

**BETWEEN**

**WESTPAC BANKING  
CORPORATION** of Rarotonga,  
Cook Islands

**Plaintiff**

**AND**

**JANETTE BROWNE**

**Respondent**

**Date:** 23 July 2014  
**Counsel:** Mr C Little for the Applicant  
Respondent in person  
**Date of Judgment:** 23 July 2014

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**JUDGMENT OF THE HONOURABLE JUSTICE COLIN DOHERTY J**

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[1] On 18 July 2014, I granted an indulgence to the Respondent in this matter to file and serve opposition documents to an application for permanent injunction and an Order for vacant possession of a property secured by way of a mortgage and by way of a Deed of Settlement from the Respondent to the Applicant.

[2] The Respondent had sought the indulgence claiming that she needed to take legal advice and get representation. Because of the notice that she had already had to do that, I granted the indulgence until today. She filed documents not by way of Solicitor but herself. A letter to me as the Judge and a document entitled "Submission of Defence". I embarked upon the hearing today when the matter was called.

[3] It has a longish history. There had been advances of \$630,000 to the Respondent and her late husband. There had been other advances as well but \$630,000 was the one that we are dealing with today. Ultimately, the advance fell into arrears relatively quickly and the parties came to negotiate a settlement. In that settlement, the Respondent granted a Deed of Mortgage in favour of the Applicant on 17 August 2011. It was over the land which was owned by her, three villas and her home. The property was collectively known as Manea Heights.

[4] An application was made to the Court in relation to enforcement of that mortgage and on the 10 September 2012, the Court did make Orders granting leave for enforcement of it. The Respondent sought to set that aside and formally applied to the Court to do so. Negotiations ensued as a result of that application and those were settled by way of a further Deed of Settlement on 29 November 2013. In that Deed, the Respondent agreed that the proceedings to set aside the Order to enforce the original Deed of Mortgage should be struck out and they were by way of Order of this Court on 3 December 2013.

[5] The Deed of Settlement provided amongst other things that \$630,000 would be paid on the 30 May 2014 in full and final settlement of matters between the parties. I was advised from the bar by Counsel for the applicant, that that was to enable about a six month period the respondent to market and sell Manea Heights.

[6] There was also an agreement in the Deed of Settlement that there would be payment to the applicant of monies received by way of income on the mortgaged property, no payments were received.

[7] The Applicant gave various notices that it intended to proceed by way of enforcement of the Deed and the mortgage and now makes the applications that it does, that are before the Court today.

[8] In the meantime, there had been further indulgences granted to the Respondent in order to enable her to attempt to refinance and she took actions to do so.

[9] The Deed of Settlement provided by paragraph 7.1:

[10] "If the borrower does not pay the settlement sum by the settlement date pursuant to clause 2, the borrower will be in default and the borrower agrees; a) that Westpac may immediately take all necessary action to obtain payment of the debt including but not limited to enforcement of the mortgage and any other security held by Westpac and not be limited to the amount of the settlement sum; b) to immediately vacate and deliver vacant possession to Westpac of all of the villas and the residence at Manea Heights."

[11] There were some further terms which need not be referred to.

[12] And so we come to today's hearing. I take the documents that have been filed by the Respondent as documents upon which I can proceed. They are certainly not documents in the usual form but I am conscious that notwithstanding the time that she has

had to engage Counsel for her own reasons, the Respondent appears in person. So I grant her the further indulgence of dealing with these documents as though they were submissions in defence of the applications, and whilst it is unsworn, I intend to take at face value the evidence that she gives me in the letter filed as well.

[13] I have some sympathy for the Respondent. It is clear that this property is important to her and her family. It is all that she has in one sense and she has been fighting for years “tooth and nail” to hold on to it. And she told me that in submissions today, that that is her ultimate aim. She has tried to raise monies to hold onto it. She had hoped that the Applicant would be more sympathetic to her. But the Applicant has run out of patience, it wants its money.

[14] The information that she has given me and the submission of defence raises a number of issues, the majority of which are irrelevant to today’s proceeding, for example, in paragraph 5 of the document labelled “Submission of Defence” she says “I am opposing the injunctions on the grounds that; a) further investigation is made regarding the accounts as per attached statement from Westpac which I am not in agreement with.” She did not attach any statement to the document that she filed but in the course of the hearing, handed up a transaction history from the Applicant addressed to her as the Respondent and Lionel Browne whom I assume is her late husband.

[15] She also handed up a photocopy of something which purports to the evidence of payment of an additional \$225,000 which has not been accounted for in the statement of her accounts that I have referred to. This purports to be a transfer or payment from an account with the Applicant at its Tauranga Branch on account of this loan amount. There is nothing to support it and even if I took it as sworn evidence, it would be hearsay as it is supposedly drawn on her husband’s account not hers. Strangely however, this appears to have been the first time that this has ever been raised. It is dated the 20 February 2007 but has never been raised as part of the settlement in 2011 or the settlement in 2013. So I do not accept that that is an appropriate proposition.

[16] The balance of the submission of defence relates to her plea for the Court to have a proper investigation of the handling of monies; this was the \$630,000. She claims that it was inappropriately used by a Solicitor acting for third parties but whom were related in the sense of being involved in the title to either Manea Heights or other related properties. But she accepts that Westpac had nothing to do with this. Westpac had advanced the

monies the \$630,000 to her Solicitors who had paid it onto the third party Solicitors supposedly to be held in trust pending availability of title.

[17] So whatever has happened to that and she may well have an action there, I do not pass comment but certainly it has got no relevance at all to the advance from Westpac in the sense of its contractual obligations and hers and or the Deed of Settlement.

[18] There is also complaint in the opposition document about the title to Manea Heights but of course that too has got nothing to do with the applicant. Nor has an allegation that there may be an action against the body corporate; there is no connection at all. The only matter of any moment in the defence document that remain is a comment about the chattels and personal belongings in her home, which are of course hers and not the property nor part of any security to the Applicant.

[19] In effect, what the Respondent has done is ask this Court for mercy to enable her to gain more time to refinance or sell or a combination of the two. I find it difficult to accept that the matters that she now raises have only just become apparent.

[20] She also made a statement in the letter to me that she has not had any formalised legal assistance. She accepted when certain documents were referred to the Court in earlier actions that that was not correct, that she has had Solicitors acting for her in the past and in relation to issues with the applicant.

[21] She impressed me as someone who has intelligence and the ability to deal with matters of some complexity herself, but I think that what she has been attempting to do here is to fight the rear guard action as best she can but with no ammunition.

[22] I am satisfied on the information available to me that the application for permanent injunction and Order for vacant possession of the property ought to be granted. There is no defence. Counsel for the Applicant seeks a double whammy by asking that a warrant for execution also be granted at this time. That on the basis that as Counsel says there is inevitability that the Respondent will not leave the property despite the Order of the Court.

[23] The Applicant will then have two options, an application for a warrant and also an application for contempt. Contempt would personally attach to the Respondent; contempt of the Orders of the Court where there are certain remedies against her personally. That is

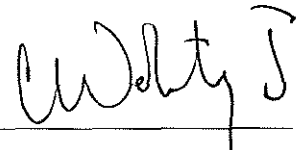
a matter for the Applicant but in view of the fact that a warrant of execution is something that dramatically impinges upon the rights of the individual and would enable the Cook Islands Police to enter into the property and to offend against the individual rights of those who remained in possession, I am not prepared to grant that application at this stage.

[24] The applicant has said that it is prepared to give 14 days to vacate. Should that not happen then the Applicant should have the opportunity to bring on the application for warrant for execution on three day's notice.

[25] In the meantime, it will be adjourned until the next sitting of this Court in its civil jurisdiction which is 21 September 2014.

[26] So the application is granted on its terms but amended to allow it to take effect 14 days from today's date.

[27] Costs are reserved.

A handwritten signature in black ink, appearing to read 'C. Doherty J', written over a horizontal line.

**Colin Doherty, J**