

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

**CIV-2011-404-008215
[2014] NZHC 232**

BETWEEN

TIAN MIN (MAGGIE) MA
Plaintiff

AND

TONY MENG HIANG TAY
First Defendant

SELINA SHAW NYUNG TAY
Second Defendant

JIREH HOTEL INVESTMENT LIMITED
Third Defendant

Hearing: On the papers

Appearances: P J Dale for Plaintiff
M Corlett and A M Swan for Defendants

Judgment: 20 February 2014

COSTS JUDGMENT OF ELLIS J

*This judgment was delivered by me on Thursday 20 February 2014 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors:
P J Dale, Barrister, Auckland
M Corlett, Barrister, Auckland
A M Swan, Barrister, Auckland

[1] I regret the delay in dealing with the matters raised in the parties' respective costs memoranda which, for some reason, were not referred to me until some time after they were filed.

[2] The specific issue presently for determination is whether or not, following my substantive judgment dated 4 September 2013¹ declining Ms Ma's claims for general damages, the first to fifth defendants are entitled to an award of either indemnity or increased costs. This judgment needs to be read in conjunction with that earlier judgment.

Background

[3] These proceedings have a somewhat long and complex history and it is necessary briefly to refer to aspects of it.

[4] Broadly speaking, Ms Ma, together with Mr Tay and his associated interests were involved in an arrangement for the purchase, development and establishment of a medical and wellness facility at Lake Karapiro. As part of that venture, Mr Tay arranged for Ms Ma to purchase one of the units at the Karapiro property and for bank mortgage finance to be provided to fund the purchase.

[5] Settlement of the unit purchase occurred. Thereafter, for a time, mortgage payments were made by one of Mr Tay's companies via rental payments for the unit under an agreed tenancy. Then, as a result of that company's financial difficulties, the flow of rental money ceased and the mortgage fell into default. As a result, the mortgagee, Westpac Bank, obtained judgment against the defaulting mortgagor Ms Ma for some \$403,034.44 plus interest.

[6] A dispute over responsibility for the mortgage default and the Westpac judgment then developed between the Ma interests and the Tay interests. A series of meetings to settle that dispute took place. As a result, two documents were signed by Mr Tay effectively accepting liability for the Westpac loan and agreeing fully to indemnify Ms Ma for the judgment debt. But Ms Ma was required to bring

¹ *Ma v Tay* [2013] NZHC 2292.

summary judgment proceedings to enforce those agreements and summary judgment was awarded in her favour by Associate Judge Gendall (as he then was) on 16 May 2012. It may be noted that Ms Ma was subsequently awarded a 50 per cent increase on the standard 2B costs in relation to that application.

[7] In his decision on the summary judgment application, however, Judge Gendall declined to deal with Ms Ma's further claims for general damages. He noted that there was little substantive evidence of actual harm and distress suffered by Ms Ma. And in his later, costs, judgment he said:

Although in this regard I found in my judgment that for summary judgment purposes, fraud with respect to the initial transaction was not able to be made out here, clearly there were a number of question marks which remained over that transaction and which would require full exploration and a testing of the available evidence if this matter had proceeded to trial.

[8] Thus it was that the general damages claim came before me for hearing last year.

The general damages claims

[9] There were three causes of action that were said to found Ms Ma's claims for general damages.

[10] The first, which was based on the indemnity agreement entered into between Ms Ma and Mr Tay, had formed one of the bases of the summary judgment decision. Although the amount claimed was \$50,000, in argument before me Mr Dale accepted that something closer to \$20,000 would be appropriate.

[11] The third cause of action was entitled *Fraud* and pleaded that Mr Tay:

- (a) Procured the plaintiff's signature to the agreement notwithstanding the fact that he knew that she did not wish to purchase the property and did not have the means to do so;
- (b) Dishonestly procured the execution of the loan documents and arranged for the Westpac mortgage advance;
- (c) Obtained and utilised for his own benefit, or for interests associated with him and the Tony Tay Group, the proceeds of the mortgage loan advance.

[12] The claim then pleaded that Mr Tay was liable to pay general damages in the sum of \$50,000 for the stress, anxiety, humiliation and reputational damage caused to Ms Ma as result of his:

- (a) dishonest conduct; and
- (b) appropriation of the mortgage proceeds; and
- (c) admission of liability

[13] The fifth cause of action was entitled *Conspiracy to Defraud* and pleaded that Mr Tay and other of his interests “dishonestly conspired to defraud” Ms Ma and Westpac by:

- (a) Representing to the plaintiff that it was in order for her to execute the documents that were placed before her by Mr Tay and the seventh defendant including the agreement for sale and purchase and loan documents.
- (b) Failing to advise the plaintiff that by executing the documents she was acquiring the unit and taking out a loan from Westpac in the sum of \$360,000 for which she would be personally responsible.
- (c) Misrepresenting that the plaintiff had an annual income of \$190,000 when in fact her income was only \$73,960.
- (d) Falsely representing to Westpac that the plaintiff wished to borrow \$360,000 for the purpose of purchasing a unit.
- (e) Arranging for a solicitor to represent the plaintiff and to receive the loan advance which was subsequently appropriated by the first defendant for his own purposes.

[14] Again, general damages in the sum of \$50,000 were claimed to compensate Ms Ma for the stress, anxiety, humiliation and reputational damage caused by this alleged conduct.

Other related proceedings

[15] At the time of the hearing before me the Westpac judgment had not been met by Mr Tay. An appeal from the learned Associate Judge's decision was also pending and Mr Tay had sought, unsuccessfully, to re-litigate his liability in separate

proceedings. His claim in that respect had been struck out by Woolford J on 25 March 2013. An appeal against that judgment had also been filed. I am advised that that appeal has now been abandoned and Mr Tay has consented to the release of funds held by Simpson Grierson to satisfy the summary judgment debt. Category 2B costs of \$16,318 were awarded to Ms Ma in those proceedings.

Settlement discussions

[16] Shortly before the commencement of the hearing before me, a “without prejudice save as to costs” letter was written by Ms Ma’s legal advisers to the defendants’ legal advisers. In it, they referred to the pending three day hearing at which the allegations of fraud would be ventilated, and the toll the extensive cross-examination which had been signalled by Mr Corlett would take on Ms Ma. Then, it said:

For that reason, and without prejudice, Ms Ma is giving consideration now to simply placing all of these matters before the Serious Fraud Office and to leave it to that organisation to investigate. I am confident that a fraud finding will be made, and for that reason one option is to adjourn the forthcoming hearing but simply reserve the right to bring on a civil claim after the SFO, IRD or Companies Office have completed their investigations.

[17] The writer goes on to detail what he calls “serious irregularities within the Tony Tay Group” which, he says, ought to be the subject of a thorough investigation. Then, he said:

All of these issues need to be taken into account if Mr Tay wishes to engage in on-going litigation with Ms Ma.

There are two further considerations. The first is that if the fraud allegations are aired the Judge has an obligation to report any conduct which might be criminal...

If Ms Ma elects not to proceed with the fraud allegations she would nevertheless be entitled to general damages, and which can be dealt with within a relatively short hearing.

[18] After then referring to a quite separate aspect of the dispute between the Ma interests and the Tay interests (concerning alleged unpaid salaries) the writer advises that Ms Ma is prepared to settle all outstanding issues (including the matters that

were then the subject of appeal, noted above) for \$200,000. Mr Tay was given seven days to accept that offer. Mr Dale now accepts that this offer was “unrealistic”.

[19] Mr Corlett responded (on a without prejudice save as to costs basis) 6 days later. In rejecting the settlement offer he referred to the “barely disguised threat to refer this matter to the SFO if my client does not accept your client’s settlement terms”. In that context he referred to s 237 of the Crimes Act (blackmail) and Rule 2.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. Mr Corlett then went on to detail the risks he perceived were associated with Ms Ma choosing to pursue the fraud claim and the difficulties in obtaining general damages merely for breach of contract. He concluded by saying:

I have however been instructed to negotiate settlement. My Client instructs that he is prepared to settle on the following basis:

- (a) Security for costs held by the Court in the *Tay v Ma* proceeding of \$20,000 to be released forthwith to your client.
- (b) Ms Ma to do all things necessary to immediately release any entitlement she has in unit 7 at the Karapiro Resort
- (c) Costs to lie where they fall
- (d) All proceedings/claims to be discontinued/ or withdrawn.

The above will constitute a full and final settlement of all matters between all parties to the proceedings.

You will no doubt advise your client that given the nature of this offer, even if she succeeds at the hearing (which in my view is unlikely) if the general damages awarded is less than \$20,000 (which in my view is very likely) my client will be entitled to costs, and will seek full solicitor client costs against her on the basis that she refused a reasonable settlement offer. I expect the costs which would be awarded to my client following a three day trial will far outweigh any costs awarded on the strike out application (even indemnity costs if awarded).

[20] Mr Tay’s offer was rejected on 16 May 2013. The hearing began two days later.²

² The above letters have been referred to the Court in the context of the present dispute although the earlier one was in fact disclosed (without objection from Mr Dale) during the hearing itself.

Is an award of indemnity or increased costs warranted?

[21] Rule 14.6(4) of the High Court Rules deals with indemnity costs and relevantly provides:

- (4) The court may order a party to pay indemnity costs if -
 - (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
 - ...
 - (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[22] The circumstances contemplated by r 14.6(4)(a) are concerned with the conduct of the parties. Indemnity costs will be appropriate whenever a party has behaved either badly or very unreasonably: *Bradbury v Westpac Banking Corporation* (2009) 3 NZLR 400 (CA) at [27].

[23] In *Bradbury* the Court of Appeal (non-exhaustively) summarised the circumstances in which indemnity costs had been ordered, as follows:³

- (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.
- (b) Particular misconduct causing loss of time to the Court and to other parties.
- (c) Commencing or continuing a proceeding for some ulterior motive.
- (d) Doing so in wilful disregard of known facts or clearly established law.

³ At [29].

- (e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions - essentially the “hopeless case” situation.

[24] In the present case Mr Corlett’s claim for indemnity or increased costs is made on the basis of the following matters:

- (a) Improper allegations of sham and allegations of fraud, which were:
 - (i) not properly particularised or pleaded;
 - (ii) made in disregard of the facts and the established law;
- (b) the pleading and pursuit of other matters that were without foundation or merit;
- (c) Ms Ma’s refusal to accept a reasonable settlement offer of \$20,000.

[25] In my view each of these grounds has substance.

[26] As I think my judgment makes clear, the third and fifth cause of action, in which the issues of sham and fraud arose, were fundamentally misconceived. Indeed, I had expressed my provisional view to that effect to Mr Dale on the first day of the hearing, during his opening address.

[27] As I indicated to Mr Dale then there is no discrete “common law fraud” cause of action; it is not synonymous with deceit and a critical element of the tort of deceit was entirely absent from the pleadings. The factual matters said to give rise to that cause of action were either irrelevant or simply not supported by Ms Ma’s own evidence. Indeed the plaintiff’s evidentiary deficiencies were such that Mr Corlett (quite properly) made the call that it was not necessary to call Mr Tay as a witness at all.

[28] Similarly, the conspiracy claim was neither properly pleaded nor subsequently articulated. Although I attempted in my analysis to give Ms Ma the

benefit of every possible doubt, it was clear from the evidence (by which, again, I mean Ms Ma's own evidence) that the critical mental elements for either an unlawful means, or an unlawful purpose, conspiracy was entirely absent.

[29] In short, I have little difficulty in concluding that the allegations of dishonesty and fraud contained in both the third and fifth causes of action were not properly particularised or pleaded and were made in disregard of the facts and the established law.

[30] Although the same criticism cannot be levelled at the general damages claim made in relation to the first cause of action, the reality is that it was a claim for a relatively small amount of money on a legal basis that was far from well-established. Moreover, as I found in my judgment, there was a logical difficulty causally linking Mr Tay's breach of the indemnity agreement and the alleged damage to Ms Ma's reputation and her anxiety and distress. Nonetheless I accept that by and of themselves, these matters would not warrant an indemnity costs award.

[31] But then there is the matter of the defendants' settlement offer. On any objective analysis Ms Ma was, in my view, unreasonable to refuse it. The same absence of perspective is made clear beyond doubt in the letter that was written by Mr Dale on her behalf. And it is fair to say that the barely veiled threat to refer the defendants to the SFO does not assist her position in relation to the issue now at hand.

[32] Equally, however, I am prepared to make some allowance for the wider context of this litigation. It is quite clear that (rightly or wrongly) Ms Ma feels betrayed by Mr Tay. Moreover, if Mr Tay had satisfied the Westpac debt in accordance with the indemnity agreement he signed and Associate Judge Gendall's judgment, rather than both appealing and seeking to launch further litigation collaterally attacking it, Ms Ma might have been feeling less bloody-minded when she instructed Mr Dale to write that letter. That said, I am in no position to judge the merits of the position taken by Mr Tay in that other litigation and the weight I give those matters must, in fairness, be very limited.

[33] In addition, and as I stated in my substantive judgment, it seems to me that there are cultural factors at play in this case that New Zealand judges such as I may struggle to understand. I am therefore prepared to cut Ms Ma a modicum of further slack; it may not be entirely just to judge the reasonableness of the stance she took by essentially European standards.

[34] In the end, I have found the issue of indemnity costs to be finely balanced. By a very narrow margin, however, I have determined that it would not be appropriate to require Ms Ma to pay them in the circumstances of this case. But I have no doubt that an award of increased costs is justified.

[35] The grounds on which increased costs awards may be made are set out in r 14.6(3), which relevantly permits the court to make such an order where (inter alia) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding by

- (a) taking or pursuing an argument that lacks merit; or
- (b) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
- (c) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding.

[36] For the reasons already given, I consider that Ms Ma has done all these things. In my view her failure to act reasonably in the pursuit of her general damages claims has contributed to the time and expense of it to an extent of at least 50 per cent. Such an uplift in my view reflects the additional resources which were necessarily spent by the defendants in addressing those claims which, as I have said, lacked any realistic prospect of success. The same may be said of what I regard as her unreasonable refusal to settle the matter.

[37] Once that point is reached, the parties are agreed that 2B costs are otherwise appropriate. There is, however, disagreement about what is to be included. But in light of what I consider to be the moveable feast that was the plaintiff's claim, I agree with Mr Corlett that:

- (a) the costs of preparing briefs of evidence; and
- (b) certification for second counsel –

are appropriately included items. On that basis, 2B costs would amount to \$28,855. As I have said, I consider a 50 per cent uplift on scale costs is warranted. Ms Ma is to pay the defendants' costs in the sum of \$43,282.50 accordingly.

Rebecca Ellis J