

IN THE SUPREME COURT OF NEW ZEALAND

SC 132/2013
[2014] NZSC 14

BETWEEN MORTGAGE ADMINISTRATION
SERVICES (CALIBRE) LIMITED
First Applicant

CAIRNS LOCKIE LIMITED (IN
LIQUIDATION)
Second Applicant

AND CALIBRE FINANCIAL SERVICES
LIMITED
Respondent

Court: McGrath, William Young and Arnold JJ

Counsel: S O McAnally and B M Hojabri for First Applicant
P L Rice for Respondent

Judgment: 4 March 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The first applicant must pay the respondent costs in the amount of \$2,500.

REASONS

[1] The first applicant, Mortgage Administration Services (Calibre) Ltd (MAS), is a mortgage manager and provided various services to the respondent, Calibre Financial Services Ltd (Calibre), the trust manager of a holding trust providing loans secured by registered mortgages over residential properties. The relationship between the two was governed by a Mortgage Origination and Management Agreement (the agreement) and an Operations Manual.

[2] In February 2008, Calibre advanced \$437,500, secured by a registered first mortgage, to Murrays Bay Property Ltd (Murrays Bay), a client of MAS. Murrays Bay defaulted on its obligations under the loan. Calibre exercised the power of sale under its mortgage. By the time of the sale, Murrays Bay was registered for the purposes of Goods and Services Tax (GST). As a result, Calibre was required to pay GST on the sale in the amount of \$41,888.89. Calibre sought to recover this amount from MAS under an indemnity clause in the agreement.¹ When MAS did not pay it, Calibre cancelled the agreement. It then issued proceedings against MAS for \$41,888.89 and also sought a declaration that the agreement had been validly terminated. MAS counter-claimed for special damages totalling \$406,000 arising from wrongful termination. The damages claimed comprised principally commissions to which MAS would have been entitled under the agreement had it not been terminated.

[3] Calibre succeeded in the District Court.² MAS was successful on appeal to the High Court.³ In the Court of Appeal, the judgment of the District Court was reinstated.⁴ Following an unsuccessful application to the Court of Appeal to recall its judgment,⁵ MAS seeks leave to appeal to this Court against both the substantive and recall decisions of the Court of Appeal.

[4] It advances two grounds:

- (a) First, the indemnity clause in the agreement could not be invoked by Calibre unless Calibre first made demand for the relevant sum from the principal debtor, Murrays Bay. Accordingly, if no demand had been made or debit raised against Murrays Bay, Calibre was not entitled to pursue MAS under the indemnity clause.

¹ Calibre held lenders' mortgage insurance but considered that it did not cover GST.

² *Calibre Financial Services Ltd v Mortgage Administration Services (Calibre) Ltd* DC Auckland CIV-2009-004-3175, 31 May 2011.

³ *Mortgage Administration Services (Calibre) Ltd v Calibre Financial Services Ltd* [2012] NZHC 732.

⁴ *Calibre Financial Services Ltd v Mortgage Administration Services (Calibre) Ltd* [2013] NZCA 503.

⁵ *Calibre Financial Services Ltd v Mortgage Administration Services (Calibre) Ltd* [2013] NZCA 565.

- (b) Second, the Court of Appeal did not address, or sufficiently address, various arguments raised by MAS in its notice supporting the judgment of the High Court on other grounds, which related in particular to Calibre's right to terminate and its duty to mitigate.

[5] We are not satisfied that it is necessary in the interests of justice that we grant leave to appeal on either point. We see no issue of general or public importance. The first issue relates to the interpretation of the contractual arrangements between the parties; we do not see it as having any broader significance. Moreover, there was affidavit evidence before the Court of Appeal that Calibre had made demand on Murrays Bay for the GST, so on the facts the issue does not appear to arise. As to the second issue, the law in relation to the additional issues that the applicant says were not sufficiently addressed by the Court of Appeal is well settled, as is the law relating to the giving of reasons.

[6] On the question whether there is a risk of a substantial miscarriage of justice, we accept that the termination of the agreement had a significant impact on MAS. Despite that, we are not persuaded that there is a risk of a substantial miscarriage, either in relation to the substantive judgment or the recall judgment. As we have said, it appears that Calibre did make demand on Murrays Bay for the payment of the GST, and the fact that Calibre had to call on its lenders' mortgage insurance to recover some of what was owed by Murrays Bay suggests that Murrays Bay was not in a position to pay. In these circumstances, it is difficult to see that MAS could succeed on a further appeal as the indemnity clause would have been validly engaged even accepting its arguments. In relation to the arguments that the applicant says that the Court of Appeal did not sufficiently address, we note that the District Court Judge did deal with them in some detail. We can see no obvious error in her analysis and no appearance of a substantial miscarriage of justice on that account.

[7] Accordingly, the application for leave to appeal is dismissed. The applicant must pay the respondent costs in the amount of \$2,500.

Solicitors:
Keegan Alexander, Auckland for First Applicant
Sanderson Weir, Auckland for Respondent