IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 002862

BETWEEN	NEW ZEALAND HOME BONDS Plaintiff
AND	DAVENPORTS WEST Defendant

Judgment: 29 June 2009

(Determined on the Papers)

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Costs

Background

[1] The plaintiff provides deposit bonds to purchasers of property under agreements for sale and purchase (Home Bonds). In August 2005 Mr and Mrs Sutton obtained the plaintiff's agreement to provide a Home Bond for a property purchase. The plaintiff provided the Home Bond and took security.

[2] In September 2006 the defendant on behalf of the Suttons procured the release of the security in return for an undertaking provided by the defendant whereby the defendant firm undertook to hold the sum of $92,600.00 in their trust account pending the finalising of the security to the plaintiff for the sole benefit of the plaintiff.

[3] Subsequently, the Suttons purported to cancel their purchase contract – the vendor refused to accept the notice of cancellation and I am advised that the dispute in that regard continues.

[4] In the meantime, the vendor of the property called on the plaintiff to meet its obligations under the Home Bond and the plaintiff paid the sum of $92,600.00 as required on 14 May 2008. It is not disputed that the plaintiff was legally obliged to make that payment.

The Singh case

[5] On 4 September 2008 the plaintiff had obtained summary judgment against an Auckland solicitor, Mr Singh, for failing to honour and undertaking to pay to the plaintiff a sum paid out by the plaintiff to a vendor in relation to a Home Bond. In the Singh case, Mr Singh's purchasing clients had purported to cancel their contract because of a real estate agent's representations. The High Court judgment established that the plaintiff's obligation to deliver payment of the Home Bond to the vendor was not subject to any dispute raised by the purchasers and the obligation was subject only to the vendor providing proof it had delivered a settlement notice which was not complied with (see *New Zealand Home Bonds Limited v Singh* Christchurch CIV 2008 409 584, 4.9.08 Christiansen AJ). Accordingly, the position that then faced the defendant in the present case was this: the defendant had given an undertaking which on its face applied so as to require it to make the payment demanded by the plaintiff and, to the extent that there might be any argument about that, the plaintiff had obtained a High Court judgment in relation to precisely the same sort of Home Bond against another solicitor.

Dishonoured undertaking – the correspondence and this proceeding

[6] The plaintiff's barrister, having had no success in persuading the defendant by correspondence to make the demanded payment provided the defendant on 5 September 2008 with a copy of the *Singh* judgment. Full payment together with interest was demanded. The defendant took advice and suggested, notwithstanding the *Singh* decision, that the plaintiff should not have paid the bond sum to the vendor given that there was a dispute between vendor and purchaser. The plaintiff's barrister sought to persuade the defendant that the *Singh* decision was directly in point. This was unsuccessful.

[7] On 1 December 2008 the plaintiff commenced the present proceeding. This was met by a notice of opposition by the defendant and an interpleader application by the Suttons, brought upon the basis that the Suttons had a dispute with their vendor as to whether they had validly cancelled their purchase agreement.

The *Singh* appeal

[8] In the meantime, the *Singh* case was working its way through appeal. The Court of Appeal gave judgment on 30 March 2009 upholding the judgment of the Associate Judge, save as to a narrow point in relation to the date from which interest should run. (See *Singh v New Zealand Home Bonds Limited* [2009] NZCA 103 at paragraphs [51] to [52].)

Resolution of the plaintiff's claim

[9] Following the delivery of the Court of Appeal's judgment in the *Singh* case, the defendant effected settlement of the plaintiff's claim.

[10] The legal position adopted by the plaintiff from the outset of this matter was vindicated. The High Court and Court of Appeal judgments simply serve to confirm the correctness of the plaintiff's position all along.

[11] The parties agreed that costs and interest should be dealt with upon the basis of submissions filed in writing, with my judgment to follow.

Costs

[12] Mr Lester submits that this is a proper case for indemnity costs.

[13] Indemnity costs may be awarded in certain circumstances set out in r 14.6(4) High Court Rules. The aspects of that rule which require consideration given Mr Lester's submissions are as follows:

> (4) The court may order a party to pay indemnity costs if—

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> …
>
> (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[14] Summarising Mr Lester's submissions in support of indemnity costs, the plaintiff asserts:

1. The plaintiff was suing upon the basis of an undertaking given by a firm of solicitors.

2. The High Court judgment in the *Singh* case confirmed that the undertaking was binding and it was irrelevant that the defendant's clients may have wished otherwise or that the defendant's clients were in a dispute as to the cancellation of the sale and purchase contract.

3. Arguments put forward by the defendant for distinguishing the *Singh* decision were flawed.

4. The defendant's emphasis upon the need to abide by client instructions misconceived the defendant's duty once an undertaking had been given to the plaintiff.

5. The refusal to meet the plaintiff's demand for payment involved the defendant firm putting its own interests ahead of its obligations upon the undertaking.

6. Indemnity costs are appropriate in cases involving breach of undertaking.

The defendant's opposition

[15] For the defendant, Mr Razak submits:

1. The defendant and its advisers considered the purported cancellation of the sale and purchase agreement by the Suttons as an important factual difference from the *Singh* case.

2. The defendant received specific instructions from the Suttons not to release the funds unless it was established that there was a binding legal obligation to do so.

3. The defendant is required to act in accordance with instructions received from clients.

4. After the High Court delivered its decision in the *Singh* case the defendant, with its legal advisers, continued to research the possible distinguishing of the *Singh* case, in light of the fact that that case was being appealed, and in the light of the written instructions from the Suttons.

5. Once the plaintiff commenced this proceeding it was necessary that the interpleader application be filed.

6. Once the Court of Appeal decision confirmed the High Court decision in the *Singh* case payment of the principal sum was made to the plaintiff.

[16] Upon this basis Mr Razak submits that costs should lie where they fall. He submits that there was no need for the proceeding to be commenced or for the parties to be forced into an interpleader application. He maintains that the defendant was the "meat in the sandwich". He effectively criticises the plaintiff for not having more patience.

Disposition – is this an appropriate case for indemnity costs under r 14.6(4)?

[17] The defendant's suggestion that costs should lie where they fall in this case is completely unmeritorious. The usual principle (r 14.2(a)) requires that the defendant as the party who failed with respect to this proceeding should pay costs to the plaintiff which succeeded.

[18] I apply the following principles in relation to my consideration of the plaintiff's claim for indemnity costs:

1. The party claiming increased or indemnity costs carries the onus of persuading the Court that their award is justified.

2. A high threshold must be passed before an order for indemnity costs is made – this may be expressed as "*truly exceptional circumstances*".

[19] I have regard particularly to the discussion of the Supreme Court as to New Zealand practice in relation to costs which is contained in *Prebble v Awatere Huata (No.2)* [2005] 2 NZLR 467. Relevant passages in the Court's reasons include:

> "Reasonable contribution" or closer reflection of actual cost?
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> [6] In New Zealand, costs have not been awarded to indemnify successful litigants for their actual solicitor and client costs, except in rare cases generally entailing breach of confidence or flagrant misconduct. Except in such cases, in both the Court of Appeal and the High Court orders for party and party costs have been limited to a reasonable contribution to the costs of the successful party. That approach is of long standing and may have been adopted partly for reasons of access to justice, as Williams J suggested in the course of argument in *Sargood v Corporation of Dunedin*.... In the High Court, a reasonable contribution has been settled with reference to a scale enacted in the rules…
>
> [10] The New Zealand approach that, in general, orders for costs are a reasonable contribution to actual costs, rather than an attempt at closer restoration to a successful litigant, is of long standing. It was described by the Court of Appeal in *Kuwait Asia Bank v National Mutual* as a "guiding principle", "represented in the prescribed scales" and "followed for many years":
>
> > "It reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. If a party has acted unreasonably – for

> instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice."
>
> The approach continues to be applied in the High Court and Court of Appeal, in the High Court with legislative approval through the setting of scales for recovery. The general approach yields where it does not deliver a just result. The discretion of the Court to make "any orders that seem just" cannot be displaced. It is adequate to deal with the risk adverted to by counsel for the appellants of "perverse incentive in favour of the continuation of already prolonged litigation by parties who have a less than robust case", should leave be sought to appeal or if leave is granted in such a case. We are of the view that a reasonable contribution to costs is just in most cases and that it would not be appropriate for us to depart from the long-established New Zealand practice in the High Court and Court of Appeal.

[20] In the event therefore the Supreme Court adopted what it stated to be the practice in the High Court and Court of appeal.

[21] I am satisfied that this is a truly exceptional case and one in which the defendant pursued a wholly unmeritorious and hopeless defence. It is therefore a case which in terms of r 14.6(4)(a) involved an unnecessary defence (even as that term is flavoured by the earlier words "vexatious, frivolous or improper",) combined with a hopeless interpleader proceeding. The other circumstances which Mr Lester summarised in his submission also constitute, cumulatively, good reason for ordering indemnity costs. In that regard I particularly note:

1. The strict honouring of solicitors' undertakings is of fundamental importance to the maintenance of the integrity of the legal profession. Strict enforcement makes for the continued efficient working of legal practice, which requires such undertakings to be honoured regardless of other supervening circumstances. (See *Ethics, Professional Responsibility and the Lawyer*, (2ed) 2006 Duncan Webb at paragraph 15.9, p 506).

2. The plaintiff in this case before the proceeding was issued provided the defendant with both the plaintiff's reasoning as to the enforceability of the undertaking and also a copy of the High Court decision in *Singh*.

3. When the plaintiff's entitlement to payment is supported not only on first principles but also by a High Court decision relating to the same contractual situation, it does not in any sense infringe the principle that costs should be predictable and expeditious to award indemnity costs against the unsuccessful party.

[22] I order that the defendant pay indemnity costs to the plaintiff. For the purposes of quantifying the indemnity costs to be paid I direct that the plaintiff file within five working days:

1. An affidavit providing proper detail of the solicitor/client costs and disbursements actually incurred to date in relation to the litigation; and

2. A memorandum containing submission as to the appropriate sum for indemnity costs (recognising that the actual level of costs will be relevant to but not decisive of that issue – see *McGechan on Procedure* at paragraph HR 14.6.03(2)).

3. I direct that the defendant file any submissions it wishes to make as to quantum within five working days after service of the plaintiff's memorandum and affidavit.

Interest

[23] The plaintiff seeks interest.

[24] Interest is within the discretion of the Court – s 87 Judicature Act 1908.

[25] The Court of Appeal in the *Singh* case (*Singh v New Zealand Homes Bonds Limited*) above at [50] held (varying the High Court decision) that the plaintiff was entitled to interest from the commencement of the proceeding in the High Court. The Court of Appeal reached that view notwithstanding that the plaintiff had requested the payment before commencing the proceeding.

[26] For the defendant Mr Razak submits that interest should not run before the date of the Court of Appeal decision in the *Singh* case. He supports that submission by reference to the fact that until the Court of Appeal judgment was delivered the defendant remained concerned as to the correct legal position in the light of the purported cancellation of the sale and purchase agreement.

[27] The defendant's submission misses the point. The defendant was wrong in its legal views throughout.

[28] The Court's usual approach is that the defendant has had the use of money which should have been available to the plaintiff to use and enjoy, and the plaintiff should be compensated accordingly.

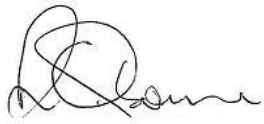
[29] The general rule is that interest should run from the accrual of the cause of action but in some cases such as where a plaintiff has slept on its rights without justification it is appropriate to award interest from the issue of the proceeding.

[30] The Court's jurisdiction under the Judicature Act is to award interest "*not exceeding the prescribed rate*" meaning in relation to the period in question no more than 8.4% per annum.

[31] But for the decision of the Court of Appeal in the parallel situation of the *Singh* case, I would have been minded in this case to award interest from the date on which the plaintiff made payment under the bond, namely 14 May 2008. It is from that date that the plaintiff was out of its money. However, having regard to the close relationship of the Singh case on the facts, it is appropriate that I adopt the same approach as that which recommended itself to the Court of Appeal.

[32] I therefore give judgment for the plaintiff for interest at 8.4% per annum from 1 December 2008 to the date on which the defendant made payment of $92,600 to the plaintiff. Leave is reserved to the parties to file memoranda in the event there is any disagreement as to the operative close-off date for interest or as to the quantum of interest.

[33] In relation to all memoranda referred to above, the memoranda shall be limited to a maximum of three pages.



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