

**IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY**

CIV-2009-425-000099

BETWEEN SANDEEP SOOD
 PARUL SOOD
 Plaintiffs

AND WENSLEY DEVELOPMENTS THE
 MARINA LIMITED
 Defendant

Hearing: 27 April 2009 (by telephone conference)

Appearances: Ms Green for Plaintiffs
 J Forsey for Defendant

Judgment: 27 April 2009

JUDGMENT OF HON. JUSTICE FRENCH

[1] This is an application brought by the defendant under r7.49 for rescission of a without notice freezing order. The application was heard today by telephone conference call and at the conclusion of the conference, I dismissed the application but awarded the defendant costs on a 2B basis.

[2] The factual background and the reasons for my ruling were as follows.

[3] The without notice order in question was made on 6 March 2009 on a Pickwick basis. Due to the urgency of the situation and the fact the plaintiffs resided overseas, their counsel Mr Soper had only filed an unsworn copy of the affidavit in support of the application and an unsigned copy of the undertaking as to damages. He advised me the affidavit was being sworn in India that day and would be filed on Monday 9 March 2009. A similar indication was given in relation to the undertaking.

[4] I recorded the advice about the affidavit in my minute and stated

[6] I am satisfied, subject to a sworn affidavit being filed, that an order should be granted.

[7] Subject to the filing of the sworn affidavit, an order is accordingly made that until further order of the Court, Duncan Cotterill shall not release to the defendant the sum of \$139,887 held by Duncan Cotterill in respect of the plaintiffs' deposit payment.

[5] Contrary to the indications that were given to me during the conference call, the sworn affidavit was not filed on the 9th March 2009. This was due to considerable difficulties Mr Soper's firm experienced in making contact with the plaintiffs in India and having the documents returned in a proper form that complied with the rules.

[6] It seems the plaintiffs' solicitors kept the Invercargill High Court registry informed about the ongoing difficulties but did not advise the defendant or Duncan Cotterill. They also failed to respond to a letter dated 24 March 2009 from the defendant's solicitors requesting copies of the documents.

[7] Counsel for the defendant then filed a memorandum seeking an unless order.

[8] On 3 April 2009, the matter came before the Associate Judge. He expressed "serious concern" about the situation but noted he had no jurisdiction.

[9] The defendant then filed an application for rescission on the grounds that the plaintiffs' without notice application "was misrepresented to the Court in terms of the pre-requisite supporting evidence and undertaking, constituting an abuse of process."

[10] As at the date the application was filed 3 April 2009, the defendant had been provided with a copy of a sworn affidavit but without the exhibits.

[11] Since then, a properly sworn affidavit complete with exhibits has been filed and the order sealed as of last Friday. Duncan Cotterill has very responsibly observed the terms of the order throughout.

[12] At today's conference call, Mr Forsey for the defendant acknowledged that the defect had been perfected as he put it, but contended the order should still be rescinded. He submitted the evidence was not there when the application was made and even if I were to rescind the order, the plaintiffs would still have their action in damages. Mr Forsey further contended that the defendant had been prejudiced because the order was made on a without notice basis at a time when it should not have been.

[13] The affidavit that has finally been sworn and filed is identical to the unsworn affidavit provided to me at the time of the without notice application. I am also satisfied that at the time Mr Soper advised me the affidavit would be filed on Monday, he fully intended this to happen, genuinely believed it would happen and had no knowledge or reason to believe otherwise. He was not in any way attempting to mislead the Court. In those circumstances, I consider it would be too draconian a step to rescind the order. It would be very different of course if the sworn affidavit that was filed was not identical to the one on which I relied.

[14] That said, I consider the defendant is entitled to costs on the application. Ms Green for the plaintiffs properly acknowledged she could not oppose an application for costs and I accordingly ordered that the plaintiffs pay the defendant costs on a 2B basis.

[15] Finally, as requested by Mr Forsey, I record that this decision is concerned solely with an application to rescind based on procedural issues. It does not preclude the defendant from making any other application to set the order aside on substantive grounds should it so wish

Solicitors:
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