IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-002373

	UNDER	section 143 of the Land Transfer Act 1952
	BETWEEN	CANTERBURY BUILDING SOCIETY Applicant
	AND	OASIS PROPERTIES LTD First Respondent
	AND	BRIDGING FINANCE LIMITED Second Respondent

Hearing: On the papers

Appearances: A Cowan for the Applicant
D B Hickson for the First Respondent

Judgment: 22 April 2009

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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[1] On 25 Mach 2009 I gave judgment to the applicant upon its application to remove the first respondent's caveat. At that time counsel for the applicant requested that I fix costs once memoranda had been filed. I have now received these.

[2] The applicant applies for indemnity costs or, in the alternative, increased costs in respect of attendances post November 2008. Before then, the applicant concedes scale 2(B) should apply.

[3] The respondent submits scale 2(B) should apply to the conclusion of the proceeding on 25 March 2009.

Costs pre-December 2008

[4] The applicant calculates category 2(B) costs to amount to $6,560. Included in this is a claim of $1,600 for "production of documents for inspection". However, the respondent did not undertake inspection of the applicant's documents. Although a significant degree of discovery was provided in the form of annexures to affidavits, I am satisfied it is not appropriate to make a claim for that item of cost.

[5] Accordingly I fix pre-December 2008 costs at $4,960, plus disbursements of $563.75.

Costs post-November 2008

[6] Applying the 2(B) scale these will amount to $1,520 and include hearing preparation and an attendance at the hearing.

[7] The applicant applies for its actual costs to be paid of $16,500 plus GST and disbursements making a total of $19,251.56. Alternatively if the applicant's claim for indemnity costs fails it seeks increased costs of 75% of actual costs. Inclusive of GST and disbursements that claim amounts to $14,438.67.

Considerations

[8] In my earlier judgment I held the first respondent had failed to prove to a sufficient standard that it had a caveatable interest in the property in question. I also said that even if there was a caveatable interest the removal of the caveat would not prejudice the first respondent's legitimate interests. I concluded there was no substance at all to the first respondent's allegations of dishonesty on the part of the applicant. I discounted entirely any claim that the applicant had dishonestly assisted the registered proprietor of the property because of knowledge it had of that registered proprietor's prior business dealings with the first respondent.

[9] In essence and in order to defeat the applicant's indefeasible rights as first mortgagee over the property the first respondent was required to show it had an arguable case for its caveatable interest. This, because in the absence of fraud a mortgagee's rights cannot be displaced as they are superior to any interest to a property claimed by a caveator.

[10] For the respondent it is submitted that had I, on 25 March 2009, had the benefit of opposing submissions I would not have readily concluded that there was an absence of a caveatable interest. I do not think that is so. Counsel has not referred me to any facts which were absent from or overlooked by me in my consideration of the affidavit evidence. Also in its notice of opposition the first respondent asserted that in order for it to establish dishonesty by the applicant it would be necessary for the applicant to give discovery of all documents touching on or concerning its dealings with the proprietor of the property over the relevant period. The evidence I accepted was that in addition to the extensive discovery provided by the applicant's affidavits an offer was made for the remainder of the applicant's file to be inspected by the first respondent. As I earlier noted in paragraph 4 herein no inspection at all was undertaken by the first respondent.

[11] The claims of dishonesty amounted to suspicion or perception only. Nothing that Mr McGurk said in his affidavit for the first respondent, came near to persuading me otherwise. Further, it is somewhat lame to claim that the discovery

provided was inadequate when no effort at all was made to inspect anything that was offered.

[12] The first respondent claims to have adopted a reasonable view toward settlement. Albeit under pressure of an obligation to settle the sale of the property to another, the applicant offered to hold the amount of the respondents' claim in trust to be paid in the outcome of any proceeding brought for disposition of that sum. That offer was made by letter dated 25 February 2009.

[13] The applicant is critical of the response on behalf of the first respondent. I am not certain that criticism is appropriate. The solicitors reiterated the first respondent's willingness to entertain any reasonable offer. It was indicated any settlement should "involve some cash or recompense for the $350,000 which it invested in Apartment 31". That response produced an impasse because it was clear the applicant was not prepared to pay any sum at all for the removal of the caveat.

[14] In overview my clear impression is that the first respondent initially firmly believed the applicant had knowledge of prior business dealings involving the registered proprietor; that it initially believed it had a caveatable interest in the property. Certainly in that correspondence around the end of February 2009 settlement negotiations were being conducted with what appeared to be good faith on behalf of both parties. Where the first respondent has fallen down is in its slack regard for its obligations as the 25 March 2009 hearing date approached. Coupled with this is its failure to even investigate its own claims of dishonest conduct.

Conclusion

[15] Overall one can conclude the first respondent's case could only have succeeded by it showing there was an arguable case based on dishonest conduct by the applicant. No where is there any evidence of that claim. In effect the first respondent has done nothing at all about that claim. Further and because of its failure to meet court ordered obligations, it is appropriate to award increased costs pursuant to rule 14.6 (3)(b)(i)-(iii) of the High Court rules. However I am not satisfied that an award for increased costs is justified to the extent sought. I am

satisfied that any merit there may have been in approving the application initially dissipated over time. That caused delay and certainly increased costs unnecessarily.

Judgment

[16] Costs for attendances post November 2008 shall be fixed in the sum of $7,500 plus GST and disbursements of $689.06.

Associate Judge Christiansen