

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2018-009-2990
[2020] NZDC 1701**

BETWEEN

DAG INVESTMENT HOLDINGS
LIMITED
Plaintiff

4 February
2020. AND

MARC NICHOLAS PRICE
First Defendant

AND

SAMANTHA EVELYN CRAIG
Second Defendant

Hearing: In Chambers

Appearances: On the papers

Judgment: 4 February 2020

RESERVED JUDGMENT OF JUDGE P R KELLAR

Introduction

[1] The plaintiff (“DAG”) seeks an order recalling a judgment dismissing DAG’s application for summary judgment against the First Defendant, Mr Price.¹ Counsel for the plaintiff has brought the application by filing a memorandum in which the plaintiff seeks an order recalling the judgment. It is unnecessary for the plaintiff to make a formal application. In any event, counsel for the first defendant, Mr Price has filed a memorandum in response and has taken no issue with the form in which the application has been made. The application will be dealt with on the papers without requiring an appearance of counsel or the parties.

¹ *DAG Investment Holdings Limited v Price & Anr* [2019] NZDC 25898

The grounds on which the application to recall the judgment is made

[2] The application is made on the basis that the Court erred in stating:

[31] Quite how DAG took an assignment of the loan facility and security and for what consideration is information that is not before the Court. And, it appears that Mr Price is also unaware of those matters.

...

[61] This is not an appropriate case for summary judgment. There needs to be closer examination (and discovery of documents) of the circumstances in which DAG took an assignment of the loan facility and mortgage. For example, how the assignment came about and what sum was paid as consideration...

[3] The plaintiff submits that those statements are “clear and unambiguous” errors because Mr Giles and Mr Craig set out the background to the assignment and the consideration for the assignment in their respective affidavits sworn on 27 March 2019 and in Exhibit A of Mr Giles’ affidavit.

[4] Mr Craig relevantly deposed as follows:²

5. ...I instructed [Mr Giles] to incorporate DAG for the purpose acquiring (sic) from ASB Bank Limited ...I also confirm that the reason I instructed [Mr Giles] to do this was out of concern for my daughter...I was concerned about the increasing debt in relation to the Loans and ASB’s lack of action in respect of addressing this.

6. I had seen two payment claims to ASB totalling around \$100,000 being the third and fourth payment claims, and I was concerned from my visits to the property that most of the work claimed for had not been started let alone completed...

7. ...I was becoming increasingly concerned as I had seen bank statements that showed a drawdown being paid into [the First and Second Defendants] joint account, then a few days later transferred into what I believe is [the First Defendant’s] personal account...This was at a time when, from my visits to the property, I could see no work being carried out on the new dwelling.

[5] Mr Giles deposed³

² Affidavit of Gordon John Craig affirmed 27 March 2019.

³ Affidavit of Toby Ross Giles affirmed 27 March 2019.

10. Concern rose on the part of Gordon Craig that [the First Defendant] may have been providing payment claims to ASB for work that had not actually been completed.

11. Because of the above concern, and the concern for his daughter...I was instructed by Gordon Craig to incorporate the plaintiff...for the purpose of acquiring from ASB all its rights in respect of the Loans advanced to the Defendants, including its interest as mortgagee over the property. DAG was incorporated on 6 December 2017...

12. On or about 20 December 2017 DAG purchased the Loans from ASB and entered into a Deed of Assignment with ASB.

[6] Exhibit A of the affidavit of Mr Giles affirmed on 27 March 2019 contained the Settlement Statement from ASB Bank dated 20 December 2017, the executed Deed of Assignment between ASB and DAG entered into on or about 20 December 2017; and copies of Notice of Assignment letters dated 21 December 2017 sent by ASB Bank to both Mr Price and the Second Defendant.

[7] Mr Giles' also deposed that notwithstanding that the Court had not made a discovery order, all non-privileged documents on the sale file between DAG and ANZEN was provided to Mr Price's solicitor and that the file had been made available for physical inspection:⁴

The jurisdiction to recall a judgment

[8] Rule 11.9 of the District Court Rules 2014 provides:

A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[9] In *Horowhenua County v Nash (No 2)* Wild CJ stated the common law principles applicable to recall of judgments.⁵ The court identified the following three categories of cases in which a judgment may be recalled:

1. Where, since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

⁴ Affidavit of Toby Ross Giles affirmed 7 March 2019 at [35]

⁵ *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC)

2. Where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance;
3. Where for some other very special reason justice requires that the judgment be recalled.

[10] The Court of Appeal has applied Wild CJ's exposition of the common law principles.⁶

[11] A "very special reason" to recall the judgment was found to exist in *NSK v General Equipment Co Ltd* where an order was made on evidence that the parties agree was incorrect.⁷ However, the Court may not revisit evidence that was considered at the original hearing and which remains in dispute. An application for recall cannot be used as an opportunity to relitigate contested evidence because that would amount to using the application as a substitute for an appeal. On the other hand, the court has a duty to correct an error rather than forcing the losing side to appeal where there is an erroneous factual finding that is material to the result.⁸

Analysis

[12] It was an error to state that there was no information before the Court as to the consideration for the assignment. Furthermore, there was some information as to what led to DAG being incorporated for taking an assignment of the ASB loans.

[13] However, those matters did not form part of the reasons for the judgment. The reasons for the judgment are twofold. The first that there is an arguable case that DAG took the assignment and exercised the power of sale for an improper purpose. Secondly, there is an arguable case that DAG breached its duty of reasonable care to obtain the best price reasonably obtainable for the property. The fact that DAG paid ASB Bank full consideration for the assignment and Mr Craig has some concerns

⁶ *Rainbow Corp Limited v Ryde Holdings Limited* (1992) 5 PRNZ 493 (CA) and *Erwood v Maxted* [2010] NZCA 93.

⁷ *NSK v General Equipment Co Ltd* [2016] NZHC 2721 at [21] and [29].

⁸ *Space Airconditioning plc v Guy* [2012] EWCA Civ 1664

about whether Mr Price had misapplied funds, which were drawn on is immaterial to the result.

[14] The reasons for the judgment note that as at November 2017 Mr Price was still trying to reach a settlement with Ms Craig through Mr Gordon Craig in relation to relationship property issues.⁹ Ms Craig had still not made any contributions to the mortgage loan instalments since separation, amounting to some \$9,018.00. As is noted at [27] in the reasons for the judgment, in November 2017 Mr Giles sent a letter to Mr Price's lawyers with a settlement offer regarding relationship property which Mr Price did not accept. Mr Price's lawyers sent a letter to Mr Giles dated 30 November 2017 containing an offer for settlement of relationship property matters. Mr Giles did not reply until 11 December 2017 in which he indicated that his clients had not been well for a good part of the last week and he asked if he could have until Thursday of that week to consider his clients' response and draft an appropriate reply. As is noted at [29] of the reasons for the judgment, Malley and Co did not receive a response from Mr Giles. They sent further emails to Mr Giles on 15 and 19 December 2017 without response.

[15] Although Mr Craig referred in his affidavit affirmed on 27 March 2019 to concern at seeing payment claims and a drawdown of funds at a time when he could see no work being carried out on the dwelling, those concerns do not appear to have been raised in the correspondence. Instead, without responding to Malley and Co's correspondence Mr Craig instructed Saunders and Co to incorporate DAG and take an assignment of the ASB Bank loan security at the very time they were seeking more time to respond to Mr Price's settlement proposal.

[16] DAG has not adduced evidence as to communications that occurred between it and/or its solicitors with the ASB or any other party prior to purchase of the loans, taking the assignment and transfer of the mortgage. Allied to that, DAG's lawyers have not provided to Mr Price's lawyer the file relating to the assignment.

⁹ At [26].

Result

[17] While it was an error to state that the consideration for the assignment was not before the Court, that information and some background about Mr Craig's concerns were not material to the outcome.

[18] The application to recall the judgment is therefore declined. There will be no order for costs.

P R Kellar
District Court Judge