

PARTIES: INDIGENOUS BUSINESS
AUSTRALIA

v

KAHUTAUNA TAMO-RANGI KANI

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 128 of 2011 (21135101)

DELIVERED: 7 June 2012

HEARING DATES: 17 May 20202012

JUDGMENT OF: MASTER LUPPINO

CATCHWORDS:

Procedure – Costs – Application by Plaintiff mortgagee for order for possession – Application by Defendant seeking relief against consequences of breach of mortgage – Order for possession refused on discretionary grounds – Order for relief made – Application by Plaintiff for costs – Contractual right to costs – Impact of the contractual right to costs on the Court’s discretion as to costs.

Law of Property Act s 86, 89, 105
Supreme Court Rules r 13.02, 63.03

Taree Pty Ltd v Bob Jane Corporation Pty Ltd & Anor [2008] VSC 228.
Gomba Holdings Ltd v Minorities Finance [1993] Ch 171.
Abigroup Limited v Sandtara Pty Limited [2002] NSWCA 45.
Russo v Buck & Ors (No.2) [2007] SASC 157.

Law of Costs, Dal Pont, 2nd Ed, LexisNexis Butterworths, 2009

REPRESENTATION:

Counsel:

Plaintiff: Ms Hawkins
Defendant: Mr Young

Solicitors:

Plaintiff: Australian Government Solicitor
Defendant: Central Australian Aboriginal Legal Aid
Service

Judgment category classification: B
Judgment ID Number: LUP1205
Number of pages: 6

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Indigenous Business Australia v Kani (No.2) [2012] NTSC 37
No. 128 of 2011 (21135101)

BETWEEN:

INDIGENOUS BUSINESS AUSTRALIA
Plaintiff

AND:

KAHUTAUNA TAMO-RANGI KANI
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 7 June 2012)

- [1] On 12 April 2012 I published reasons for decision in this matter. The applications then considered by the Court were an application by the Plaintiff seeking an order for possession consequent on a default by the Defendant under her mortgage as well as *'costs of and incidental to the application'*. By separate Summons the Defendant sought orders dismissing the Plaintiff's application and in the alternative seeking relief against the consequences of default pursuant to section 105 of the *Law of Property Act*.
- [2] The central issues in the substantive proceedings concerned the validity of the notices given by the Plaintiff to the Defendant. I found that the Plaintiff's notice of default given pursuant to the mortgage was both valid

and effectively served but that the statutory notice required by section 89(2) of the *Law of Property Act* (“the LPA”) was not validly served. I made orders granting the Defendant’s application for relief pursuant to section 105 of the LPA and refused the Plaintiff’s application for possession. These reasons now concern the costs of the proceedings.

- [3] Succinctly the reason I made the orders in the substantive proceedings was that the Defendant had cleared the arrears and, as I considered that granting relief pursuant to section 105 of the LPA was appropriate, I concluded that the possession order should be refused. That was because possession was sought to enforce the power of sale and the deficiencies in the service of the statutory notice meant that power of sale could not be exercised at that time and until a further notice was given.
- [4] The general rule is that the costs of a proceeding are in the discretion of the Court: see Rule 63.03 of the *Supreme Court Rules* (“the SCR”). The usual order for costs is that costs follow the event.
- [5] The relatively uncommon feature of this case is that the Defendant is contractually bound to pay the costs of the Plaintiff. The relevant mortgage provided in clause 2.1.1 for the Defendant as mortgagor to pay to the Plaintiff the ‘*amount owing*’. That term is defined in the mortgage as including:-

“Any costs or expenses incurred or payable by *us* in exercising any rights or powers contained in the *mortgage* or any *agreement covered by the mortgage*;”

- [6] That wording would support an argument that costs are to be paid on an indemnity basis. Indemnity costs however were not specifically claimed in the Originating Motion. If indemnity costs were to be sought the prayer for relief should have specifically stated that: see Rule 13.02(1)(c) of the SCR and *Taree Pty Ltd v Bob Jane Corporation Pty Ltd & Anor.*¹
- [7] The case raises question concerning the interrelationship between the Court's power to award costs and a party's contractual right to costs. There are a number of relevant authorities. The bulk of those decisions relate to the basis of the costs order as opposed to the entitlement to costs or the exercise of the discretion. Nonetheless the principles can equally apply to the question of the entitlement to costs.
- [8] The principles which I think can be extracted from the authorities are:-
1. Where there is a contractual right to costs, the discretion of the Court should generally be exercised in accordance with that contractual term provided that the term is plainly and unambiguously expressed: *Gomba Holdings Ltd v Minories Finance*,² *Abigroup Limited v Sandtara Pty Limited*;³
 2. The contractual right stands and has effect independent of any costs order: *Abigroup Limited v Sandtara Pty Limited*;⁴ and

¹ [2008] VSC 228 at p 54

² [1993] Ch 171

³ [2002] NSWCA 45

⁴ [2002] NSWCA 45

3. The contractual term does not override the Court's discretion and the contractual term is merely a factor to take into account in the decision to order costs: *Abigroup Limited v Sandtara Pty Limited*,⁵ *Russo v Buck & Ors (No.2)*.⁶

[9] Applying all relevant principles to the current proceedings, although the Defendant was successful in securing an order for relief pursuant to section 105 of the LPA, such an order is a concession given by a court and only arises when the party seeking relief is already in breach. An order for relief modifies what would otherwise be a strict legal entitlement to enforcement at the option of the mortgagee. It is the Defendant's own breach which makes the application necessary. Accordingly success in such applications is not viewed as success for the purposes of the application of the usual order that the successful party is awarded costs. Indeed the converse is true as routinely the order for relief is conditional upon payment of costs by the mortgagor. The usual rule that applies in cases where a party seeks a concession or an indulgence is that the party is ordered to pay the other party's costs of the application.⁷ Relief against forfeiture is one of the recognised applications of this principle.⁸

[10] Although the Plaintiff was unsuccessful in securing an order for possession, that was essentially based on defective service of the statutory notice. The Plaintiff however was strictly entitled to apply for possession even without

⁵ [2002] NSWCA 45

⁶ [2007] SASC 157

⁷ *Law of Costs*, Dal Pont, 2nd Ed, LexisNexis Butterworths, 2009 at p 438

⁸ *Law of Costs*, Dal Pont, 2nd Ed, LexisNexis Butterworths, 2009 at p 441

serving the statutory notice. The Plaintiff has a right to possession without compliance with section 89(2) of the LPA as that process is only required as a precondition to the exercise of the power of sale. The right to possession exists both under the mortgage and pursuant to section 86(e) of the LPA. It cannot therefore be said that the application for possession by the Plaintiff was inappropriate. Although the order was refused, that was in conjunction with the granting of relief pursuant to section 105 of the LPA and crucial to that was that the Defendant had cleared the arrears by the time of the decision.

[11] Therefore applying these principles, noting the contractual entitlement to costs and noting the usual costs rule when an indulgence is sought and granted, I am of the view that, with one exception, the Plaintiff should be awarded costs.

[12] The exception is in respect of the section 89(2) LPA notice. Whether it can be said that a section 89(2) LPA notice which did not comply with all of the formalities, including valid service, falls within the meaning of the phrase “*incurred or payable by us in exercising any rights or powers contained in the mortgage or any agreement cover by the mortgage*”⁹ or not, as that notice was ineffectual due to the identified deficiencies, the Plaintiff should not be allowed the costs incidental to that. I do not interpret the contractual entitlement to authorise the Plaintiff’s recovery of those costs independent

⁹ See para 5 hereof

of a cost order in the proceedings. As the notice was ineffectual, I am not prepared to order that the Plaintiff recover the costs related to that.

[13] Therefore I order the Defendant to pay the Plaintiff's costs, assessed on the standard basis, of and incidental to the proceedings save and except for the costs of and incidental to the notice pursuant to section 89(2) of the LPA. I allow the parties 28 days within which to agree costs and in default of agreement within that time, costs are to be taxed.