IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-5513

BETWEEN	DAVID WILLIAM COLE AND ROBYN CAROL PURCELL Plaintiffs
AND	LINLEY ALEXANDRA MURRAY First Defendant
AND	TSB BANK LIMITED Second Defendant

Hearing: (ON PAPERS)

Appearances: N P Tetzlaff for plaintiff
K F Gould for first defendant

Judgment: 8 December 2011 at 4:00 PM

JUDGMENT OF ASSOCIATE JUDGE DOOGUE
[on Costs]

This judgment was delivered by me on
***8.12.11 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..

Solicitor/Counsel:
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K Gould, Barrister, Auckland – kevingould@xtra.co.nz

[1] The plaintiffs sought orders for the sale of a property. The first defendant as co-owner resisted the proceedings and filed a statement of defence. Eventually she consented to a sale of the property at an agreed value.

[2] The plaintiffs claim that the first defendant behaved unreasonably in taking matters to the stage where the plaintiffs had to initiate proceedings to obtain an order, which, in the result, would have been in the terms of what the parties actually agreed to. Therefore the plaintiffs say that r 15.23 of the High Court Rules which governs costs on discontinuances ought not be applied on this occasion.

[3] Rule 15.23 provides as follows:

> **15.23 Costs**
>
> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

The leading case in this area is *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd*.[1] In that case the Court of Appeal considered that the Judge ordering costs in the High Court erred in focusing only on the issue of whether a party's motivation was ulterior or improper. The reasonableness of the parties' respective stances was the main consideration, and "matters highly relevant to *whether it was just and equitable to displace the* [equivalent to r 15.23] *presumption*"[2] were also to be considered and weighed.

[4] It is also the case that the purpose of having a presumption in the rules is to obtain certainty and predictability about costs decisions which can be anticipated, as these can impact the choices a party makes as to the future of litigation it is involved in.

[5] In trying to balance up these considerations in the present case, I think the following issues are relevant.

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1 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973.
2 Ibid, at [29] (emphasis added).

[6] It is not unusual for co-owners of property to have to seek the assistance of the Court by the making of orders under s 341 of the Property Law Act 2007 to resolve disputes between them. It may be that the parties' wishes may fundamentally diverge so that one party cannot agree that the property should be disposed of and yet not be able to buy out the other party. The result is the owners would continue to be locked in their co-ownership arrangement. There may also, alternatively, be presented a dispute not about the decision to sell but about the question of what price the parties should seek.

[7] In this case the issues disclosed by reading the statement of claim and statement of defence seem to be that:

a) the first defendant did not oppose the making of orders for the sale of the property;

b) she considered that the plaintiffs were demanding "an excessive sale price". Whether that "excessive sale price" was objectionable because it meant she would not be able to buy out their interest or because it would prejudice the prospects of a sale to third parties is not clear; and

c) the first defendant's views were that the property should be sold by "private treaty". This would seem to be in contra distinction to a sale by auction, tender or by some other means.

[8] The plaintiffs obtained three offers for the property — in each case to the same proposed purchaser. Eventually the first defendant agreed to a sale by the third agreement in which the price was approximately the same as in the first two (the second offer which was rejected being a little higher than the first and third).

[9] The plaintiffs have filed an affidavit which summarises their view of the unreasonableness of the position which the first defendant took. As well, both counsel have filed memoranda.

[10] The offers were made over the period 1 March 2011 to 20 May 2011 when the plaintiffs indicated that she would sign an agreement for sale and purchase to the third party. I decline to read the affidavit about the merits of the case. There are two reasons for that. The policy underlying the rules on costs is to provide certainty and to prevent the Court becoming involved in disputes about costs. Secondly, the contents of the affidavit have not been accepted by the first defendant but there could well be disputes of a factual nature which could only be resolved after a facts hearing. This is exactly the type of outcome that is at variance with the objectives of the rules. The plaintiffs may object that no affidavit has been filed in response by the first defendant but there was no obligation on her to do so. No timetable order had been made and the standing procedures of the courts contained in the High Court Rules do not impose any obligation on the defendant to respond.

[11] Obviously the matter did not go to trial so there has been no opportunity by the Court to assess the merits of the parties' positions.

[12] In overview, the position is this. Proceedings were issued by the plaintiffs in August 2010. In August 2011 the third offer was accepted.

[13] The plaintiffs are critical of the first defendant and say that she used the process of negotiations as a lever to obtain an advantage about matters other than the issue of whether the house should be sold and the price at which that ought to occur. It is not possible for the Court to come to a conclusion as to the truth concerning those matters.

[14] In summary, a matter which could be viewed as taking this case out of the ordinary therefore making it just and equitable that the Court depart from the presumption in r 15.23 is that the plaintiffs obtained in the proceedings all the relief that they sought. However, the Court does not have a firm basis upon which to conclude that there was not some give and take about what sale price should ultimately be accepted. The first defendant plainly raised issues of the price that the plaintiffs wanted to receive. She characterised it as excessive as I have noted. It might be that both sides ultimately wanted the property to be sold but the sticking point was on the question of value. I do not consider that the Court could rationally

conclude that it has sufficient information upon which it can come to a safe conclusion about whether the plaintiffs obtained exactly what it wanted from the proceedings and the first defendant nothing.

[15] One other matter that could possibly be relevant is that the plaintiffs incurred expenditure which ultimately can be viewed as being for the advantage of both sides. But that too, requires an assessment of the objectives that the plaintiffs had in bringing the proceedings. The Court of course does not know what occurred in the course of negotiations. But it is not inconceivable, for example, that the first defendant found herself unable to negotiate because of substantial differences in approach which had been signalled in the communications between the lawyers. It might be that what the plaintiffs wanted was ultimately found to be unreasonable. These are simply matters that the Court cannot come to a conclusion about. As I have stated, I do not consider that it is reasonable to embark upon a disputed factual hearing to ascertain the truth of these various matters.

[16] Mr Gould has suggested that costs lie where they fall. Given that sensible suggestion of compromise I, too, consider that that is the appropriate order to make in the circumstances and I order accordingly.

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J.P. Doogue
Associate Judge