

**Solicitor ordered to pay the costs that his client had been ordered to pay to the opposing party**

**10 September 2015**

**Karin Ottesen**

**Introduction**

1. In *Nadarajapillai v Naderasa (No 2)*,<sup>1</sup> the New South Wales Court of Appeal ordered a solicitor to pay to the opposing party the amount of the costs that his client had been ordered to pay to that party because the solicitor had instituted and maintained an appeal on behalf of the client that had no prospects of success and that was without merit.

**Original proceedings**

2. The respondent ("**Lender**") had originally commenced proceedings by Statement of Claim in the District Court of New South Wales. The Statement of Claim alleged that the Lender had lent moneys to the appellant ("**Borrower**"), that the Borrower had defaulted in his repayment obligations pursuant to the loan agreement and that the Borrower had ignored the Lender's demands for repayment.
3. The Borrower filed a Defence in which he essentially admitted that:
  - the loans had been made;
  - certain moneys were owing in respect of the loans;
  - certain interest was payable on the outstanding loans; and
  - a demand for repayment had been made.
4. As a result of these admissions, the principal material fact in issue before the District Court judge was whether the Lender had met the requirement of the loan agreement to give the Borrower 90 days' notice before demanding repayment.
5. The District Court judge concluded that the 90 days' notice had been given and that, since the Borrower had not repaid the moneys, the Lender was entitled to a verdict and judgment in an amount of \$128,471.72.

**Appeal to the Court of Appeal**

6. The Borrower appealed to the New South Wales Court of Appeal which dismissed the appeal with costs.<sup>2</sup> Emmett JA (McColl and Macfarlan JJA agreeing) gave the Court's reasons.

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<sup>1</sup> [2015] NSWCA 209.

<sup>2</sup> *Nadarajapillai v Naderasa* [2015] NSWCA 109.

7. The Borrower had been represented by counsel at the hearing in the District Court but on the appeal he was represented by a solicitor (“**Solicitor**”).
8. The grounds in the Borrower’s Notice of Appeal included contentions that the Borrower had been denied natural justice and that the District Court judge had failed to take into account all relevant facts and matters.
9. When the appeal was called on for hearing, the Solicitor sought leave to rely on amended grounds of appeal in substitution for the grounds in the Notice of Appeal. Although no satisfactory explanation was given for the lateness of the application for leave to amend, leave was granted.<sup>3</sup>
10. Emmett JA said that, given the admissions made by the Borrower, the main issue before the District Court had been whether the Lender was entitled to repayment of the loans prior to giving 90 days’ notice that repayment was required. His Honour further said that as a demand had been made more than 90 days before the commencement of the proceedings, it followed that, as at the date of commencement of the proceedings, the principal of the loans was due and owing. Accordingly, there was no reason why the Lender was not entitled to sue for recovery of the principal, together with contractual interest up to the date of judgment.<sup>4</sup>
11. His Honour noted that no written submissions had been provided in support of the amended grounds of appeal and described the oral submissions made by the Solicitor in support of the amended grounds as “quite incomprehensible.”<sup>5</sup> His Honour then said:

*“More significantly, no attempt was made before this Court by the [Solicitor] to grapple with the fact that, before the primary judge, counsel for the Borrower had indicated that the only issue for determination was that 90 days’ notice had not been given and that the consequence was that the Lender was not entitled to repayment of the loans. The grounds of appeal do not complain about the determination of that question by the primary judge. Rather, they raise questions that were simply not in issue before the primary judge and about which no complaint was made to the primary judge.”<sup>6</sup>*

12. One of the complaints made on behalf of the Borrower related to the representation provided by counsel for the Borrower but his Honour described this complaint as “entirely without substance.”<sup>7</sup> His Honour then said:

*“Indeed, one might compliment the Borrower’s legal representatives for having narrowed the issues in the way that they did. That is not a comment*

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<sup>3</sup> Above n 2, at [15].

<sup>4</sup> Above, n 2, at [19]-[20].

<sup>5</sup> Above, n 2, at [21].

<sup>6</sup> Above, n 2, at [21].

<sup>7</sup> Above, n 2, at [22].

that could be made about the representation of the Borrower before this Court.”<sup>8</sup>

13. His Honour concluded that:

- there was “absolutely no substance” in any of the amended grounds of appeal;
- all of the amended grounds of appeal were “quite unarguable”;
- the appeal was “entirely without merit; and
- the appeal must be dismissed with costs.<sup>9</sup>

#### **Lender’s notice of motion seeking order against the Solicitor**

14. The Lender subsequently filed a notice of motion seeking an order that the Solicitor pay to the Lender the amount of the costs that the Borrower was ordered to pay. The Court of Appeal dealt with the motion on the papers. Once again Emmett JA (McColl and Macfarlan JJA agreeing) gave the Court’s reasons.

15. In his written submissions, the Lender sought to invoke the Court’s power in s 99(2)(b)(ii) of the *Civil Procedure Act 2005 (NSW)* (“CPA”) as the basis for the order sought. Section 99 applies if it appears to the Court that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.<sup>10</sup> Where the section applies, the Court may, under s 99(2)(b)(ii), direct the legal practitioner, if a solicitor, to pay to the client “the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs.”

16. In his written submissions filed in opposition to the notice of motion, the Solicitor made reference to his duty to present any argument that he believed was reasonably arguable in the client’s best interests, and claimed that it was not always easy to decide what was and what was not reasonably arguable.<sup>11</sup>

17. Emmett JA found that s 99(2)(b)(ii) of the CPA did not provide a basis for an order that the Solicitor pay the costs to the Lender directly because, in its terms, it contemplated an order that the solicitor pay to his or her own client the costs that the client had been ordered to pay to another party. However, his Honour said that the Court had a general power to make such an order arising out of the supervisory jurisdiction of the Court with respect to legal practitioners admitted by the Court, a jurisdiction which was not to be read down by reason of the provisions of the CPA.<sup>12</sup>

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<sup>8</sup> Above, n 2, at [22].

<sup>9</sup> Above, n 2, at [22]-[23].

<sup>10</sup> See s 99(1) CPA.

<sup>11</sup> Above, n 1, at [15].

<sup>12</sup> Above, n 1, at [8]-[9]. See also *Re Felicity; FM v Secretary, Department of Family and Community Services (No 4)* [2015] NSWCA 19 at [16]-[20].

18. His Honour further said that that jurisdiction of the Court was exercised in circumstances where it was shown that a legal practitioner had failed to fulfil his or her duty to the Court and to realise his or her duty to assist in promoting in his or her own sphere the cause of justice.<sup>13</sup>

19. His Honour then stated as follows:

*“In considering whether to order costs against a legal representative, it is necessary to balance carefully two different interests. The first is the public interest in maintaining and nurturing a legal profession that provides vigorous representation to litigants in court, uncompromised by a fear of personal sanctions for failure. The other is the public interest in the efficient administration of justice. The latter finds express recognition, in mandatory terms, in the overriding purpose provisions (ss 55-60) of the Civil Procedure Act.”<sup>14</sup>*

20. His Honour noted that:

- the grounds stated in the Notice of Appeal had apparently been prepared by the Solicitor;
- written submissions filed in support of the Notice of Appeal which were signed by the Solicitor had primarily complained about a perceived lack of particulars in the original pleadings although the Borrower’s Defence had admitted nearly all of the allegations made in the Statement of Claim and no such argument had been made before the District Court judge;
- further written submissions filed on behalf of the Borrower and also signed by the Solicitor had contained similar arguments; and
- a late application for leave to amend the grounds of appeal had been made without supporting submissions and without any satisfactory explanation for the lateness of the application.<sup>15</sup>

21. His Honour also noted what had been said in the Court’s earlier reasons about the lack of substance in any of the amended grounds of appeal and the incomprehensibility of the Solicitor’s oral submissions.<sup>16</sup>

22. His Honour considered that the conduct of the Solicitor, in instituting and maintaining an appeal that had no prospects of success, and which lacked merit, amounted to serious incompetence on the Solicitor’s part as a legal practitioner and that costs had been incurred improperly and without reasonable cause, in circumstances for which the Solicitor was responsible. Therefore, his Honour said that the Solicitor should bear the costs that the Borrower was ordered to pay to the Lender.<sup>17</sup>

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<sup>13</sup> Above, n 1, at [9]. See also *Myers v Elman* [1940] AC 282 and *Kelly v Jowett* [2009] NSWCA 278; (2009) 76 NSWLR 405 at [61].

<sup>14</sup> Above, n 1, at [10]. See also *Re Felicity*, above, n 12, at [14].

<sup>15</sup> Above, n 1, at [13]-[14].

<sup>16</sup> Above, n 1, at [4];[14].

<sup>17</sup> Above, n 1, at [17].

23. His Honour noted that the Solicitor had filed an application to the High Court of Australia on behalf of the Borrower seeking special leave to appeal from the earlier orders made by the Court and that the Lender had asked that the Court, in dealing with the notice of motion, take into account the terms of that application and a supporting affidavit of the Borrower. His Honour said that the proposed grounds of appeal to the High Court seemed to raise the same grounds that had been argued in the Court of Appeal and that the Borrower's supporting affidavit deposed that the Solicitor had advised the Borrower that he had an arguable case which involved a question of law of substantial public importance. His Honour then said that, to the extent that the application and the supporting affidavit had any impact on the conclusion reached on the notice of motion, they supported that conclusion.<sup>18</sup>

24. Accordingly, orders were made as follows:

- The Solicitor pay to the Lender the amount of the costs that the Borrower had been ordered to pay the Lender.
- The Solicitor pay the Lender's costs of the notice of motion.

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10 September 2015

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<sup>18</sup> Above, n 1, at [18].