

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

**CIV 2009 409 000231**

BETWEEN                      NEW PASTURES LIMITED  
   Plaintiff  
  
AND                                FM CUSTODIANS LIMITED  
   F irst Defendant  
  
AND                                GOLD BAND FINANCE  
   Second Defendant

**CIV 2009 409 000233**

AND BETWEEN                NEW PASTURUES LIMITED  
   Applicant  
  
AND                                FM CUSTODIANS LIMITED  
   Respondent

Hearing:            (Determined on the Papers)

Judgment:        2 November 2009

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**JUDGMENT OF ASSOCIATE JUDGE OSBORNE  
As to Costs**

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**Application**

[1]     The plaintiff discontinued this proceeding just before the hearing of the first defendant's summary judgment application. The single issue between the parties is as to whether increased costs should be awarded under High Court Rule 14.6.

## **Background**

[2] FM Custodians is the custodian trustee of the Canterbury Mortgage Trust. It was the lender in relation to a principal sum of \$1,670,000.00 lent to Netherwood Farm Limited as borrower and a Mr J P G Egden as covenantor. A mortgage security was taken over Netherwood Farm. The loan fell into default. FM Custodians took steps towards realising its security.

[3] New Pastures alleged in this proceeding that an oral contract was entered into in January 2009 for the sale of the mortgage and debt to New Pastures. To meet the difficulty as to the absence of writing, the plaintiff asserted that the oral contract had been partly performed by sending various documents and details to FM Custodians. Shortly afterwards, FM Custodians had entered a contract to sell the mortgage and loan to another party.

[4] New Pastures commenced this proceeding for specific performance of the contract.

[5] Subsequently, New Pastures issued an amended statement of claim joining Gold Band Finance, which was the nominee of the party which had bought the loan and mortgage. Now, instead of suing for specific performance the plaintiff sued for damages of \$200,000.00. This was for breach of contract by FM Custodians and against Gold Band Finance for tortious conduct.

[6] New Pastures registered a caveat against FM Custodians's mortgage in January 2009. FM Custodians's solicitors immediately wrote to New Pastures's solicitors demanding the removal of the caveat upon the basis that New Pastures had no equitable or legal interest in either the land or the mortgage. New Pastures refused to remove the caveat. FM Custodians commenced the caveat lapsing procedure through the District Land Registrar. New Pastures then made an application for orders that the caveat not lapse and granting New Pastures leave to register a second caveat. FM Custodians filed opposition to the application.

[7] On 4 March 2009 the Court made the following orders in the caveat proceeding by consent:

- (a) The Caveat No 8047720.1 registered against Mortgage 6754177.2 (which mortgage is registered over land described as Lot 1 DP 357359 and Part Lot 1 DP 6200 and Part Lot 4 DP 6285) be removed.
- (b) That in accordance with the Deed of Assignment of Loan dated 21 January 2009 between the Respondent and Aurous Asset Holdings Limited (being the nominee of Gold Band Finance Limited) Gold Band Finance Limited shall cause payment to be effected by Aurous Asset Holdings Limited to the Respondent, and the Respondent shall transfer the said mortgage to Aurous Asset Holdings Limited.
- (c) Gold Band Finance Limited shall forthwith deposit the sum of \$150,000.00 on interest bearing deposit in the solicitors' trust account of Harman & Co.
- (d) The parties shall ensure that the sale of the said land shall proceed as between the Vendor and the Purchaser and Gold Bank Finance Limited, with the sum deposited by Gold Band Finance Limited remaining on deposit to cover and damages that may be found to be payable to the Applicant if it is able to prove its claim in the proceeding CIV 2009 409 231 (which claim is denied by the Respondent and Gold Band Finance Limited). The sum of \$150,000.00 is not to represent any cap, or agreement to cap, on liability in CIV 2009 409 231 (which liability is denied by the Respondent and by Gold Band Finance Limited).
- (e) All issues of liability as between the Respondent and Gold Band Finance Limited are reserved.
- (f) The costs of this proceeding are reserved pending determination of the proceeding CIV 2009 409 231.
- (g) Leave is reserved to the parties to apply for directions if necessary.

[8] The caveat proceeding was then adjourned to November 2009 having regard to the fact that the summary judgment proceeding was to be heard in September 2009 with a judgment to be expected shortly thereafter.

### **Costs – the principles**

[9] Upon a plaintiff's discontinuance of the proceeding, the plaintiff must pay to the defendants costs of and incidental to the proceeding up to and including the discontinuance, unless the defendants otherwise agree or the Court otherwise orders: r 15.23.

[10] The general costs discretion and rules under High Court Rules Part 14 continue to apply. Increased costs or indemnity costs may be awarded to a defendant: *Lesa Systems Limited v Canzac Limited* HC CHCH CIV 2006-409-624 John Hansen J.

[11] As to the situation of discontinuance, I have particular regard to the following principles, which I derive from the Court of Appeal's review in *Kroma Colour Prints v Tridonicato NZ Limited* (2008) 18 PRNZ 973 AT 975:

- (a) The presumption in r 15.23 may be displaced where justice and equity, in the circumstances of the case, require a different costs outcome.
- (b) The Court will not speculate as to the merits of a case it has never heard but the Court can have regard to the merits in the exceptional case where they are clear.
- (c) The Court may have regard to the reasonableness of the stance of any of the parties.

## **Discussion**

[12] The rights of FM Custodians in relation to the loan and mortgage were clearly documented and protected by standard commercial arrangements entered into in writing in the normal way. FM Custodians was moving to protect its position given that the borrower/mortgagor was substantially in default for a sum approaching \$2 million.

[13] The case brought by New Pastures in this Court in both proceedings was self-evidently weak from the outset. It alleged an oral contract which was not supported by the contemporaneous documents. There was also manifest weakness in the affidavit evidence filed by New Pastures on such key matters as the certainty of terms making up the alleged contract. Finally, the alleged acts of part performance relied upon to avoid the consequences of an unwritten contract did not satisfy the requirements of the doctrine of part performance.

[14] It was accordingly unsurprising that New Pastures eventually discontinued the proceeding at the eleventh hour.

[15] This is one of the relatively exceptional cases where the Court is entitled to reach a clear view as to the relative merits of the parties' positions in the proceedings. The merits were with the defendants.

[16] The defendants' contention as to the weakness of the plaintiff's case was explained clearly to the plaintiff's solicitors at an early point but the plaintiff persisted with the summary judgment application.

[17] The plaintiff had also persisted with the caveat proceeding itself until the eleventh hour, when it permitted the caveat to be removed by consent.

[18] The Court in July 2009 had to intervene in the summary judgment proceeding to deal with a timetable breach by the plaintiff when the plaintiff had previously been

given generous time to complete its obligations. An unless order had to be made to bring the proceeding back on track.

[19] The plaintiff then only discontinued its proceeding a week after the first defendant had filed its detailed submissions for the summary judgment hearing. The plaintiff filed its discontinuance on the very day that its submissions in response were required.

[20] This is a case for the payment of increased costs under r 14.6(3)(b) – the plaintiff has contributed unnecessarily to the time and expense of this proceeding both by failing to comply with directions of the Court during the proceeding and by pursuing arguments which lacked merit.

[21] A 2B categorisation would have normally been an appropriate categorisation for this proceeding and for the related caveat proceeding. It is appropriate in the circumstances of this case that there be a 50% uplift on a 2B calculation.

[22] There is no issue taken as to the calculation flowing from a 2B assessment, namely that there should be an allowance on a 2B basis of 4.2 days for this proceeding and 3.5 days for the caveat proceeding.

### **Order**

[23] I order in relation to this proceeding that the plaintiff pay to the first defendant the costs of this proceeding on a 6.3 day calculation, together with disbursements to be fixed by the Registrar.

[24] For convenience, I direct that this judgment shall apply equally to CIV 2009 409-233. I order that the plaintiff pay to the first defendant in that proceeding costs calculated on a 5.25 days basis, together with disbursements to be fixed by the Registrar.

## **Release of deposited funds**


[25] By the consent order made on 4 March 2009 the second defendant deposited a sum of \$150,000.00 pursuant to interest bearing deposit. The sum was paid to cover any damages which may be found to be payable to the plaintiff if it was able to prove its claim in proceeding 231.

[26] The plaintiff has failed to prove that claim. Indeed, it has discontinued the proceeding. Mr Ormsby for the first defendant seeks an order for the release of the deposit, plus accrued interest, to the second defendant.

[27] Mr Wallace for the plaintiff submits that by reference to a report of the receivers of Netherwood Farm Limited the \$150,000.00 deposit should be treated as funds held in escrow and potentially belonging to the plaintiff.

[28] In reply, Mr Riach for the second defendant correctly observes that the submission for the plaintiff misconceives the nature of the deposit and the basis upon which it was held on deposit. The funds in question came from the second defendant to meet any damages and were only intended to be held to meet the possibility that the plaintiff was successful in the proceeding. It was not. The funds, both in terms of the agreement between the parties and in terms of the order made by consent, are to be released.

[29] I direct the firm of Harmans to release to the second defendant the \$150,000.00 placed on deposit through the trust account of Harmans, together with net accrued interest.



Associate Judge Osborne

Solicitors  
Cousins & Associates, Christchurch  
Wynn Williams & Company, Christchurch  
Harmans Lawyers, Christchurch.