MATTER OF	an application to reopen file EMPC 396/2019
BETWEEN	SUSHILA DEVI BUTT First Plaintiff
AND	ARTHUR ROYD WILSON BUTT Second Plaintiff
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF HEALTH First Defendant
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTER OF HEALTH Second Defendant

Hearing:	11–12 April 2022
Appearances:	A Till and J Perrott, counsel for plaintiffs W Aldred and O Wilkinson, counsel for defendants
Judgment:	12 October 2022

JUDGMENT OF JUDGE KATHRYN BECK

[1] Mr and Mrs Butt had previously brought proceedings against the Attorney- General on behalf of the Ministry and the Minister of Health and the Minister of Social Development and Minister for Disability. Those proceedings were discontinued after reaching a settlement at a judicial settlement conference (JSC) on 27 August 2020. That settlement was contained in a Record of Settlement of the same date.

[2] Mr and Mrs Butt have issued new proceedings against the defendants. They ask that the Court cancel the Record of Settlement on the basis that they were induced to enter it by a misrepresentation. They also ask the Court to declare that the Ministry of Health (the Ministry) was their employer and that it has breached minimum code legislation, to make orders in relation to entitlements and penalties, and to find that they were disadvantaged by the actions of the Ministry as their employer and award them compensation.

[3] In a judgment determining a strike-out application by the defendants, the Court dismissed the application. It held that, but for any misrepresentation, the plaintiffs' claims in these proceedings were fully and finally settled by the Record of Settlement and its subsequent fulfilment. However, the claim that the plaintiffs were induced into the Record of Settlement by a misrepresentation was not untenable, and a full hearing on the issue was required.1

Issues

[4] This hearing follows on from that judgment. The purpose is to determine preliminary issues:

(a) Did the defendants misrepresent the meaning of the Record of Settlement entered into by the parties, following a JSC, on 27 August 2020?
(b) Were the plaintiffs induced to enter into the Record of Settlement as a result of such misrepresentation (if established)?

[5] If the plaintiffs were induced to enter the Record of Settlement by a misrepresentation, it will be necessary to consider whether cancellation is permitted under s 37(2) of the Contract and Commercial Law Act 2017 (the Act) or whether damages are appropriate under s 35 of the Act. This will require consideration of the following issues:

1 *Butt v The Attorney-General sued on behalf of the Ministry of Health* [2021] NZEmpC 228.

(a) Did the parties expressly or impliedly agree the truth of the representation was essential to the Butts?

(b) Did the misrepresentation substantially reduce the benefit of the contract to the Butts?

(c) Should damages be awarded?

The facts

[6] The Butts have two severely intellectually disabled adult children. Their first child, Ashneel Butt, is 30 years old. Their second child, Alisha Butt, is 27 years old. Both children require full-time care; the care that is required is complex and challenging.

[7] It has been very difficult for the Butts to care for their children. They say they have often spent in excess of 50 hours per week looking after them without proper support or breaks. They say it has also been difficult for them to find carers to help look after their children.

[8] Access Community Health (Access) was funded by the Ministry of Health to provide carers for the Butts' children. In the Butts' view, however, some of carers provided have not always been suitably trained, and the Butts themselves were not funded to train the carers to look after their children.

[9] The Butts issued proceedings against the Attorney General on behalf of the Ministry and others. The Butts raised a number of claims including the need for better support. In an attempt to resolve the issues, the parties attended a JSC on 27 August 2020.

[10] Prior to and during the JSC, the Butts instructed their then lawyer, Ms Paula Wilson, to ensure that Mrs Butt would be paid to train the carers. The Butts say this was important to them because once new carers were trained, those carers would be able to relieve pressure on them, which would allow them to take more regular breaks.

[11] The Butts attended the JSC with a Ministry representative, Mr Wysocki, and the Ministry's legal representative, Ms McKechnie. The JSC was presided over by Judge Corkill.2

[12] It was common ground that much of the morning discussion was taken up with issues relating to carers, backup carers, and training for carers. During the meeting the parties discussed the possibility of Mrs Butt being paid by the Ministry to train carers.

[13] I accept the Butts made it very clear that it was important to them that Mrs Butt be able to train the carers and be paid to do so.

[14] I also accept that the Ministry informed the Butts that it could not bind Access or settle on its behalf. However, it was not disputed that, as funder, the Ministry had substantial power when making requests of Access.

[15] After lengthy discussions, the parties caucused. Ms Wilson prepared a draft Record of Settlement which included at cl 1(c**)**:

... the Ministry of Health will cover training costs for two weeks for Mrs Sushila Butt to train the carers once agreed upon as between Access and the Butts."

[16] She then emailed the draft to Ms McKechnie, counsel for the defendants, at

1.54 pm.

[17] Ms McKechnie called Ms Alison van Wyk, who is the chief executive officer of Access. Ms van Wyk states the following about the conversation:

I was asked whether funding for training is included in the fee Access is paid by the Ministry. I explained that it was. ... It was discussed that there was no funding available to pay Sushila to train any Access staff. Such funding is not required, as Access would not follow a process to have an unqualified non- employee train one of our employees.

[18] Ms McKechnie mostly agrees with Ms van Wyk's account of the conversation and states that Ms van Wyk told her:

2. Due to the allegation of misrepresentation, the usual confidentiality that applies to discussions in a JSC do not apply; see *Butt v Attorney General* [2021] NZEmpC 156, [2021] ERNZ 709.

... carers that Access provided to the house were fully trained prior to their arrival at the house. As a result, additional training of the carers was not required. Nor would it be appropriate for Mrs Butt to be paid for any "training".

[19] After Ms McKechnie had spoken with Ms van Wyk, she called Ms Wilson. Ms Wilson missed her call but called her back straightaway at 2.27 pm, and they spoke for one minute and six seconds.

[20] The parties differ as to what was said in that conversation. I deal with that below.3

[21] After this telephone conversation, Ms McKechnie sent an amended Record of Settlement to Ms Wilson with a number of tracked changes. The relevant amendment for the purposes of this proceeding is the deletion of the clause that the Ministry would cover training costs for two weeks for Mrs Sushila Butt to train the carers once agreed upon as between Access and the Butts.4 The amendment was accompanied by the comment: "Paula – Access tells us that additional funding isn't required for training."

[22] Ms Wilson says she understood this correspondence from Ms McKechnie to mean:

a. the Butts would be paid to train carers, as requested by the Butts earlier in the JSC; and
b. funding was available, within [Access's] current funding, for this training.

[23] She says that based on that understanding, she then told the Butts that Ms McKechnie had told her the training costs to train a replacement carer would be covered by Access instead of the Ministry.

[24] It is common ground that Ms McKechnie never expressly told Ms Wilson that Mrs Butt would be paid by Access.

3 See below at [53]–[71].

4 Previously cl 1(c), but in the amended version it was cl 5(c).

[25] It is also common ground that she did not tell Ms Wilson that Access was not willing to have an unqualified non-employee train its staff and would not pay Mrs Butt to carry out the training.

[26] Both parties signed the agreement as amended by the defendants (which did not include cl 5(c) but still contained cl 5(a) and (b)) and a copy was sent to the Court at 3.45 pm.

[27] Subsequently, on 31 August 2020, Access sent a new carer to care for the Butts' children. However, Mrs Butt claims that the carer was not trained. She says she expected to be able to train the carer and be paid to do so. It became apparent that Access did not agree to that taking place.

[28] On the same day, Mrs Butt says she emailed Ms Wilson complaining about the Ministry's failure to fund the training. On 4 September 2020, Mrs Butt called Ms Wilson seeking clarification of whether she would be paid to train a backup carer. Ms Wilson confirmed that she would be paid for the training.

[29] Following on from the phone call, Ms Wilson sent an email dated 4 September 2020 attaching the track changed Record of Settlement proposed by the defendants. She advised the Butts:

2. Please look at number 5(c) – Simpson Grierson have noted in the comment box in red that the training costs for you Sushila will be covered by Access.
3. Hence we removed this clause as Simpson Grierson confirmed that you will be paid for training a replacement carer.

[30] On 4 September 2020, the Butts emailed Simpson Grierson alleging that the Ministry had breached the settlement agreement. They attached Ms Wilson's email to them (above) and reiterated that she had told them that Mrs Butt would be paid for training a replacement carer.

[31] In a letter dated 23 September 2020, Simpson Grierson, on behalf of the Ministry, advised the Butts that Ms Wilson's email is not accurate and that there was no agreement that training costs would be provided, reflected by the fact that the clause

was not in the signed agreement. They said that the Ministry only committed to set up a meeting between the Butts and Access to explore the recruitment of a replacement carer, which it did.5

[32] Mrs Butt says it was crucial that she be paid to train people to care for their children. She understood that funding was not required from the Ministry because Access had the funding to pay her and would pay her. She says that she and her husband would never have settled their case and signed the Record of Settlement if they had known that was not the case.

Law

[33] The central provision for the purposes of the preliminary hearing was s 37 of the Act, which states:

37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached

(1) A party to a contract may cancel it if—

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

...

(2) If subsection (1)(a) ... applies, a party may exercise the right to cancel the contract if, and only if,—

(a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
(b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—
(i) substantially to reduce the benefit of the contract to the cancelling party; or
(ii) substantially to increase the burden of the cancelling party under the contract; or
(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[34] Section 37(1)(a) of the Act allows a party to cancel a contract if the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract. This provision essentially

5 A meeting was scheduled to take place on 3 October 2020.

requires three elements to be proven. First, there must be a misrepresentation. Second, the representation must be made by the other party to the contract. Third, the party seeking to cancel the contract must have been induced to enter the contract. I focus on the first and third elements. The second element is not in dispute.

Misrepresentation

[35] In considering whether there has been a misrepresentation, the case law often considers two questions: first, whether there was a representation;6 and secondly, whether that representation was false or misleading.7 Both parties followed that approach in the hearing. However, these questions are focused on situations where an express representation has been made. In the present case, it is alleged that the defendants' silence led to their statement(s) being misunderstood. Accordingly, it is necessary to consider when silence can constitute a representation.

[36] This is discussed in some detail by Stephen Todd in *Burrows, Finn and Todd on the Law of Contract in New Zealand*.8 He notes that mere silence will not generally amount to a misrepresentation; however, if silence distorts a positive representation, this may amount to a misrepresentation. He further notes that a half-truth may create a misleading impression.9 Ultimately, when determining whether a representation was made in the case of a half-truth, the question is whether the party has made a statement which implicitly conveys a representation.10 Another way of approaching this issue is to ask whether the defendants' statements and silence together "painted an erroneous picture to the plaintiffs".11

6. The Contract and Commercial Law Act does not define the word "misrepresentation", so the old common law definitions are used; see Stephen Todd "Misrepresentation" in Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract*

in New Zealand (7th ed, LexisNexis, Wellington, 2022) 363 at 366; and *New Zealand Motor Bodies v Emslie* [1985] 2 NZLR 569 (HC) at 593–594.

7. See *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395, [2020] 3 NZLR 383 at [107].

8 Stephen Todd, above n 6, at 374–376.

9 Stephen Todd, above n 6, at 374.

10 *Southern Response Earthquake Services Ltd v Dodds*, above n 7, at [115].

11 *Wakelin v RH & EA Jackson Ltd* HC Auckland A1131/83, 6 August 1984 at 8.

> [37] The test for whether a statement conveys a representation was summarised by the Court of Appeal in *Ridgway Empire Ltd v Grant*. The Court held:12
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> [11] Whether there has been a misrepresentation of fact is not determined merely by considering the literal meaning of the words used without regard to the context. The enquiry is what a reasonable person would have understood from those words in all the circumstances. Relevant considerations will often include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used.

Inducement

> [38] Turning to the issue of inducement, three elements must be established.13 First, the misrepresentation must have created a misunderstanding in the claimant's mind, but the meaning relied on, which created that misunderstanding, must be reasonably available.14 Second, the claimant must have relied on that misunderstanding and that reliance must also have been reasonable.15 However, although the claimant's reliance must be reasonable, "where a clear and unequivocal representation is made, the representee should normally be able to take it at face value".16 Third, the misunderstanding must have been one of the reasons which induced the claimant to make the contract.17
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> [39] For inducement to occur, the party who made the representation must intend to induce the other party. The Court of Appeal adopted this approach in *Savill v NZI Finance Ltd*.18 It is sufficient for the parties' intention to be actual or constructive.19 However, it should be noted that s 37(1)(a) states that it does not matter whether a misrepresentation is innocent or fraudulent.

12 *Ridgway Empire Ltd v Grant* [2019] NZCA 134; (2019) 20 NZCPR 236 at [11]; the Supreme Court denied leave to appeal this case in *Ridgway Empire Ltd v Grant* [2019] NZSC 85; see also *Southern Response Earthquake Services Ltd v Dodds*, above n 7, at [114].

13 Stephen Todd, above 6, at 379–380.

14. *West as Trustee of the West Family Trust v Quayside Trustee Ltd (in rec and in liq)* [2012] NZCA 232 at [30].

15 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 at [46].

16 At [53].

17 At [42]–[43]; see also *Savill v NZI Finance Ltd* [1989] NZCA 150; [1990] 3 NZLR 135 (CA) at 145.

18 *Savill v NZI Finance Ltd,* above n 17, at 145.

19 *Bonz Group PTY Ltd v Cooke* [1996] NZCA 301; (1996) 7 TCLR 206 (CA) at 212.

Essentiality of truth of representation

> [40] If a party was induced to enter a contract by a misrepresentation, cancellation is available under s 37(2)(a) if the parties have expressly or impliedly agreed that the truth of the representation is essential to the cancelling party. As there was clearly no express agreement here, it is necessary to consider what it means for parties to impliedly agree that the truth of a representation is essential. The Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd* held:20
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> > [24] ... The court must ask itself whether, without expressly stating that the term is essential ... the parties can be seen, in context, to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied.
> > [25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.
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> [41] The Supreme Court in *Mana* was considering a situation where it was alleged that an express term of a written contract had been breached and that the term in question was essential. As such, the Court was considering what it means for a term

to be essential. It was not considering the related but separate issue of what it means for the truth of a representation to be essential to a cancelling party.

[42] Ms Till cited the test in *Mana* at [25] as being directly applicable to the present case. However, I find that although the test at [25] will be the appropriate test in some situations involving a misrepresentation,21 the Supreme Court indicated at [24] that the court must also ask itself whether the parties can be seen to have intended that the term is essential, or in our context that the truth of the representation is essential. I emphasise that the Supreme Court held it to be necessary to ask what the *parties* intended. This indicates that there must be mutual intent for there to be an agreement.

20. *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25].

21 See *Fowler Developments Ltd v Robertson* [2012] NZHC 1218.

The Court of Appeal held similarly in *Karum Group LLC v Fisher & Paykel Financial Services Ltd* that the wording of s 37(2)(a) "expressly requires mutuality".22

[43] Overall, based on these decisions, I find there must be some form of meeting of the minds for there to be an agreement; that is not possible where there is no knowledge of what one is agreeing to.

Substantial reduction of benefit

[44] If cancellation is not available under s 37(2)(a), it may be available under s 37(2)(b)(i) if the misrepresentation substantially reduces the benefit of the contract to the cancelling party.

[45] When discussing what "substantial" means, Richardson J in the Court of Appeal held:23

Substantiality in that statutory context is a matter of fact, degree and impression. It has the same flavour as "significantly" and "considerably". It is equally incapable of any kind of arithmetical analysis. One must stand back and, assessing the matter objectively, determine whether the effect of the breach will ... substantially ... reduce the benefit of the contract ...

Analysis

*Did the defendants misrepresent the meaning of the Record of Settlement entered into by the parties, following a JSC, on 27 August 2020***?**

What was the representation?

[46] The defendants' primary submission is that Ms McKechnie did not make a misrepresentation to the plaintiffs.

[47] The plaintiffs say that the representation was that Mrs Butt would be paid funding directly to train carers for a period of two weeks. This was not correct and so amounts to a misrepresentation.

22 *Karum Group LLC v Fisher & Paykel Financial Services Ltd* [2014] NZCA 389 at [64].

23 *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 284–285.

[48] As noted above, it is common ground that Ms McKechnie did not expressly say that Mrs Butt would be paid by Access or from its funding.

[49] The plaintiffs submit that Ms McKechnie's behaviour gave rise to a half-truth or, in other words, that her statements and silence together painted an erroneous picture to them.

[50] The matter upon which she was silent is not in dispute. Ms McKechnie knew, but did not advise Ms Wilson or the Butts, that Access would not pay Mrs Butt to train its employees, or even allow her to train the employees.24

[51] The question is whether silence on this point, combined with the statements that were made, paint a picture25 or implicitly convey a representation26 that Mrs Butt would be paid to train carers for a period of two weeks.

[52] Accordingly, it is first necessary to establish what was said by Ms McKechnie on behalf of the defendants.

The phone call

[53] Ms Wilson and Ms McKechnie had a one minute, six second phone call. They provide differing accounts of what was

said. I turn to consider that issue.

[54] Ms McKechnie's accounts of the phone call are:

1 October 2021 (affidavit)

I advised [Ms Wilson] that I had spoken to Ms van Wyk about arranging a meeting with the Butts in Kaitaia and that Ms van Wyk was agreeable to that. I also discussed with Ms Wilson the conversation I had had with Access about training replacement carers. I conveyed to Ms Wilson that Access had told me that their carers were trained and that their training was already included in [Access's] funding from the Ministry. As a result, no more training was needed – and no further money from the Ministry was needed for any such training.

24 See above at [17]–[18], [25].

25 *Southern Response Earthquake Services Ltd v Dodds*, above n 7.

26 *Wakelin v RH & EA Jackson Ltd*, above n 11.

14 March 2022 (brief of evidence)

I told her that Access had told me that their carers were trained and that their training was already included in [Access's] funding from the Ministry and that no more training was needed – and no further money from the Ministry was needed for any such training.

[55] Taken together, Ms McKechnie's evidence is that she told Ms Wilson that:

(a) she had spoken with Ms van Wyk;
(b) a meeting could be arranged in Kaitaia between Access, the Ministry and the Butts;
(c) Access says that their carers are trained;
(d) Access says that the carers' training was covered by funding from the Ministry;
(e) Access says that no more training was needed; and
(f) Access says that no further money from the Ministry was needed for training.

[56] Ms Wilson provided a few accounts of the phone call with Ms McKechnie. They are set out below:

28 August 2020 (File note)

Ms McKechnie ... advised me that she had spoken with Access and "we do not need" to have the clause in the settlement agreement about payment for training for Mr and Mrs Butt as "training is covered as part of their funding".

4 August 2021 (Affidavit)

Ms McKechnie advised me that she had spoken with Access about arranging a meeting with the Butts in Kaitaia. Ms McKechnie also said to me that Access had told her that a specific clause for Mrs Butt to train replacement caregivers was "not needed". Ms McKechnie told me that Access said to her that "training was already covered in their funding".

12 October 2021 (Affidavit)

... my understanding from ... the ... telephone call with Ms McKechnie was that Mrs Butt would be paid for training as "training was already covered in their funding".

22 March 2022 (brief of evidence)

Ms McKechnie advised me that she had spoken with Access about arranging a meeting with the Butts in Kaitaia. I did not know who Ms McKechnie spoke with at Access. I specifically recall Ms McKechnie advising me that the

clause I drafted regarding Mrs Butt being paid for two weeks training was "not needed" as training was "already covered in their funding".

28 March 2022 (brief of evidence)

I do not agree with Ms McKechnie's statement that she fully relayed to me Ms Van Wyk's explanation of why Mrs Butt would not be paid ... Ms McKechnie merely said that "we" have spoken with "Access". She did not advise me the name of the person she had spoken with. In this same phone call Ms McKechnie stated, in response to the clause I had specifically drafted about the Ministry covering training costs for two weeks for Mrs Butt, that this clause was "not needed" as "training was covered in their funding".

[57] While there is a different level of detail between accounts, I do not consider them to be inconsistent with each other as submitted by counsel for the defendants. Taken together, Ms Wilson's consistent evidence is that Ms McKechnie advised her that:

(a) she had spoken with Access (but not specifically Ms van Wyk);
(b) she had spoken with Access about arranging a meeting in Kaitaia;
(c) the clause Ms Wilson had drafted about Mrs Butt being paid for training was "not needed"; and
(d) Access had said that "training is already covered in their funding".

[58] There are some details of this conversation on which the parties are agreed. These are that Ms McKechnie:

(a) advised Ms Wilson that she had spoken with Access about arranging a meeting in Kaitaia; and
(b) Access had advised her that training for the carers was already covered in their funding.

[59] They disagree on three points. First, Ms Wilson denies she was told that Ms McKechnie spoke with Ms van Wyk (I do not consider this to be material). Secondly,

Ms Wilson denies that she was told that Access's carers were trained. Thirdly, and most importantly, Ms Wilson says that Ms McKechnie told her that the training *clause* was not needed whereas Ms McKechnie says that she told Ms Wilson that the further *training* was not needed. The third point of disagreement is perhaps most relevant, but I note the other two points of disagreement because they are helpful in considering which of the recollections is to be preferred.

[60] Ms McKechnie's first affidavit was prepared over a year after the events themselves. She acknowledged that she did not make any file note at the time. The letter from Simpson Grierson to the Butts, written a month after the events on 23 September 2020, does not discuss the content of the telephone conversation at all – it simply states that Ms Wilson's email does not accurately convey the position. It is therefore limited in its operation as an aide memoire. There was no evidence of any other material that Ms McKechnie drew from when recalling the details of the phone call with Ms Wilson.

[61] On the other hand, Ms Wilson created a file note the day after the conversation occurred.

[62] Counsel for the defendants submits that Ms McKechnie's evidence should be preferred over that of Ms Wilson for several reasons.

[63] The defendants say that Ms McKechnie's account has been consistent, whereas Ms Wilson has varied with different levels of detail.

[64] It is correct that Ms McKechnie's evidence has remained materially consistent across both of her affidavits. That her second affidavit is consistent with the first, however, does not take us very far in a proceeding such as this. Given that the second affidavit essentially repeats the first, the real question is whether the first affidavit is accurate.

[65] I do not agree that Ms Wilson's account has been inconsistent. A varying level of detail does not amount to inconsistency per se. I consider that her evidence has

been consistent. Importantly, I consider her account has remained consistent with her file note.

[66] Counsel for the defendants submits that Ms McKechnie must have told Ms Wilson that the carers were trained because this is "consistent with the reality" on the basis that Access carers were and are trained. I do not accept that submission. It was not the shared reality of the parties at the time. The Butts had made it very clear that they did not consider some of the carers to have been adequately trained, which is why Mrs Butt wanted the opportunity to train them herself. That view was genuine. Whether it was reasonable is not a question for today.

[67] Overall, I prefer Ms Wilson's account. I consider that it is more likely than not that Ms McKechnie said that the training clause was not needed, rather than that further training was not needed. Given the Butts' strong view, if Ms McKechnie had said that further training was not needed, this would have been an issue for Butts, and therefore Ms Wilson. It would not have provided a basis for deleting the clause.

[68] Further, it is already agreed that Ms McKechnie did not convey the whole of the conversation she had with Ms van Wyk to Ms Wilson. For example, she did not share that Access would not agree to an unqualified non-employee training its staff. That was also consistent with reality but omitted from the conversation.

[69] The defendants also submit that Ms McKechnie's evidence should be preferred because it is consistent with what Ms van Wyk says she told her. I do not consider this assists the defendants. First, I do not agree that on the issue of staff training they are consistent. While Ms Van Wyk does say in her affidavit that Access staff were trained, she does not say it in reference to her discussion with Mr Wysocki and Ms McKechnie. When talking about the discussion she had with them, she only says she told them that funding for training was included in their fee and there was no funding to pay Mrs Butt because they would not have an unqualified non-employee train an employee. As noted above, it is already accepted that Ms McKechnie did not convey that aspect of the conversation with Ms van Wyk to Ms Wilson.

[70] It is difficult to recall a one minute, six second conversation a year later in the absence of an aide memoire. Ms Wilson prepared a file note the day after the conversation. I consider that to be the best evidence of the content of the conversation.

[71] Therefore, on the balance of probabilities, I find Ms McKechnie only advised Ms Wilson of the following in their phone call:

(a) She had spoken with Access.
(b) She had spoken with Access about arranging a meeting in Kaitaia.
(c) The training clause for Mrs Butt was "not needed".
(d) Access had said that "training is already covered in their funding".

The comment on the proposed deletion

[72] Having analysed the phone call, I turn to the comment on the draft agreement. The defendants proposed a tracked changed version of the draft Record of Settlement. That version deleted cl 5(c) which had read: "The Ministry of Health will cover training costs for two weeks for Mrs Sushila Butt to train the carers once agreed upon as between Access and the Butts."27

[73] The deletion was accompanied by the comment: "Paula – Access tells us that additional funding isn't required for training."

[74] It was the only comment made on the amended draft which contained a number of proposed changes including in relation to full and final settlement.

[75] Ms Till, for the Butts, submits that Ms Wilson and the Butts reasonably understood the word "training" in the comment to be a reference to training by the Butts. In the context of the phone call, I consider this is reasonable. The comment does not explicitly specify what type of training additional funding was not required for, but the only training referred to in the clause was training for two weeks by Mrs

27 Clause 1(c) in the first draft.

Butt, and the only funding referred to was funding for her to perform that training. Accordingly, it was reasonable for Ms Wilson and the Butts to interpret the word "training" in the comment to be the training provided for in the clause.

[76] Further, Ms McKechnie accepts in evidence that the training referred to was training by Mrs Butt.

[77] Both parties put forward differing interpretations of the words used in the comment:

(a) The clause is not needed because the carers are trained and do not need more training (the defendants).
(b) The clause is not needed because Access already has funding to pay the Butts to train their carers (the plaintiffs).

[78] On the evidence, it is clear that Ms Wilson took the second meaning above. That is what she told the Butts during the JSC and then confirmed in her email on 4 September 2020.

[79] The plaintiffs submit that the phone call and the comment on the draft together amount to a representation that Mrs Butt would be directly paid funding to train carers for a period of two weeks. The training clause was not needed because training costs are already covered in the funding, and no additional funding was required for Access to pay the Butts to train the carers.

[80] Again, it is clear on the evidence that is what Ms Wilson understood the defendants, through their counsel, to be saying.

*What would a reasonable person have understood?*28

[81] The question is whether that is what a reasonable person would have understood in the circumstances.

28 *Ridgway Empire Ltd v Grant*, above n 12.

[82] Ms Aldred submits that the defendants' interpretation29 was more reasonable because Judge Corkill told the parties to focus on what the Ministry could do (not third parties) and because Ms Wilson knew that Ms McKechnie could not bind Access. They say it was therefore unreasonable for Ms Wilson to think that the defendants were saying that Access would pay the Butts.

[83] Ms Aldred also submits that the only clause that allowed for Mrs Butt to be paid for training was deleted, so Ms Wilson, as a solicitor, could not have reasonably thought that Mrs Butt would be paid. Additionally, she submits that the original

clause did not unconditionally provide that Mrs Butt would be paid in any case.

[84] These submissions do not take into account the telephone conversation between Ms McKechnie and Ms Wilson. A representation (intentional or otherwise) by its very nature goes beyond the scope of the settlement document. Relevant considerations include the respective knowledge of the parties and the words used.30

[85] I find that Ms Wilson's understanding was reasonable considering what she was told, which was not the full story. Ms McKechnie did not tell her that Access would not allow Mrs Butt to train carers at all irrespective of whether she was paid or unpaid to carry out that training.

[86] Ms Aldred's submission in relation to the deletion of the only clause that referred to payment may be relevant to the issue of whether it was wise of Ms Wilson to agree to the deletion of the clause without first obtaining some form of collateral commitment in writing from the defendants or Access. However, while that may well have been wise in hindsight, it is not relevant to the issue of what a reasonable person would have understood from those words in the circumstances.

[87] I find that the combination of the phone conversation, Ms McKechnie's silence on Access's position that it would not pay Mrs Butt or allow her to train staff, and the comment on the draft Record of Settlement painted an erroneous picture to the plaintiffs.31 That picture was that it was not necessary for the training clause to be in

29 See above at [77(a)].

30 *Ridgway Empire Ltd v Grant*, above n 12.

31 *Wakelin v RH & EA Jackson Ltd*, above n 11.

the contract because Access was already funded to train the carers and Mrs Butt would be paid directly to train carers for a period of two weeks.

[88] This representation was erroneous because Access would not allow an untrained non-employee to train its employees irrespective of whether she was paid or unpaid to carry out that training

[89] Accordingly, it was a misrepresentation.

Were the plaintiffs induced to enter into the Record of Settlement as a result of such misrepresentation (if established)?

[90] The Butts emphasised from the outset of the JSC that the training issue was important to them and that they had specifically instructed Ms Wilson to make sure that the agreement included payment for Mrs Butt to train backup and replacement carers. That is what the training clause did. But for the misrepresentation, the Butts would not have agreed to the training clause being removed and would not have signed the Record of Settlement in its final form.

[91] On that basis, I find that the Butts were induced to sign the agreement by the misrepresentation.

[92] Ms Aldred submits that even if the Butts relied on the misrepresentation, their reliance was not reasonable. She essentially submits they should have got it in writing. I do not accept this. While it would have been wise to shore up any understandings in writing, the failure to do so does not negate the fact of the misrepresentation. There is no provision in the Record of Settlement that prevents the Butts from relying on pre- contractual representations.

[93] In the absence of any such clause, it would be inconsistent with the purpose of s 37 of the Act to allow a party to avoid the consequences of their misrepresentation by shifting responsibility for not guarding against such a circumstance to the representative of the other party. This Court's equity and good conscience jurisdiction would also count against such an outcome.

[94] For completeness, I note that Ms Aldred raised the fact that the Butts made their misrepresentation claim some time after signing the agreement and after they had already tried to cancel it. Even though the Butts may already have been suffering from 'buyer's remorse', that does not negate any legitimate concern about the misrepresentation. Their email to Simpson Grierson on 4 September 2020, attaching Ms Wilson's email of the same date,32 is evidence of their concern only eight days after the Record of Settlement was signed. It was clear at that early stage what Ms Wilson had understood from her interactions with Ms McKechnie and what she had conveyed to the Butts.

[95] The Butts filed the initial statement of claim in these proceedings themselves. The claim in relation to misrepresentation was made after they instructed counsel and obtained advice. I do not consider the timing to undermine their claim.

[96] In any case, the Butts' disappointment with the settlement after the fact has no bearing on the issue of whether they were induced to enter the settlement agreement by a misrepresentation.

[97] Having concluded that the Butts were induced to enter the agreement by the misrepresentation, I turn to consider whether the contract can be cancelled and/or whether damages are available.

Did the parties expressly or impliedly agree that the truth of the representation was essential to the Butts?

[98] Under the Act the Butts can cancel the agreement if the parties expressly or impliedly agreed that the truth of the representation was essential to the Butts.

[99] As noted above,33 there must be some form of meeting of the minds for there to be agreement.

32. Which clearly sets out Ms Wilson's perception of what she had been told and what she had, in turn, conveyed to the Butts.

33 At [42]–[43].

[100] There is no evidence to indicate that Ms McKechnie intentionally misled the Butts. She says she was unaware of Ms Wilson's understanding until the email from the Butts of 4 September 2020.

[101] If Ms McKechnie did not intentionally make the representation, she cannot have agreed that the truth of that representation was essential.

[102] Likewise, while there is no doubt that it was essential to the Butts, there is no evidence of any discussion between Ms Wilson and Ms McKechnie that could give rise to any implied or express agreement to that effect.

[103] The Butts cannot cancel the agreement on the grounds that there was an express or implied agreement that the truth of the representation was essential to them.

Did the misrepresentation substantially reduce the benefit of the contract to the cancelling parties?

[104] The Butts can also cancel the contract if the effect of the misrepresentation substantially reduced the benefit of the contract to them.

[105] The effect of the misrepresentation was that the Butts agreed to remove the training clause and sign the Record of Settlement. Therefore, the issue for consideration is whether the removal of the training clause substantially reduced the benefit of the agreement to the Butts.

[106] The draft clause stated:

... the Ministry of Health will cover training costs for two weeks for Mrs Sushila Butt to train the carers once agreed upon as between Access and the Butts

[107] Ms Aldred submits that the removal of the training clause did not substantially reduce the benefit of the contract. She submits that the benefit of the clause could be characterised in two ways. First, the benefit could be understood as being an opportunity to be paid for some unspecified amount of work over the course of two weeks. Secondly, she submits that the benefit of the clause could be understood as

being the provision of properly trained carers. She submits that these benefits were of limited or no net benefit to the plaintiffs.

[108] It is necessary to consider the meaning of the draft clause briefly within the context of the rest of the draft agreement.

[109] Under draft cl 5(a), the Ministry agreed to send a letter of support on behalf of the Butts to Access. The intent of the letter was to encourage Access to convene a meeting, and under cl 5(b), the letter would encourage Access to explore/agree to a procedure to recruit backup and replacement carers for the Butts' daughter. Under cl 5(c), once replacement and backup carers were found, the Ministry would pay Mrs Butt to train them.

[110] Assuming that appropriate carers were found by Access, the draft clause would have been beneficial to the Butts in two ways. First, the Butts would have benefitted financially as the Ministry would have paid them for two weeks of training. Secondly, and arguably more importantly, the Butts would have benefitted from having carers that they considered were trained to perform services in a manner appropriate to the needs of their daughter.

[111] Given that carers first needed to be found, I agree that the clause's benefit is conditional on that occurring. However, that does not mean the clause would not have been substantially beneficial to the plaintiffs if it had been included in the contract. As has already been noted, the opportunity to be able to train carers was extremely important to the Butts. On this basis, the loss of that opportunity substantially reduced the benefit of the contract to them.

[112] While the financial benefit of the payment for training may have only been in the region of $1,500, it was about more than the money.34 The value of carers being trained to their satisfaction and the flow-on effects of that were of significant benefit to them.35

34. The minimum wage in 2020 was $18.90. Assuming Mrs Butt would have been paid for two 40- hour weeks, she would have received: 2 x 40 x $18.90 = $1,512.
35. Those flow-on effects included the ability to take breaks while trusting the children were properly cared for.

[113] The misrepresentation substantially reduced the benefit of the contract to the Butts in that it resulted in the removal of the clause and the consequential loss of not only the prospect of payment for training, but also the opportunity to train the carers.

[114] The plaintiffs are entitled to cancel the Record of Settlement.

Damages

[115] No evidence was produced in relation to damages. I do not consider that I am able to make any finding in that regard.

Conclusion

[116] While the defendants may not have intended it, the plaintiffs were induced to enter the Record of Settlement by a misrepresentation.

[117] The misrepresentation substantially reduced the benefit of the Record of Settlement for them, and they are entitled to cancel it.

[118] The plaintiffs are therefore entitled to proceed with their claim.

[119] I direct that a directions conference be convened to manage the next steps in the process.

[120] The parties are encouraged to attempt to agree costs. If they are unable to do so, any application should be filed within 21 days of the date of this judgment. Any response should be filed within 21 days thereafter.

Kathryn Beck Judge

Judgment signed at 2 pm on 12 October 2022
