EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM 2018-004-313
[2018] NZFC 10222

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	PETER BERIC Applicant
AND	JOANNA MAITLAND CHAPLAIN, OLAF GUY EADY AND SIMON HOLM EADY as executors of the estate of DIANA MAITLAND EADY Respondents
AND	JOANNA MAITLAND CHAPLAIN, OLAF GUY EADY AND SIMON HOLM EADY as trustees of the ECI Trust DIANA MAITLAND EADY Interested Party

Judgment: 24 December 2018
(On the papers)

DECISION OF JUDGE I A McHARDY
[As to costs]

Background

[1] On 9 October 2018 I made the following orders in respect of the applicant's application to sustain notices of claim against two properties owned by the Interested Party;

(a) The application to sustain the notice of claim against the property known as [Property 2] was successful;

(b) The application to sustain the notice of claim against the property known as the [Flat 1] apartment failed. The notice of claim was allowed to lapse, on the condition that half of the proceeds of any sale of [Flat 1] must be retained in the Interested Party's solicitor's trust account.

[2] I reserved costs and invited counsel to file memoranda as to costs which have now been received. It is apparent from memoranda filed on behalf of the Interested Party and the applicant that there is a significant difference in opinion as to what settlement offers were made prior to the hearing. Each party is taking the position that the other party rejected appropriate settlement offers pre-hearing and therefore costs should be awarded accordingly.

Offers of settlement

[3] In submissions filed on behalf of the applicant the chronology of the offers of settlement, from his point of view, have been set out. The without notice application to sustain the notice of claim dated 10 July 2018 was served on 11 July 2018. On 19 July his lawyer, Priscilla Brown, rang the Interested Party's lawyer, Peter Spring, and made an oral offer to settle the application to sustain the notices of claim on the following basis:

(a) The notice of claim against the [Property 2] remain in place until the resolution of the proceedings or earlier agreement;

(b) The notice of claim against [Flat 1] lapsed to enable the property to be sold provided that half the proceeds are retained by the respondent's lawyers until resolution of the proceedings or earlier agreement and;

(c) The respondents provide the applicant with an undertaking not to sell the Trust-owned property at [address deleted – Rental Property] until resolution of the proceedings or early agreement.

[4] This offer was recorded in a letter from Mr Spring of the same date, rejected and counted with the following offer:

(a) The notice of claim against [Property 2] remaining in place until the determination of the proceedings or settlement, whichever occurred first;

(b) The notice of claim against [Flat 1] lapse and the respondent trustees are free to do with it as they see fit (notably it is pointed out there are significant borrowings secured against [Property 2] and this offer provided no assurances against those borrowings being increased, and no security for the applicant's proprietary claims to a 50% interest in [Flat 1] (which was unencumbered).

[5] The applicant's submissions were filed the next day on 20 July and at para [63] a compromised proposal was set out as follows:

(a) The notice of claim against [Property 2] remain in place until the determination of the proceedings or settlement, whichever occurred first; and

(b) The notice of claim against [Flat 1] lapsed to enable the property to be sold provided that half the net sale proceeds were retained by the respondent's lawyer until the termination of the proceedings or settlement, whichever occurred first (amended submissions were

filed for the applicant on 21 July 2018 but no changes were made to the proposal in the new paragraph [65]).

[6] In their submissions dated 23 July 2018 the respondents asserted that this proposal "should not be countenanced by the Court" (para [68]).

[7] On 3 August 2018 the respondents proposed that the notice of claim against [Property 2] remain, the notice of claim over [Flat 1] lapse and the respondents undertake to keep borrowings secured over [the Rental Property] to below $3 million. Notably substantial borrowings are secured against [Property 2] which this proposal did not address and the offer provided no security for the applicant's proprietary claims to a 50% interest in [Flat 1], an unencumbered asset.

[8] On 7 August Ms Brown advised Mr Spring that the applicant was proceeding with the hearing of the application to sustain the notice of claim on 9 August. On 7 August Mr Spring emailed Ms Brown an open letter setting out the following offer:

(a) The notice of claim against [Property 2] remain in place until the determination of the proceedings or settlement, whichever occurred first and;

(b) The notice of claim against [Flat 1] lapse to enable the property to be sold provided that the proceeds of sale were used to retire debt of the Diana Eady Family Trust and;

(c) The respondent trustees agree not to borrow against the [Rental Property] property in excess of $3 million.

[9] Subsequent communication took place between Mr Spring and Ms Bruton culminating in Mr Spring sending an email to Ms Bruton at 10.25am on 8 August 2018 (less than 24 hours before the hearing the next day). This stated that from the proceeds of sale of [Flat 1] the respondents would repay as much as possible of their borrowings, the mortgage secured over [Property 2] would be discharged and no further

borrowings against [Property 2] would occur. This offer did not provide any protection for the applicant's proprietary claim to 50% interest in [Flat 1].

[10] At the hearing on 9 August 2018 the applicant filed a further affidavit, dated 8 August 2018, revoking the offer set out in the submissions of counsel and requesting that both notices of claim remain against [Property 2] and [Flat 1] properties.

[11] The respondents' claim to be entitled to costs on the basis that their offer on 7 August is a better result for the applicant than what he was granted in the decision. However the applicant points out that the necessary detail of that offer was not provided until 8 August 2018, less than 24 hours before the meeting and that the respondents' assertion that this was a better offer than the outcome ordered by the Court is incorrect. The applicant's primary claims are proprietary claims against the [Property 2] and [Flat 1] properties themselves. The decision preserves [Property 2] and secures half the value of [Flat 1] (provided an arms-length sale at market value occurs) pending determination of the applicant's claims. The respondent's proposal did not provide any security for the applicant's claimed proprietary interest in [Flat 1].

[12] The respondents had from 20 July to 8 August to accept the proposal which was ultimately ordered by the Court. It is argued the applicant acted entirely reasonably, refusing the offers of 19 July and 10 August. He has undoubtedly done better by proceeding to hearing than he would have had had he accepted those offers. The offer of 7 August (in fact 8 August) came too late and does not affect the reality that the applicant's claims succeeded:

(a) his notice of claim over [Property 2] was sustained and;

(b) his proprietary claim to a relationship property interest in half the equity of [Flat 1] was recognised and protected by the Court's order that half the proceeds of sale are held in trust for security for this claim.

[13] The submission is made however that notwithstanding the very sensible compromise offer made by the applicant's submissions of 20 July 2018, the

respondents forced him to a hearing with the applicant achieving the very outcome proposed in those submissions.

[14] It is submitted that the reality is that the instigation of the lapsed procedure by the respondents of the applicant's notice of claim and their refusal of his compromise offer was yet another attempt by them to cause maximum cost, stress and distress to the applicant. Reference is made in counsel's submissions to what is seen as examples of this pattern of conduct. Issue is taken with these particular submissions and are argued to be irrelevant to the issue of costs.

[15] Basically however, it is the applicant's submissions that the applications to sustain the notices of claim have succeeded in relation to [Property 2] and in relation to [Flat 1] on the terms proposed by him, costs follow the event and therefore it is submitted that the applicant is entitled to an award of costs against the respondents.

[16] An assessment of the costs from the applicant's point of view is set out in counsel's submissions. Costs have been fixed on a Category B scale and amount to $4,539. The point is made that these costs are significantly less than the actual costs and disbursements incurred by the applicant. The submission is made that the respondents' application for costs (on their opposition to the application which they lost) is misconceived and contrary to principle.

Interested party's position

[17] Counsel for the Interested Party argued that the applicant cannot fairly be categorised as the successful party for the purposes of costs as half of his application failed. It is submitted that in circumstances where both parties have some measure of success, it may ordinarily be appropriate for costs to lie where they fall. However for the reasons set out in the submissions, it is claimed that costs are payable to the Interested Party:

(a) The Interested Party at an early stage, made an offer of settlement on the basis that the [Property 2] notice of claim would be sustained and the notice of claim at [Flat 1] would lapse. It is said that

argument on this score was, therefore, entirely unnecessary and the Interested Party is entitled to costs from the date that offer was made;

(b) Most significantly, viewing the matter in terms of *Calderbank* principles, the applicant achieved substantially less in terms of protection for himself than the Interested Party's offer on 3 August 2018 in that he forewent the Interested Party's generous offer to retain the significantly more valuable [Rental Property] property which would have afforded the applicant millions more dollars of retained equity in the property in order to satisfy any judgment he might secure;

(c) Specifically, it is said that the [Rental Property] property owned by the Interested Party is worth $7.1 million. The Interested Party offered to undertake not to secure more than $3 million of borrowing against that property, which would have secured over $4 million in equity for the purposes of meeting any judgment made in the applicant's favour;

(d) The judgment of this Court, by contrast, it is said requires the Interested Party to retain one half the proceeds of sale of [Flat 1]. That apartment being worth just over $3 million, the security afforded to the applicant is likely to be around $1.5 million, significantly less than he was offered by the Interested Party.

[18] Calculation of costs in relation to this application from 19 July 2018 amount to $4,183 in scale fees, if awarded on a 2B basis. The analysis is based on the assumption that costs lie where they fall on steps taken prior to 19 July 2018.

[19] An uplift is sought from 3 August 2018 in respect of the steps taken by the Interested Party after making the offer outlined above. Those steps are:

(a) Preparation of the bundle for the hearing: ($712.00)

(b) Appearance at the hearing: ($890.00)

(c) Second counsel (if allowed by the Court) ($445.00)

[20] An uplift of 50% is sought as follows:

(a) Preparation of the bundle for the hearing ($712 plus 50% = $1068);

(b) Appearance at the hearing ($890.00 plus 50% = $1,335.00);

(c) Second counsel ($445.00 plus 50% = $167.50).

[21] The overall total sought has therefore increased to $5,206.50 which it is submitted is more than reasonable in the circumstances: the actual expenses incurred by the Interested Party in defending this application are significantly higher.

Replies

[22] Each party has filed further brief memoranda by way of reply. Counsel for the applicant says that the undertaking provided by the trustees in relation to the [Rental Property] property did not prevent the trustees from selling the [Rental Property] and disposing of the proceeds. Thus, contrary to the respondent's claims, the respondents did not offer meaningful "security of over $4 million".

[23] It is further pointed out that Mr Spring in his letter of 19 July 2018 (attached to memorandum of counsel for the Interested Party seeking costs dated 4 December 2018) states that "your client has no real claim against the [Rental Property]… although the trustees have no present intention to sell that property, it would be imprudent of them to fetter their ability to do so in the absence of any claim to it". The point is made that if [Rental Property] was subsequently sold, the only remaining property owned by the trustees would be [Property 2]. The submission is made that the undertaking did not adequately protect the applicant's proprietary claims against [Flat 1] and [Property 2].

[24] For the Interested Party issue is taken with what is referred to as being a number of pejorative claims regarding the conduct of the Interested Party and the Executive. The submission is made that such assertions made by counsel for the applicant are insupportable but this is not the appropriate context within which to address them.

[25] From counsel's perspective there is only a need to respond briefly to the submission made by the applicant which he considered relevant to the matter before the Court.

[26] In respect of the submission made by the applicant that insufficient evidence was available to assess the Interested Party's offer of settlement, particularly the assertion that there was inadequate information regarding security over [Property 2], it is said that the information identified was not necessary. At its very highest, the applicant claims an interest worth $3 million (i.e. half of [Property 2] and half of [Flat 1]). The Interested Party offered security of over $4 million. It is said that all this is apparent on the face of the evidence which was before the Court and that therefore the concern expressed on this score is groundless.

Discussion

[27] These proceedings were needed because from the applicant's point of view there was no option if he wished to sustain the notice of claims against both the [Property 2] and [Flat 1] properties. It is evident that there were ongoing discussions to try and reach agreement which would avoid the Court hearing. Counsel for the Interested Party argues that the outcome of the proceedings was that both parties in some way succeeded. In other words the applicant did not successfully sustain both notices of claim that had been registered against the two properties. The Interested Party was able to take steps to pay off debt which had been their intention.

[28] However the fact remains that the parties had not been able to reach an understanding short of a Court hearing. The applicant has set out why he considers it was not possible to reach an accommodation. He says that there were potential difficulties for him if he were to accept the settlement offers that were made by the Interested Party. For instance, the points made in respect of [the Rental Property] are

correct. The claim the applicant seeks to progress relates to both [Flat 1] and [Property 2]. It is understandable as to why the applicant would not consider the undertaking offered in respect of [the Rental Property] as being acceptable and therefore wished to retain the claims in place in respect of [Flat 1] and [Property 2].

[29] I do not consider that the ultimate decision did represent the win-win situation that counsel for the Interested Party is putting up as a justification for there being no order for costs against the applicant. The argument that the Interested Party's costs as from 19 July should be met by a costs award against the applicant suffers from the same issue, that is that the offer that was made on 19 July was not palatable to the applicant because it did not afford the protection that he was seeking.

[30] The applicant, given the claims that he is making, had every right to apply to sustain the notices of claim. This was in response to actions instigated by the Interested Party. This resulted in a hearing because the parties were unable to reach an accommodation before the nominated hearing date. The applicant can be seen to have achieved through the hearing an order which protected his position in a more secure way than had been offered by the Interested Party. Accordingly I consider that this is a situation where the applicant has succeeded and therefore he has an entitlement to an order for costs.

[31] I order costs in the sum of $4,539 as sought by the applicant having been calculated on a category B scale.

Dated at Auckland this day of December 2018 at

I A McHardy
Family Court Judge