IN THE HIGH COURT OF NEW ZEALAND 13/10 M.655/92
WELLINGTON REGISTRY

1371

UNDER The Declaratory Judgments Act 1908

IN THE MATTER OF Memoranda of Mortgage of DEANE LINDSAY FULLER of Greytown, Company Manager and SUSANNE BETTY FULLER his wife, to NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED to ELLEN ANTICA FULLER and to INVINCIBLE LIFE ASSURANCE LIMITED

BETWEEN ELLEN ANTICA FULLER
of Masterton, Retired

Applicant

A N D INVINCIBLE LIFE ASSURANCE LIMITED
of Level 3, Invincible Building, 136 The Terrace, Wellington, Financier

Respondent

Hearing: 30, 31 May and 1 June 1994

Judgment: 20 June 1994

Counsel: G. Taylor and N. Levy for Applicant
H.B. Rennie and P.A. Morten for Respondent
J.W. Saxton for Westpac Banking Corporation

Memorandum: 21 September 1995

MEMORANDUM AS TO COSTS OF GALLEN J.

I gave judgment in this case in favour of the applicant against the respondent on 20 June 1994. I held in that judgment that the applicant was entitled to costs as against the respondent, but

accepted that there were outstanding matters which required resolution in terms of the judgment, before costs could actually be assessed. The parties were unable to agree as to an appropriate award of costs and in respect of certain other matters which were in the way negotiations developed, bound up with the question of costs.

In December 1994, the applicant filed a memorandum as to costs. This was not then referred to me for the obvious reason that other parties were entitled to reply to it and I was unaware that it had been filed. The respondent filed a memorandum in reply. It is undated and as in the case of the memorandum of the applicant, was not made available to me because it was expected that the applicant would file a memorandum in reply. I was unaware that the respondent's memorandum had been filed. A reply by the applicant was dated 20 April 1995 and a further memorandum by the respondent dated 21 April 1995, was also filed. Westpac Banking Corporation, a party to the proceedings, filed a memorandum dated 13 April 1995. I was then overseas and did not return to Wellington until July 1995. When the file was placed before me, not all the memoranda referred to were on it and it was impossible to deal with the matter until the file had been completed. I accordingly requested that copies of the memoranda be made available. This was done while I was away from Wellington on circuit and I eventually received them on my return on 11 September. I mention these matters to explain why there has been some delay in dealing with the questions raised.

Counsel have referred to the principles involved and rely upon the decision of Hardie Boys J. in *Morton v. Douglas Homes Limited (No.2)* [1984] 2 NZLR ; *Tarrant v. Hastie* (Dunedin Registry, CP.14/93, unreported judgment delivered 18 October 1994 per Williamson J.) and *Hamilton City Council v. Waikato Electricity Authoirty* (Hamilton Registry, CP.21/93, unreported judgment delivered 29 September 1993 per Hammond J.). There is no dispute as to the principles involved. Counsel also referred to *DFC New Zealand Limited v. Bielby* (1990} 3 PRNZ 405 and *McGrath v. Bank of New Zealand* (1988) 1 PRNZ 257.

While those authorities helpfully set out the various factors which may properly be taken into account, looked at overall, as Hardie Boys J. said, the over-riding consideration is the nature and course of the proceedings which is I think, sufficient to encompass the approach of the parties and the conduct of the proceedings. Using as a basis the amounts which the applicant stood to gain or lose, the applicant's advisors have calculated on the basis of the scale that total scale costs would amount to $20,368.19. They contend that bearing in mind the solicitor and client costs which have been rendered (which are approximately $54,000) and the proportion which scale costs on average bear to such costs, the figure which is realised if the scale is used as a basis for calculation, is reasonable but should be increased to take into account the fact that allegations of fraud were made and that in addition, there should be a certificate in respect of junior counsel.

Mr Taylor argues that the allegations of fraud lengthened the trial and were lacking in substance. He contends too, that the factual complexity of the proceedings was such with the resultant necessity to prepare involving additional time, that taking all these matters into account together, the appropriate range of costs is from $33,000 - $41,500.

By contrast, it is the contention of the respondent that in the circumstances of this case, the contribution towards costs ought to be no more than a third of the actual solicitor and client costs and also contends that the solicitor and client costs rendered are unjustifiable, bearing in mind the approach of the applicant to the proceedings and the necessity or otherwise for all the work which was done. It is the respondent's contention that a generous award of costs would be $11,000.

Counsel on both sides of the argument explored in some detail the progress of the case and the approach adopted by the various legal advisors. I do not consider that it is appropriate in this case at least, to explore the matter in that way. The award of costs is discretionary and in a case such as this, it is my view that it is more appropriate for an overall view to be taken which reflects the nature and conduct of the proceedings. Counsel agreed thst the case did not

involve difficult questions of law. In my view however, it involved complex questions of fact arising out of the labyrinthine dealings of some of those involved. The background to the proceedings was such that counsel were entitled, indeed obliged, on both sides, to approach the matter with care, which they clearly did.

In considering the complexity of the matter and the course of the proceeding, it is perhaps worth pointing out that in dealing with the outstanding questions, the applicant's memorandum extended over 19 typewritten pages with 45 separate clauses. The respondent needed 29 pages and 130 clauses. The applicant's reply required 25 pages and 63 paragraphs. These figures speak for themselves.

It was the contention of the respondent that there should be some reduction in respect of a number of matters which were dealt with in detail in the memoranda of which the most subtantial was the fact that the applicant did not succeed in respect of a number of issues, including an attempt to establish entitlement under the second caveat and an application for directions before Master Thomson, where an attempt was made to have the question of accord and satisfaction argued separately as a pre-trial issue.

I do not think that there should be any reduction in respect of either. As far as the first is concerned, it was a subsidiary matter and it is by no means uncommon for a party to succeed in respect of some contentions and not others. As far as the argument before the Master is concerned, that was met by an order for costs in the Master's Court and it is sufficient in my view to leave it at that.

It is also the contention for the respondent that the costs ordered to the applicant should be reduced in respect of what might be described overall as contentions that the applicant's conduct of the proceedings, including interlocutory matters such as discovery, were such that a reduction was justified. Again looking at the matter overall, I do not consider that it is appropriate to make any such reduction.

In the end, I hold that the scale costs as calculated by Mr Taylor, provide a reasonable return to reflect the fact that the applicant has succeeded. I am also of the view that the applicant is entitled to recover costs in respect of second counsel. The complexity and nature of the case were of themselves enough to warrant the engagement of junior counsel and the possibility of fraud, reinforced that.

Looked at overall, I fix the applicant's entitlement to costs in respect of those issues on which she succeeded, including an allowance for junior counsel, at 25,000 dollars together with disbursements which, if they are disputed, are to be fixed by the Registrar.

There are two further matters on which rulings are sought. The first involves whether the sum the plaintiff must pay in acquiring the mortgage the subject of the proceedings, should be increased by interest and if so, how much? It is the contention of the respondent that the applicant should pay interest at 17%, the penalty rate contained in the mortgage, from 20 June 1994 until the date of settlement.

The effect of my judgment in this matter is that the applicant was entitled to have the National Mutual mortgage transferred to her as at 12 February 1993. It has not yet been transferred to her and the question arises as to what interest can properly be claimed by the respondent under the mortgage and which can be taken into account in settling the transfer. If the mortgage had been transferred to the applicant as at the date on which I have held it should have been transferred, then the amount which the applicant was required to pay would not have been inflated by increased interest and what she did herself as to the collection of interest would have been entirely a matter for her.

Accordingly I am of the view that the respondent is not entitled to include in the settlement as against the applicant, interest from 12 February 1993 until that time at which she was obliged to settle in accordance with the judgment. That could not have been before the settlement statement was received and that was 13 October 1994. It follows then that I do not find that the respondent is entitled to increase the amount owing by interest during that period. From that period on,

the respondent is entitled to recover interest. The question arises as to an appropriate figure. It is the respondent's contention that it is entitled to penalty interest since interest in accordance with the mortgage was not paid. In my view, the respondent was not entitled to the payment of penalty interest and accordingly, the settlement statement cannot be regarded as one which required the applicant to comply with it. It would therefore be open to argue that the applicant was not obliged to pay any interest until such time as a settlement statement which properly reflected the amount which the applicant would be required to pay, was submitted to her. It was I think however, encumbent on the applicant to at least respond at that stage and according to the memoranda, this did not occur because the parties had been unable to agree on an overall settlement of the matters at issue.

In my view, the respondent is therefore entitled to recover interest from the date at which an appropriate response could have been expected to the settlement statement. In this regard I accept the contention of the applicant that this date ought to be fixed as at **14 October 1994**. The applicant contends that the rate of interest should be that fixed by the Judicature Act, arguing that the obligations under the mortgage merged in the judgment. The whole dispute was over the acquisition of the mortgage and accordingly, I hold that the rate of interest to be taken into account is that which the mortgage itself fixes and that that is payable from 14 October 1994 until the date of settlement, but is not to include penalty interest.

The second question is who should stand the costs incurred by the mortgagee in enforcing the mortgage. The respondent claims to be able to recover costs and disbursements incurred in an attempt to enforce rights secured by the mortgage and in particular, costs incurred in relation to a preparation for a mortgagee sale. The applicant conceeded that the respondent was entitled to recover something in respect of this work, but the respondent goes further and seeks costs incurred in the litigation, contending that they are costs incurred in defending his rights and recoverable in terms of the covenants contained in the mortgage itself. Westpac Banking Corporation as an interested party, has filed a memorandum with regard to this aspect of the matter.

Again the matter has been explored in depth by counsel. I am prepared to accept that the respondent is entitled to recover appropriate sums in respect of the mortgagee sale and disbursements. It is the contention for the applicant that the costs should be reduced on the basis that a substantial proportion of those costs amounts to routine work and does not justify the sum claimed. It is the contention for the applicant that in respect of the disputed items, the costs claimed should be halved. I am in no position to deal with this matter as though it were a taxation before the Registrar and if I were to proceed dealing with the matter item by item, the resolution of this matter would be unreasonably delayed.

The amount claimed for fees is $5,400. I am prepared to fix that at **5,000 dollars** and to accept the disbursements as claimed, that is **1,150 dollars**.

In so far as the respondent seeks to recover its costs of the present litigation and disbursements in terms of the mortgage, that will be disallowed and no sum awarded in respect of that.

Solicitors for Applicant:	Messrs Gold Walsh and Company, Masterton
Solicitors for Respondent:	Messrs Macalister, Mazengarb, Perry, Castle, Wellington
Solicitors for Westpac Banking Corporation:	Messrs Simpson, Grierson, Butler, White, Wellington