

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

CIV-2009-404-002243

BETWEEN BODY CORPORATE 325589
 Applicant

AND JAE KYU KIM
 Respondent

Hearing: 10 December 2009
 (On the Papers)

Appearances: S W Shin for the Applicant
 No Appearance of or for Respondent

Judgment: 10 December 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 10 December 2009 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Craig Griffin and Lord P O Box 9049 Newmarket Auckland 1149 for the
Applicant

[1] The applicant applies without notice for an order awarding it costs on a solicitor/client basis. The applicant is a body corporate of a property situated at 307/47 Wakefield Street, Auckland, (“the property”). The costs award is sought as a consequence of legal fees the applicant incurred in proceedings in this Court against the respondent, who was the registered proprietor of one of the units on the property.

[2] The applicant obtained a judgment by default, sealed against the respondent for the sum of \$12,859.33 on 9 June 2008, in the District Court at Auckland. The applicant registered a charging order absolute against the respondent’s unit on the property on 1 July 2008. The applicant applied to the District Court to have the judgment by default removed to the High Court so as it could apply for a sale order. A certificate of judgment was obtained pursuant to s 66 of the District Courts Act 1947 for the purposes of removing the judgment to the High Court. The certificate of judgment was sealed on 24 February 2009. On 20 April 2009, the applicant filed a certificate of judgment of the Auckland District Court, judgment of the High Court for sealing, sale order, request for issue of sale order and affidavit in support, and letter of instructions in the High Court. Following those steps, this Court sealed the sale order on 23 April 2009.

[3] The consequence of those steps was the sale of the respondent’s unit on the property under the conduct of the Sheriff of this Court. The property sold at public auction and the sale and purchase of the property was settled on 7 October 2009.

[4] The applicant now seeks to recover the legal costs it expended in achieving the sale of the respondent’s unit. Its legal expenses come to approximately \$7,425 (including GST), plus disbursements of \$1,155.95.

[5] The applicant first applied to the Sheriff to approve the costs. The Sheriff accepted the reasonableness of the disbursements, but has disagreed with an award of solicitor/client costs. The Sheriff has provided a report in which he states his reasons for refusing to award costs on a solicitor/client basis. The reasons given in the report are:

- a) Under r 17.4, an entitled party is not entitled to recover a sum greater than the amount owing under the judgment, the costs and expenses relating to the enforcement process and any interest due under the judgment.
- b) Rule 14.2(c) provides that costs should be assessed by applying the appropriate daily recovery rate, that is at the rate and time as specified in schedules 2 and 3 of the High Court Rules.
- c) Based on category 2 of schedule 2 (\$1,600 per day) and the time specified for a writ of sale in schedule 3 (0.5 of a day), the allowable costs on a sale order (writ of sale) would be \$800.

[6] Rule 14.1(3) provides that the provisions of any Act override subclauses (1) and (2) of r 14.1.

[7] Section 37 of the Unit Titles Act 1972 provides for the enforcement of rules of a body corporate.

[8] Rule 2.3(h) of the body corporate rules of the property permit the body corporate to obtain solicitor/client costs against any unit title holder of the property that has engaged in legal proceedings against the body corporate.

[9] Until such time as the applicant obtains a judgment on an award of costs, costs cannot be recovered pursuant to r 2.3(h).

[10] Counsel for the applicant submits that under the combined effect of s 37 of the Unit Titles Act and r 2.3(h), subclauses (1) and (2) of r 14.1 are overridden.

[11] The Sheriff is of the view that the body corporate cannot recover on a solicitor/client cost basis without first obtaining judgment, and has drawn the Court's attention to s 37(12), which provides that the body corporate shall be entitled to apply to any Court of competent jurisdiction for an order enforcing the performance of any rule.

[12] The Sheriff has gone on to note that, as a matter of practice, he will consider approval of reasonable costs (and disbursements) over and above that allowed under r 14.2(c) where those costs relate to all necessary conveyancing work in relation to the sale and transfer of the property. In the present case, he has allowed costs as follows:

Conveyancing costs	\$1,440.00
Disbursements	\$1,288.95
Costs as allowed on writ of sale	\$ 800.00

[13] I have considered the interlocutory application and the memorandum filed in support. It is clear to me that s 37(12) provides that a body corporate is entitled to apply to any Court of competent jurisdiction for an order:

Enforcing the performance of or restraining the breach of any rule.

[14] Rule 2.3(h) clearly provides for the body corporate to recover from a defaulting proprietor legal fees on a solicitor/client basis. In this case, the respondent is a defaulting proprietor. The material before the Court shows that the applicant had to go to great trouble in order to recover the judgment debt of \$12,859.33 from the respondent.

[15] In applying to this Court without notice seeking solicitor/client costs, the applicant is making an application which this Court can treat as an application made in accordance with s 37(12) for an order of this Court enforcing the performance of r 2.3(h). In that way, this Court can give judgment on the applicant's entitlement to recover solicitor/client costs under r 2.3(h).

[16] Without the interlocutory application without notice, the Sheriff had no jurisdiction to grant costs at the level sought by the applicant. But now that the application has been made to this Court, I consider that this Court has jurisdiction, through a combination of s 37(12) and r 2.3(h), to override the general provision for costs set out in the High Court Rules and to award costs as sought by the applicant. On the information available to me, I am satisfied that the foundation for an award of solicitor/client costs is made out.

[17] Accordingly, I direct that the applicant is entitled to an award of costs calculated on solicitor/client costs of \$7,425, plus GST. The applicant has not provided a basis for disputing the Sheriff's decision on the disbursements. Since the Sheriff has had full opportunity to examine those disbursements, I see no reason to interfere with the decision of the Sheriff on the amount of disbursements recoverable.

Result

[18] The applicant is awarded costs of \$7,425, together with disbursements as fixed by the Sheriff.

Duffy J