IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3380

	BETWEEN	STRATEGIC NOMINEES LIMITED Plaintiff
	AND	LAKE ESPLANADE MANAGEMENT COMPANY (QT) LIMITED Defendant

Hearing: 26 November 2009

Appearances: Mr Vizor for Plaintiff
Mr G Nielsen (applicant for leave to represent defendant)

Judgment: 26 November 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE

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[1] There is listed in my Court today a Notice of Application to set aside a judgment which I entered 24 July 2009 against the defendant company. An application was filed by the defendant to that end on 14 August 2009. The application was filed by Farry & Co solicitors and counsel nominated was Mr Chris Patterson.

[2] An affidavit that has been filed since, by Mr Farry of the law firm, makes it clear that he has been unable to continue to instruct Mr Patterson as counsel because the defendant has run out of funds and there is no money available to meet the costs of either the instructing solicitors or counsel. Mr Patterson was granted leave to withdraw when this matter was called. Mr Nielsen has filed an application dated 23 November 2009 and intituled 'Notice of Application by defendant's sole director Mr Gregory C O Nielsen seeking leave to represent himself personally in these proceedings'. Notwithstanding the title of the document what Mr Nielsen actually seeks it leave to represent the company. Mr Nielsen is not a barrister and solicitor and does not have rights of audience to represent the company.

[3] Mr Nielsen's application essentially recites that the grounds are that the company does not have money to pursue the application to set aside judgment and he, Mr Nielsen, personally does not have funds either.

[4] The background briefly to the application is that the defendant in another company which I shall call 'Queenstown Villas' & Lake Esplanade were companies in which Mr Nielsen and his brother Mr R Nielsen were involved. Queenstown Villas owned the property and the defendant was a lessee. The defendant's business was operating the individual villas and renting them out for the owners. The plaintiff had lent money to Queenstown Villas. It now seeks to enforce what it says are its rights to clear the lease off the property so that they can be sold with clear title. The plaintiff company said that Mr Nielsen on behalf of the company undertook as long ago as 21 December 2005 to arrange for the lease to be cancelled. The plaintiff says that the defendant company has not owned that undertaking and it was against that background that it sought summary judgement seeking specific performance in a form which would direct the parties to cancel the lease.

[5] Part of the difficulties that have afflicted Queenstown Villas and the defendant are tied up with a long-running dispute between Mr Nielsen and his brother Mr R Nielsen.

[6] The plaintiff opposes the application that Mr Nielsen makes to represent the company. The grounds set out in the notice of opposition are three.

a) A company may be represented by a lay person only in cases of emergency;

b) None of the grounds raised by the defendant, including a lack of funds, constitutes an emergency;

c) It would be inappropriate for Mr Nielsen to represent the defendant given that he is giving evidence on the defendant's application to set aside and the credibility of that evidence is a central issue in that application.

[7] In its notice of opposition the plaintiff signalled that it relied upon the well known authority of *Re G J Mannix Limited* [1984] 1 NZLR 309 and other authorities.

[8] I do not for one moment doubt Mr Nielsen's sincerity. He takes the view that the defendant company is one of the last remaining assets he now has and that if steps are not taken to set aside the judgment entered in July of this year, what little he has left will be lost.

[9] But there are very major problems in the way of the application and indeed I cannot grant it.

[10] This is not a case of emergency which is one of the permissible cases where lay-persons can appear on behalf of a company. All of the problems that Hammond J identified in his judgment *G B and J Z Chambers Limited v AEL Corporation* (1994) 7 PRNZ 635 at 640 apply to this case. His Honour then underscored the importance of only professional advocates who are subject to a disciplinary code and

are familiar with the methods and scope of advocacy presenting arguments to the Court. I might also say that professional lawyers are required to understand and adhere to their duty to the Court in matters such as not misleading the Court which is of value to maintaining the integrity of administration of justice. Hammond J also noted that where an officer appears for a company he or she might represent their own interests and not the interests of the company. There is no evidence in this case, of course that those who own the company are united as to their objectives in the present litigation and that underscores this particular difficulty. There are other grounds set out in the judgment of Hammond J all of which apply with force in the present case. I mean no disrespect when I say to Mr Nielsen that even in the very limited circumstances of arguing the present application in his remarks to me he did not differentiate between the role of giving evidence on the one hand and confining himself to making proper submissions on the evidence on the other. I have no doubt that exactly the same problem would arise if he was given leave to embark upon advancing the company's application to set aside the judgment.

[11] Finally I should mention that Mr Nielsen in underscoring the importance of the case also mentioned that Strategic Nominees Limited, the plaintiff is taking contempt proceedings against him. Those proceedings are separate from the present proceedings but more importantly they will be directed against Mr Nielsen personally and he will have the right to obtain legal aid in those proceedings and if that is not forthcoming, to represent himself.

[12] But for the moment the application I am dealing with is to grant leave to Mr Nielsen to represent the company. I am unable to see why the circumstances of this case distinguish it from the mainstream authorities and I have no alternative but to disallow the application. The application is dismissed.

The application to set aside judgment is brought under Rule 12.14.

[13] As a preliminary point it seems to me that that Rule has no application because the minute that I issued on 24 July 2009 indicates that Mr E Grove appeared for the defendant on that date and therefore the judgment was not one that was given against the party who did not appear at the hearing of the application.

[14] But in any case I am satisfied that there has been no miscarriage of justice. As Mr Vizor pointed out the proceedings in this matter were served on 9 June 2009 which gave it 27 working days to file a notice of opposition. There is no explanation as to why is was impossible or difficult for the defendant to take steps to defend the proceeding in that time. As I understand it the defendant's position, it is that the undertaking which the plaintiff sought to enforce had not in fact been signed by Mr G Nielsen. Mr Nielsen though did not file an affidavit to that effect which he could easily have done in the time between when he was served and when the matter was called for hearing. At the first mention before me, the defendant said the reason for wanting more time was that it wanted to get access to various documents held by a professional advisor. In my view that was not a proper ground for deferring the filing of a notice of opposition and an affidavit in support. It may have become relevant at a later stage in the proceeding if the defendant had taken the view that summary judgment ought not to have been entered because this was one of those cases where discovery should first be allowed. But the case was not in that category.

[15] There is simply no proper explanation of the delay. There are some other possible bases of defence raised. One of them was that Mr Nielsen said that there was no record in his solicitor's files that he had been given advice concerning the undertaking he was alleged to have given. But as Mr Vizor has pointed out to me the alleged lack of advice cannot amount to a defence. A further possible ground that the defendant might have wished to advance is that the form of the undertaking that he is alleged to have signed did not apply to the leases because these were leases entered into after the undertaking was provided. There seems to be very little substance to that particular point. What the undertaking required the undertaker to do was <u>when requested</u> by the plaintiff to do so, to provide a cancellation of the leases – whenever entered into - so that the plaintiff could then offer the property for sale with a clear title and vacant possession. The undertaking referred to leases generally including those that were yet to be granted.

[16] In my view there are no grounds for granting the application to set aside the judgment. There has been no miscarriage of justice and the application will be dismissed. The plaintiff will have costs on a 2B basis together with disbursements fixed by the Registrar.

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J.P. Doogue
Associate Judge