IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-6915

	BETWEEN	WAIMAORIMANU LIMITED Plaintiff
	AND	GORDON HUNTER KELSO Defendant

Hearing: 9 March 2009

Counsel: P Rice for Plaintiff
No appearance by or on behalf of Defendant

Judgment: 9 March 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Grove Darlow, PO Box 2882, Auckland
Davys Burton, PO Box 248, Rotorua
Counsel:
P Rice, PO Box 4341, Auckland

Introduction

[1] Waimaorimanu Ltd seeks judgment against Mr Kelso, a valuer, in the sum of $6,033,245. The claim is based on an allegedly negligent valuation of land and buildings carried out by Mr Kelso for the purposes of a solicitor's nominee company advance in September 2005. The purpose of the advance was to enable two companies to acquire land in Masterton and near Raetihi respectively.

Background

[2] On 15 September 2005, Davies & Co Solicitors Nominee Co Ltd made a conditional offer of mortgage finance to Redfern Holdings Ltd and Forest 888 Ltd. The offer was for $6,361,240 and was conditional on receipt of a satisfactory valuation of properties to be acquired. There had been an earlier valuation report dated 21 February 2005, but confirmation of its reliability was required.

[3] One of the conditions of the proposal was that the valuer who had prepared the February 2005 valuation, issue a further report for the benefit of the nominee company which would comply with New Zealand Law Society requirements for nominee company loans. The valuer was to confirm earlier valuations provided in the February 2005 report, to consider the potential value of the Masterton property with resource consents for 12 sections and to consider the potential value of the Masterton property if resource consents were obtained for more than 60 sections.

[4] The original valuations had been undertaken by Mr Kelso of Lewis Wright Ltd, registered valuers. In a report dated 13 September 2005, expressed as being for mortgage purposes, Mr Kelso valued the land and buildings of the Masterton land (on the most conservative basis) at $11,400,000 and the Raetihi land at $520,000. Assessing subdivision consent for Masterton, the value was something in the order of $24,000,000. Mr Kelso provided a lending recommendation for the Masterton property of $7,060,000 for mortgage purposes; namely 50% of land and buildings.

[5] I am satisfied that, in reliance on that valuation, the nominee company entered into a formal loan agreement with the borrowers; advancing $6,360,000 on 18 November 2005. The loan was to be repaid on 18 November 2006. The ordinary interest rate was 12.5% per annum, with a penalty rate of 17.5% per annum. Appropriate securities were taken to safeguard the nominee company's position.

[6] The borrwers defaulted. On 5 March 2007, steps were taken to sell the properties. Those properties have since been sold.

[7] The major contributor to the nominee company advance was a company associated with Mr David Renwick, a Wellington businessman. That company advanced $4,900,000. The right to bring proceedings in the event of a default was expressly subrogated to Waimaorimanu Ltd, given its position as principal investor.

[8] Subsequently, all securities were assigned to Waimaorimanu, as was the benefit of any claims against the valuers, both Mr Kelso and his employer, Lewis Wright Ltd. On 3 October 2008, Lewis Wright Ltd settled for $1,000,000 and the proceeding against it was discontinued.

[9] Waimaorimanu now seeks judgment against Mr Kelso for the full extent of its claim, taking into account the $1,000,000 settlement achieved with Lewis Wright Ltd.

The claim

[10] The trial of this proceeding was set down for this week. On 23 February 2009, Mr Kelso, through his counsel, filed a memorandum indicating that he no longer wished to defend the claim. An admission of liability was filed. Judgment is sought today on formal proof in the sum of $6,033,245. Evidence has been led from three witnesses in support of the claim.

[11] Mr Davies was the solicitor who arranged for contributions to be made to the advance to acquire the Masterton and Raetihi properties. In his witness statement, which has been confirmed today on affirmation, he explained the background to the

transaction. In oral evidence today, he has also explained that the nominee company had the ability to take a similar quantum of contribution from investors and place it with at least two other commercial opportunities involved in acquiring property. His evidence reveals that an investor, whether in the present arrangement or in one of the other investment opportunities he described, could have expected to receive a return on that investment calculated at 12.5% per annum interest.

[12] Mr Morice, an experienced registered valuer, has given evidence about the way in which Mr Kelso undertook the valuations. He expresses the opinion that Mr Kelso was negligent in carrying out the valuation exercise. In particular, Mr Morice has pointed to Mr Kelso's failure to take adequate account of comparative sales and in placing too high a value on coastal areas and timber rights. Notwithstanding the valuation provided by Mr Kelso, it appears that the true value of land and buildings at the time of the advance was in the vicinity of $1,800,000 only.

[13] The third witness was Mr Renwick, the director of Waimaorimanu. He gave evidence of the circumstances in which he authorised his contribution to be made and the assignments of securities and claims that subsequently took place. Mr Renwick has detailed the steps taken to mitigate loss. He said:

> [12] The Blairlogie property sold for $235,000. The net amount recovered after deduction of all selling costs, receivership and legal expenses, rates and GST was only $74,578.18. I produce copies of the sale and purchase agreement, settlement statement and reconciliation statement. ....
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> [13] Mockingbird Farm sold for $1,150,000 plus GST. The net amount recovered after deduction of all selling costs, rates and legal expenses was $1,094,906.30. I produce copies of the sale and purchase agreements, settlement statement and reconciliation statement. ....
>
> [14] The Watershed Road property sold for $300,000 plus GST. The net amount recovered after deduction of all selling costs, rates and legal expenses was $320,288.16. I produce copies of the sale and purchase agreement, settlement statement and reconciliation statement. ....
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> **Recovery from Second Defendant**
>
> [15] The plaintiff settled its claim against the second defendant for $1,000,000 .... It was a term of the settlement agreement that the

> plaintiff reserved its rights to continue its claim against the first defendant. I produce a copy of the settlement agreement. ....

[14] Mr Renwick also gave evidence that he would have been prepared to place the investment funds used in either of the other investments to which Mr Davies referred. He was able to point to significant mortgage investments that he made at a time contemporaneous to the advance in issue, on which interest returns of something in the order of 12.5% are being received.

[15] I am satisfied, on the authority of *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576 (CA), that Mr Kelso owed a duty of care to the nominee company. Plainly, Mr Kelso knew of the nominee company's interest and the reason why it required a valuation report confirming his earlier assessment in February 2005. It is also clear that he was aware of the alternative basis involving subdivision, to which Mr Davies referred, in the loan proposal.

[16] In addition, Mr Kelso's admission of liability, coupled with Mr Morice's evidence, satisfies me that Mr Kelso breached his duty of care by failing to exercise proper skill and care in undertaking the valuation exercise. The question is what loss flows from that negligence.

[17] The amount claimed is as follows:

Principal Sum:		6,360,000
Plus interest @ 12.5% from 18 November 2005 to date of judgment, say 9 March 2009 (1,206 days)		2,626,767
		8,986,767
Less		
Interest paid under Loan		463,750
Net amount recovered from sales		
- of Blairlogie	74,578	
- of Mockingbird Farm	1,094,906	
- of Watershed Road	320,288	1,489,772
Recovered from second defendant		1,000,000
NET LOSS		**$6,033,245**

[18] Mr Rice, for Waimaorimanu, placed reliance on *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 (HL) at 309. Lord Nicholls of Birkenhead, delivering the principal speech in the House of Lords considered the basis on which damages ought ordinarily to be claimed in a case

involving professional negligence by a valuer. His Lordship suggested that, typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which it would still have had in the absence of the loan transaction, *plus interest at a proper rate*, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property.

[19] The *Nykredit* formulation of loss has been considered recently in New Zealand, in *Davys Burton v Thom* [2009] 1 NZLR 437 (SC), in the context of a professional negligence case involving solicitors. While the Supreme Court did not address specifically the interest component to which Lord Nicholls referred, it did make it clear that the object was to put the plaintiff in the position it would have been in had the defendant fulfilled his duty: see, in particular, paras [16] and [17] of the principal judgment, delivered by Elias CJ.

[20] The only query of the claims made that I raised with Mr Rice was that relating to interest. Mr Rice, having called additional evidence from Mr Davies and Mr Renwick on that topic, has satisfied me that the quantum of interest claimed at the rate set out is appropriate in terms of the formulation of principle to which Lord Nicholls referred. All of the cases suggest that the ultimate question of what damages flow is for the Judge to determine is a question of fact.

Result

[21] In those circumstances, I am satisfied that the claims for damages set out previously have been made out and that the net loss suffered by Waimaorimanu is $6,033,245. Judgment is entered in that sum together with costs.

[22] Costs are awarded on a 2B basis, together with reasonable disbursements. Both costs and disbursements shall be fixed by the Registrar. The Registrar will need to adjust that calculation to take account of the basis on which formal proof is addressed by the costs rules.

P R Heath J