

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

CIV 2007-404-001013

BETWEEN BARREA GROUP LIMITED (IN
LIQUIDATION)
Plaintiff

AND JOSE DEBORAH BARNES
First Defendant

AND WESTPAC BANKING CORPORATION
Second Defendant

Hearing: 28 April 2009

Counsel: W G Manning for plaintiff
G P Denholm for first defendant
No appearance for second defendant

Judgment: 28 April 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
Christopher Taylor, PO Box 37772, Newmarket for plaintiff
Foy & Halse, PO Box 26-218, Auckland for first defendant
MinterEllisonRuddWatts, PO Box 3798, Auckland for second defendant

[1] This proceeding and a related proceeding CIV 2007-404-1012 (which are being heard together) have come before the Court today to deal with any applications arising as a consequence of directions given on 3 February 2009.

[2] There is one application formally before the Court, namely an application by the first defendant for an order that the plaintiff provide security for costs. However, in the course of the hearing today, counsel have also addressed two other matters, namely provision of answers to interrogatories that the plaintiff has sought from the first defendant, and provision of further particulars of the plaintiff's claim.

Background

[3] This proceeding has had a tortuous history. A two day trial was to have been held in November last year. It was vacated in late October because there were still unresolved issues over discovery and interrogatories (orders made on 25 August 2008 had not been properly complied with).

[4] Against that background, further case management orders were made at a conference on 3 February 2009. Of particular relevance today, there were orders that:

- a) the first defendant file and serve answers to interrogatories, together with any application under Rule 8.3 in respect of any interrogatories she did not wish to answer, by 13 March 2009;
- b) the first defendant file and serve any application for security for costs by 13 March 2009; and
- c) the first defendant file and serve any other interlocutory application by 13 March 2009.

[5] The only formal step taken by the first defendant in response to those directions has been to lodge its application for security for costs. She did so on 27

March 2009. I refer to this as lodging the applications because she failed to pay the appropriate filing fee.

[6] The first defendant has still to provide answers to the interrogatories sought by the plaintiff, and has not applied for a direction that she need not answer interrogatories to which she objects. A further issue has also been raised today about particulars recently provided by the plaintiff.

[7] In light of the history of this proceeding, I indicated at the conference on 3 February 2009 that no further latitude would be afforded to the first defendant in respect of interrogatories, and that counsel should be prepared to argue all applications today if time permitted. I will now address each of these matters against that background.

Application for security for costs

[8] The first defendant first indicated an intention to seek security for costs in her counsel's memorandum to the Court of 29 October 2008, supporting the plaintiff's request for vacation of the November trial date. No steps were taken prior to the conference on 3 February 2009. Her application was filed two weeks late (without seeking extension) and without the appropriate filing fee. Counsel for the first defendant informs me that his instructing solicitors had insufficient funds from the first defendant to meet the filing fee at that time, and have been unable to obtain the necessary funds from the first defendant since then. He seeks a further seven days within which to pay the filing fee to enable the application to proceed.

[9] Counsel for the plaintiff asks that the application be removed from the Court file as it is now well out of time. He also seeks costs on the basis that the plaintiff was not informed until today that the fee had not been paid and hence the application would not proceed today. The plaintiff has been put to the expense of filing notice of opposition and of preparing argument for today.

[10] I consider that the Court would be justified in refusing to extend time. As far as I am aware, there has been no change in the position of the plaintiff over the

course of this proceeding. It was in liquidation at the time that the proceeding was issued on 28 February 2007. The first defendant has at no time explained the delay in bringing the application. She has taken no steps to explain the delay in filing the application, and has done nothing to seek extension of time. The Court has made known to her counsel and solicitors that the application could not proceed until the filing fee was paid. Even today counsel is unable to say more than that the first defendant hopes to be in a position to pay the fee within seven days.

[11] Having said that, I accept that there is time available before trial (currently scheduled for the beginning of November 2009) in which to address this application. I am prepared to give the first defendant a final opportunity to bring the application, but without prejudice to the plaintiff's ability to argue the question of delay generally. This is to be seen, however, as a last concession to the first defendant in the matter. To that extent, I intend to extend time but direct that the application be struck out unless the first defendant complies with that timetable.

[12] I make the following orders:

- a) I extend time for the first defendant to complete the filing of her application for security for costs, by paying the requisite filing fee, by no later than **5:00 pm on Monday, 4 May 2009**.
- b) If the first defendant does not pay the filing fee by that date, the application that was lodged on 27 March 2009 is to be removed from the Court file and returned to counsel for the first defendant. No further application is to be allowed.
- c) If the filing fee is paid by that date, as ordered, the file is to be returned to me for directions for hearing. Those directions will include the filing of any affidavit by the plaintiff in reply, and the filing of synopses of argument.

Interrogatories

[13] I consider that the first defendant's default in answering interrogatories administered by the plaintiff is even more serious. I made timetable orders on 25 August 2009 for administration of interrogatories and for the filing of any answers ahead of the trial then scheduled for the week of 24 November 2008. The plaintiff issued a notice to the first defendant in accordance with that timetable. The first defendant did not answer in accordance with the timetable, or at all. As I have said, that was one of the factors in the plaintiff's decision to seek vacation of the trial scheduled for November.

[14] When the matter came back before me in a case management conference on 3 February 2009, I recorded the outstanding position in respect of the plaintiff's interrogatories, as follows:

[6] The plaintiff has issued a notice to the first defendant to answer interrogatories. The first defendant was due to provide answers to that notice by 8 September 2008. In a subsequent memorandum her counsel, Mr Denholm indicated that he had instructions to oppose answering. No steps have been taken, nor has any application been made for extending time. Mr Manning has proposed a timetable which affords the defendant further opportunity to oppose. I will give directions accordingly, but there will be no further latitude afforded to the first defendant.

[15] As I have already stated, I reset the timetable, and required the first defendant to file and serve her answer to any interrogatories to which she did not object, by 13 March, and to file an application under Rule 8.3 by that same date in respect of any interrogatories to which she did object.

[16] Again, the first defendant has taken no steps to seek an extension of time, and there has been no formal explanation for the default. Counsel for the first defendant has endeavoured to explain the delay today, but I prefer to accept the submission of counsel for the plaintiff that this delay is another illustration of prevarication on the part of the first defendant which has permeated this proceeding.

[17] Counsel for the first defendant informs me that he has drafted answers to the interrogatories and submitted them to the first defendant, but been instructed that the first defendant is not content to sign them in the form drafted and wishes to amend

them. I have not had a satisfactory explanation as to why all this could not have been done within the timetable set.

[18] Counsel for the first defendant has also informed me that his instructions are that the first defendant will answer all of the interrogatories. However, he has provided a copy of the draft to counsel for the plaintiff today and, although I have not seen that draft, I understand that the proposed answers are not, in all cases, comprehensive answers to the questions. Counsel for the plaintiff informs me that not every question is answered (global responses are given) and in one case there is a refusal to answer. Counsel for the first defendant accepts this summary.

[19] As I indicated in my minute of 3 February 2009, I do not consider that any further latitude should be afforded to the first defendant. I make the following orders:

- a) The first defendant is to file and serve comprehensive answers to each of the interrogatories in the plaintiff's notice dated 1 September 2008;
- b) The first defendant's answer is to be filed and served by no later than **5:00 pm on 6 May 2009** and unless she does so, her statement of defence is to be struck out; and
- c) There is no extension of time for the first defendant to file and serve an application under Rule 8.3.

Particulars

[20] At the hearing today, counsel for the first defendant raised for the first time some issues as to the adequacy of particulars of the claim provided by the plaintiff in a formal response filed on 27 March 2009. He sought an extension of time to make application for further and better particulars.

[21] Again, I am unwilling to extend time. The first defendant was to have filed any application by 13 March 2009. Clearly she could not do so by that time as the particulars were not filed for a further two weeks. However, that was a consequence

of the first defendant having been some 18 days late in filing her notice requiring those further particulars. Of even greater significance, no application has been filed since 27 March 2009, nor any application made formally to extend time. As I have said, the matter was raised for the first time today.

[22] I have also considered the particulars that have been filed. In my view, they are extensive and appear to address the requests that have been made. I have not had time in the hearing today to go further into this matter, but I understand from counsel for the first defendant that the issue is whether the first defendant has been given sufficient particulars of the plaintiff's claim that the first defendant holds property on constructive trust. I am satisfied that the particulars provided are sufficient to inform the first defendant generally as to the nature of the allegations made and the basis for those allegations. I also accept the submission of counsel for the plaintiff that the plaintiff's evidence, when filed, will expand upon these particulars and answer any remaining questions that the first defendant may have, and that a timetable for exchange of briefs will allow her sufficient time to meet that case.

[23] I am also taking into account, in deciding not to allow yet further interlocutory steps, that the plaintiff is a company in liquidation with limited financial means. This proceeding has to be brought to trial as soon as possible and as economically as possible.

Costs

[24] The last matter to address is the cost of today's hearing. The plaintiff has succeeded either wholly or in large part on all three matters addressed. I consider that it is entitled to costs for today's hearing on a 2B basis. I reserve any issue over wasted costs in respect of the defended application for security, for determination in due course as part of the costs of that application.

Associate Judge Abbott