IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-006180

IN THE MATTER OF	Section 145A of the Land Transfer Act 1952 and the Te Ture Whenua Maori Act 1993
AND	
IN THE MATTER OF	an application by NGA URI WHAKATIPURUNGA O NGARAE (INC)
BETWEEN	NGA URI WHAKATIPURUNGA O NGARAE (INC) Applicant
AND	MARAC FINANCE LIMITED Respondent

Hearing: Memoranda

Appearances: J D Dorbu for applicant
T J G Allan for respondent

Judgment: 29 July 2009 at 5:30pm

JUDGMENT AS TO COSTS OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 29 July 2009 at 5:30pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Sione T Fonua, PO Box 91787, Shortland Street, Auckland 1140 for applicant
Grove Darlow & Partners, PO Box 2882, Victoria Street West, Auckland 1142 for respondent

[1] The respondent (Marac) seeks orders that it be indemnified for its costs in this matter, and that the applicant's solicitor and counsel jointly and severally pay these costs.

Background

[2] The costs are sought following dismissal of an application for an order that a caveat not lapse.

[3] The applicant Nga Uri Whakatipurunga O Ngarae (Inc) (Nga Uri) claimed to be a Maori tribal entity but, despite its name, is neither a Maori corporation (formed under Te Ture Whenua Maori Act 1993) nor an incorporated society (formed pursuant to the Incorporated Societies Act 1908).

[4] Nga Uri claimed that the caveat in question protected a beneficial interest under an agreement for sale and purchase. Marac was the mortgagee in respect of that property under a pre-existing registered mortgage. The caveat was preventing it from pursuing a mortgagee sale.

[5] In its notice of opposition Marac challenged Nga Uri's claim to a caveatable interest but said that in any event the caveat was unsustainable as any interest that Nga Uri could establish was subordinate to its prior interest as mortgagee.

[6] Nga Uri filed its application on 18 September 2008. Marac's solicitor wrote twice to Nga Uri's solicitor prior to filing its notice of opposition, seeking evidence that it was a legal entity. He did not receive a reply before filing Marac's notice of opposition on 23 September 2008. On that same date he wrote again to Nga Uri's solicitor (Sione T Fonua) and counsel (John D Dorbu) as follows [sic]:

> I act for Marac Finance Ltd (Marac).
>
> As you are aware Marac is the first mortgagee of the property comprised and described in certificate of title 260721 (North Auckland Land Registration District) ("the Land").

For the reasons that follow, Marac puts you on notice that it intends to make an application for solicitor and client costs against you both personally in connection with the Applicant's caveat 7865366.2 ("the Caveat") and application made to sustain the Caveat being called in the High Court at Auckland on 24 September 2008 at 2.15pm.

1. The Land registered under the Land Transfer Act 1952 ("Land Transfer land"), not land registered under the Maori Land Act 1993 (Maori land").

2. There is no such entity as the Applicant. Searches of incorporated entities under the Incorporated Societies Act 1908 or the Companies Act 1993 or the Charitable Trusts Act 1957 reveal there is no such entity as the Applicant.

3. The Maori Land Court (Hamilton Registry) have checked the national data bases for Maori Incorporations under section 248 and 279 of the Maori Land Act 1993. They have confirmed there is not such entity registered in the national database bearing the Applicant's name.

4. No interest in land created by the mortgagor (legal or equitable) can prevail over that of the registered mortgagee's interest in the Land. Marac has not consented to the agreement for sale and purchase giving rise to the alleged caveatable interest recorded in the Caveat. Accordingly, the Court is compelled to lapse the Caveat.

5. Given the above, there is, firstly, no basis for the caveatable interest and, secondly, no basis on which it will be sustained.

If by 5.00pm this afternoon, you have provided Marac care of this office with an undertaking in writing to either consent to an order lapsing the Caveat to withdraw it, Marac will not seek costs against you, notwithstanding that it will have by then incurred substantial legal costs in preparing its notice and affidavits in opposition. If you do not do so, Marac will seek costs against you personally.

[7] Nga Uri's solicitor responded by fax on 24 September 2008. Again, the full text of the letter reads:

We acknowledge receipt of your letter of 23 September 2008.

Your tactic of bullying and threat is unprofessional.

The Maoridom has customary rights which derive from the Treaty of Waitangi not from Act of Parliament. The Westminster model and the doctrine of Supremacy of Parliament are arguably subject to the Treaty of Waitangi. It is about time that this kind of legal argument should be presented in court. This is in accordance with the Maori jurisprudence which has been pushed aside for over hundred years.

Everyone is entitled to argue its case in the Court of Law and it should not be subject to the fear of legal costs.

> Any application for a solicitor and client costs will be vigorously defended.
>
> We respectfully ask you not to use the bullying and threats tactics as you have done to any of your colleagues in the future.

[8] The application was heard on 24 September 2008 and by subsequent memoranda (the applicant was given opportunity to file a reply affidavit after the hearing). I gave judgment on 9 December 2008 dismissing the application on two grounds. The first was that the caveat was a nullity because it was not lodged by a legal person holding a beneficial interest in the land. The second was that Marac's interest as mortgagee had priority, there was no basis for challenging its indefeasibility, nor reason for the Court to intervene on equitable grounds (consent by Marac or other conduct affecting their right to priority).

[9] Marac has filed evidence in support of its application for costs, explaining the economic circumstances justifying urgency, and evidencing the costs claimed of $9,073.25. Marac says that it considers the fees reasonable in the circumstances (urgency in the exercise of its power of mortgagee sale given the economic climate, and additional costs in finding urgent representation). It claims indemnity costs on the basis that the application had no prospect of success, and Nga Uri's solicitor and counsel were warned and invited to withdraw in its solicitor's letter of 23 September 2008.

The principles for indemnity costs

[10] The Court has power under r 14.6 of the High Court (formerly r 48C) to award indemnity costs notwithstanding the general principles for determined costs according to scale:.

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> ….
>
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
>
> ….

> (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.

[11] This rule reflects the Court's overrriding discretion in the determination of costs, but only if it is satisfied that it is appropriate to do so: *Glaister v Amalgamated Dairies Limited* [2004] 2 NZLR 606 (at para [28]). It also reflects the more general principle that the Court will take into account, when considering the incidence of costs, whether a losing party has pursued a wholly unmeritorious and hopeless claim: *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1991] 3 NZLR 457, 460.

[12] The test for indemnity costs is a high one. The Court will require the applicant to prove exceptional circumstances. These may include a proceeding being commenced in wilful disregard of known facts or clearly established law or where allegations are made that ought never have been made : *Hedley v Kiwi Cooperative Dairies Limited* (2002) 16 PRNZ 694; *Paper Reclaim Limited v Aotearoa International Limited* [2006] 3 NZLR 188. Thus, in *Lewis v Cotton* [2001] 2 NZLR 21 the Court of Appeal (at para [65] – [72]) upheld an award of indemnity costs commenting that one aspect of the claim "bordered on the hopeless".

[13] Actual costs will be relevant but indemnity costs may be less if the Court considers actual costs are unreasonably high: *Health Waikato Ltd v Elmsley* (2004) 17 PRNZ 16. The test is what a reasonable observer would expect for that litigation.

[14] The Court has an inherent jurisdiction to order solicitors and barristers who misconduct litigation to pay costs personally. This can extend, in appropriate circumstances, to indemnity costs: *Utah Construction & Mining Co v Wats*on [1969] NZLR 1062 (CA), affirmed in *Gordon v Treadwell Stacey Sm*ith [1996] 3 NZLR 281 (CA), at 283:

> New Zealand Courts have in recent years declared that legal advisors who misconduct litigation may be ordered to personally pay costs incurred by an opposing party … on some occasions it may be appropriate to require them to pay costs on a solicitor and client basis.

[15] The principles which the Court applies are to be found in *Harley v McDonald* [2002] 1 NZLR 1(PC), and are summarised in *McGechan on Procedure* HRPt14.12(3). For present purposes the relevant principles are:

a) The Court's concern when exercising this jurisdiction is the public interest in administration of justice. The order can be intended to compensate the claimant or sanction the lawyer for a serious breach of duty to the Court.

b) It is necessary to show more than a mere mistake or error of judgment by the lawyer. Conduct which is gross negligence may be sufficient.

Has Marac established a case for indemnity costs?

[16] Marac contends that Nga Uri should have known from the outset that its caveat was unsustainable, but that there can be no doubt on the point after Marac's solicitors sent their letter of 23 September 2008. It says that the issue as to whether Nga Uri was a legal entity was raised in correspondence (the first time was on 27 August 2008) but not heeded. The indefeasibility of Marac's rights as prior mortgagee is well established law, and the argument as to consent was raised late (when it was apparent that there was no merit in the other arguments) and without any evidential support.

[17] Counsel and the solicitor for Nga Uri have filed a lengthy memorandum in opposition to the claim for costs. They submit that Marac has not made out the factual basis for an award of indemnity costs. They contend that an unincorporated society can issue a legal proceeding. They refer to the evidence of David Ian Wright (who states that he is chairman of Nga Uri, which he describes as "a body politic") and that he had authority to file an affidavit on behalf of Nga Uri (this point is also relevant to whether costs should be ordered against counsel and solicitor personally).

They also submit that Nga Uri was prevented from tendering evidence that would have established Marac's consent.

[18] The issue in respect of the grounds for indemnity costs is not whether an unincorporated society can issue proceedings per se, but rather whether there is an entity which can claim the caveatable interest. That Nga Uri was not such an entity should have been apparent from the outset. The application was hopeless in the form it was brought.

[19] The same has to be said of the claim that Marac had consented to the agreement. This has the hallmarks of a last minute argument (as counsel for Marac suggests). Nga Uri does not answer the compelling point that it could and should have tendered evidence as to Marac's consent at the outset. The claim was merely raised in counsel's submissions at the hearing.

[20] Counsel now submits that the leave given to file a reply affidavit did not extend to evidence on this point. I do not recall this particular restriction (there is no mention of it in my judgment) but if counsel believed that to be the case I would have expected either that ruling or my subsequent judgment to have been appealed, or at the very least evidence on the point produced in support of the opposition to indemnity costs. The fact that neither of these steps were taken suggests that there is nothing in the point.

[21] The lack of evidential basis for an agreement is borne out by the memorandum on costs, in which reference is made to "lengthy discussions with the registered proprietor about the sale and when settlement could take place", and an inquiry made by Marac's manager Mr Wilkinson "about whether any deposits had been paid and if so that could be forwarded to the lender". This is not evidence of consent, capable of challenging Mr Wilkinson's very direct evidence that Marac did not consent to the agreement. The inquiries about the agreement are entirely understandable. No doubt Marac wished to consider whether to allow the sale to proceed as the best way of realising its loan. The memorandum also attaches a letter written by Marac's solicitors to Nga Uri's solicitor dated 11 December 2008 asking whether Nga Uri was in a position to complete the agreement as at the scheduled

settlement date (19 December 2008). I read that letter in the same way as the earlier discussions and inquiry.

[22] There is force to the submission of counsel for Marac that there would have been more merit to Nga Uri's submission (on both points) if it had settled the sale and purchase agreement and sale proceeds has been applied to Marac's debt (or perhaps even tendered settlement). There is no suggestion that this happened.

[23] I am satisfied that this was a hopeless case which ought not to have been brought in the form it was and should not have been pursued to hearing, including the attempts to shore up the case after the hearing itself. The case for indemnity costs has been made out.

Availability of claim for damages

[24] Counsel and the solicitor for Nga Uri submitted that I should take into account that Marac has a remedy in damages under s 146 of the Land Transfer Act 1952. That is an entirely separate matter (on which Marac has reserved its position). The issue here is whether Marac should have been put to the costs of opposing this application. I consider that it should not.

Is an order against counsel and the solicitor appropriate?

[25] The submission of counsel and solicitor for Nga Uri was essentially that the solicitor was entitled to rely on instructions that Nga Uri was a properly incorporated Maori entity, and that Marac needed to show something more than that the case was hopeless (there was no breach of duty owed to the Court to justify the Court's sanction). They relied in particular on the following passage from *Harley v McDonald* (at para [67]):

> [67] Then there is the proposition that a barrister who pursues a hopeless case not appreciating it to be hopeless displays such a degree of incompetence as to amount to a serious dereliction of her duty to the Court. Their Lordships consider this proposition, without more, to be unsound. Without attempting to provide a precise definition of what amounts to a serious dereliction of duty, they are of the opinion that it is open to the Court

> to penalise incompetence which leads to a waste of the Court's time or some other abuse of its process resulting in avoidable cost to litigants. But it will almost always be unwise for the Court, in the exercise of this jurisdiction, to treat the pursuit of hopeless cases as a demonstration of incompetence. As a general rule litigants have a right to have their cases presented to the Court and to instruct legal practitioners to present them on their behalf. Although exceptional steps may have to be taken to deal with vexatious litigants, the public interest requires that the doors of the Court remain open. And on the whole it is in the public interest that litigants who insist on bringing their cases to the Court should be represented by legal practitioners, however hopeless their cases may appear. For these reasons something more than the mere fact that the case is hopeless is required.

[26] Nga Uri's solicitor's response to Marac's solicitors' letter of 24 September 2008 (set out in paragraph [7]) is clearly dismissive of the arguments advanced by Marac as to why the application could not succeed. It does not refer to the only ground on which there could have been valid opposition if there was evidence to support it (Marac's consent). It evidences an application being pursued without due regard to legal authority or a proper legal basis. It is difficult to consider how this could be considered as anything other than gross negligence. I do not distinguish between counsel and solicitor in this respect. Both have the same responsibility for it.

[27] I also need to take into account the further point that both counsel and solicitor appear to have ignored the nature, and hence standing, of Nga Uri. Counsel for Marac took issue with the fact that neither Nga Uri's solicitors nor its counsel enquired into the nature and standing of Nga Uri before bringing the application, and then persisted with it notwithstanding having been alerted to the issue as to its legal status three weeks before the application was brought and again before notice of opposition was filed. Counsel referred to r 5.36 of the High Court Rules (formerly r 41) and submitted that Nga Uri's solicitor had no authority to issue the proceeding as the applicant was not a legal entity.

[28] There are two aspects to the submission for Marac. The first is that this issue ought to have alerted Nga Uri's solicitor and counsel to the lack of legal entity to claim the caveatable interest. The second is that there is no entity against which Marac can obtain an order for costs.

[29] Counsel and the solicitor for Nga Uri argue that there was no reason for them to question that Nga Uri was a legal entity. The solicitor says that he received instructions in writing on a letter-headed paper with a seal indicating that Nga Uri was incorporated. Both counsel and the solicitor say they had no reason to second guess whether Nga Uri was an entity capable of entering into the agreement and owning property. I do not accept this submissions. They were expressly put on notice by the correspondence from Marac's solicitors. It is not a case of whether Nga Uri was incorporated or not, but rather whether or not it was a legal entity capable of claiming a caveatable interest. If they did not pick up this point, they should have.

[30] Marac relies on its second point (no party against whom to seek costs) as an aggravating circumstance. If it is true, it may amount to the "something more than the mere fact that the case is hopeless" which the Privy Council has said is needed: *Harley v McDonald*. If Mr Wright (as chairman of Nga Uri) accepts responsibility personally for the costs of the application, this point will fall away. If he does not do so, I regard that as a clear indication that the solicitor and counsel have both failed to establish appropriate authority for bringing the application, in breach of their duty to the Court. That is a sufficient justification for the Court to make an order to recognise that breach of duty and compensate Marac for costs which it should not have had to incur.

Are the costs reasonable?

[31] Counsel and the solicitor for Nga Uri did not make any submissions on the quantum of the indemnity costs (other than the general submission that there was no justification for imposition of costs to that extent).

[32] Marac's solicitors rendered two accounts. The first was for $5,109.50 (inclusive of GST) for all attendances prior to receipt of the judgment. This covered perusal of the application and taking instructions on it, preparing the notice of opposition and two affidavits in support of that opposition, correspondence with Nga Uri's legal advisors (and undertaking the factual inquiries and legal research required for that correspondence), receiving and taking instructions on the further affidavit in

reply and accompanying memorandum, and instructing counsel both before the hearing and in respect of his post-hearing memorandum. The second invoice was for $1,320 and was for matters following judgment, including preparation of Marac's costs memorandum and affidavit in support. In addition, the counsel who appeared for Marac at the hearing, and submitted a further memorandum post-hearing, rendered an account for $2,643.75. I note again that Marac regards the costs as reasonable.

[33] I consider that it was reasonable for Marac to move as quickly as it did, and for the legal resources to be applied to have the matter dealt with urgently. In a difficult and declining property market, it was prudent to move as quickly as possible to try to minimise any adverse economic effect. I consider that it was also reasonable to brief alternative counsel (due to unavailability of Marac's solicitor, who would normally have argued the matter but was engaged in another hearing). This was not done until Nga Uri had declined to withdraw its application.

[34] I consider that a reasonable observer would have expected these costs to have been incurred in the circumstances.

Decision

[35] Marac is entitled to indemnity costs in the total sum of $9,073.25.

[36] These costs are to be paid by Nga Uri's solicitor (Sione T Fonua) and counsel (John D Dorbu) on a joint and several basis, but this order is not to be sealed for 14 days. If within that time David Ian Wright (as chairman of the applicant group Nga Uri Whakatipurunga O Ngarae (Inc)) files an undertaking to accept responsibility for the costs personally, this order shall be discharged.

Associate Judge Abbott