

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2011 7030

TITLES STRATA MANAGEMENT PTY LTD
(ABN 32 001 119 331)

Plaintiff

v

FRANK NIRTA AND OTHERS (according to
the schedule attached)

Defendants

JUDGE: Daly AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 10 July 2015
DATE OF RULING: 29 July 2015
CASE MAY BE CITED AS: Titles Strata Management Pty Ltd v Nirta (No 2)
MEDIUM NEUTRAL CITATION: [2015] VSC 366

REAL PROPERTY - Plaintiff successful in its claim to be subrogated to the security interests of the previous lender - Nature of the security interests to which the right to subrogation extends - Whether plaintiff entitled to costs on a solicitor client basis in accordance with the agreement between the defendants and the first lender - Entitlement to costs at a special rate, and to be secured by the mortgaged property a mere contractual entitlement.

COSTS - Whether successful plaintiff's costs should be reduced to reflect mixed success and failure on different issues - Order made for a proportion of costs to be paid.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Selimi	Pasha Legal
For the First and Second Defendant	Ms A Kozary, solicitor	ERA Legal
For the Second Defendant by counterclaim	Mr C Connor	Solicitor for the Registrar of Titles

HER HONOUR:

1 On 15 May 2015, I delivered my reasons for judgment in this proceeding ('Reasons'),¹ and reserved for further consideration the form of order necessary to give effect to the Reasons, and the question of costs. Given the multiplicity of issues in the proceeding, the nature of the findings made in respect of particular issues, and the involvement of the Registrar of Titles, the final disposition of this proceeding is not a simple matter.

2 A summary of the issues in the proceeding, along with my findings in relation to those issues, follows:

- (a) whether the signatures on the second loan documents purporting to be that of Mrs Nirta were in fact those of Mrs Nirta, or whether they had been forged by an unknown party: *the signatures were forged by an unknown party;*
- (b) if Mrs Nirta's signatures on the second loan documents have been forged, whether knowledge of the fraud can be imputed to Titles Strata such as to defeat Titles Strata's claim for indefeasibility in respect of the mortgage over the pizza shop: *no, no such knowledge can be imputed to Titles Strata;*
- (c) even if any fraud found to have occurred cannot be sheeted home to Titles Strata, and as such, the mortgage over the pizza shop is protected by reason of the principle of indefeasibility, whether the covenant to pay in the second loan agreement has been incorporated into the mortgage, or whether the mortgage in fact 'secured nothing': *the mortgage secured nothing;*
- (d) if the registered mortgage over the pizza shop is ineffective, whether Titles Strata is entitled to the benefit of the doctrine of subrogation, on the basis that the funds advanced by the second loan were used to pay out the first loan: *yes, Titles Strata is entitled to be subrogated to the security held by STSL;*

¹ See [2015] VSC 187. The defined terms used in this Ruling are consistent with those used in the Reasons.

- (e) if Titles Strata is entitled to recover under the doctrine of subrogation, whether all the terms and conditions of the first loan apply, so as to enable Titles Strata to recover not only the principal of the first loan, but also interest in accordance with the terms of the first loan: *no, Titles Strata is not entitled to interest in accordance with the terms of the first loan agreement;*
- (f) if, contrary to my finding, the second loan agreement is valid, whether the clause providing for interest under the second loan agreement is unenforceable by reason of it being a penalty: *yes, the interest charge under the second loan agreement is an unenforceable penalty;* and
- (g) if Mrs Nirta's signatures on the second loan documents have been forged, but if the indefeasibility of the mortgage over the pizza shop is unimpeachable by reason of any fraud of Titles Strata, and it is held that the mortgage over the pizza shop secured the sum advanced by Titles Strata, is the Registrar liable to indemnify Mrs Nirta for any losses she has suffered by reason of the registration of the mortgage over the pizza shop, and if so, how much? *Yes, in the sum of \$28,497.50, plus interest pursuant to statute.*

3 The issues that were before the Court at the hearing on 10 July 2015 were as follows:

- (a) the precise form of the orders to give effect to the Reasons, including the nature of the declarations to be made and the manner in which any sale of the pizza shop was to be effected;
- (b) whether Title Strata's right to be subrogated to the rights of STSL include its rights to obtain a charge over all of the property of Mr and Mrs Nirta (including the home), and, if so, the nature of the orders to give effect to those rights;
- (c) the parties' costs in the proceeding generally, including the costs incurred by the Registrar of Titles in the proceeding; and

(d) the contention in the written submissions filed on behalf of Mrs Nirta that the default judgment against Mr Nirta dated 24 February 2012 ought to be set aside or varied having regard to the findings made in the Reasons.

4 Taking the last matter first, the solicitor for Mrs Nirta accepted that any application by Mr Nirta to vary the terms of the default judgment ought to be made on proper notice and supported by affidavit. I made orders directing that any such application be filed and served by 22 July 2015, returnable on the date of delivery of this ruling, and for completeness, stayed enforcement of the judgment until that time.

5 As for (a) above, following discussion during the hearing on 10 July 2015, the only real contentious issue was whether the control of the sale of the pizza shop should be in the hands of the plaintiff, in the hands of Mrs Nirta, or in the hands of an independent third person.

6 In my view, there is no good reason not to follow the usual course in such matters, that is, that the sale be in the hands of the party which is in the position of a mortgagee. There is nothing about the relevant property (a commercial property in an established inner suburb) which would warrant any special arrangements being made. The difficulty with appointing an independent third party is that the proceeds of sale of the pizza shop will inevitably be eroded, which is not in the interests of either Mrs Nirta or Titles Strata.

7 As for (b) above, the Reasons did not address the exact nature of the securities held by STSL to which Titles Strata was entitled to be subrogated. Rather, the Reasons focussed upon whether the plaintiff was entitled to assume the contractual rights of STSL under the terms of the first loan agreement, in particular, the right to charge interest at the rates applicable under the first loan agreement.

8 Titles Strata submitted that the doctrine of subrogation entitles it to take advantage of any security interest of STSL, including its right to a charge over all of the property of Mr and Mrs Nirta, including the home. He relied upon the following statement of principle of Powell J in *McCull's Wholesale Pty Ltd v State Bank of New*

*South Wales.*²

... a surety who pays the debt is entitled to have assigned to him every judgment, specialty or other security which is held by the creditor in respect of the debt, whether or not at law it is deemed to have been satisfied by payment; and he is entitled to stand in the place of the creditor and use all his remedies in order to obtain indemnification from the principal debtor, or contribution from any co-surety, for advances made and losses sustained by him.

In fact, after payment of the debt, the Act operates as an implied assignment of the securities and places the surety in the position previously occupied by the creditor, albeit for the purpose of enforcing the surety's right to an indemnity. (citation of authority omitted)

9 This statement has been endorsed by White J in *Ngū v Australian and New Zealand Banking Group*³ and *Toppi and Anor v Lavin*.⁴ The above passage is relied upon in support of Title Strata's contention that it is not only entitled to assume the rights of STSL as the mortgagee of the pizza shop, but is also entitled to assume the rights of STSL as chargee under the terms of the first loan agreement.

10 Clause 11.2 of the first loan agreement provides as follows:

Charge over assets

In addition to the Borrower's other Obligations, the Borrower charges in favour of the Lender, all of its Rights, title and interest in all of its property, both real and personal and whether existing or acquired after the Agreement Date, with the repayment of the Debt and as and after the time when a default has occurred under the Loan Agreement, the Borrower consents to the Lender lodging a caveat over any of the Borrower's real property and authorises and consents to the Lender physically accessing any land where any of the Borrower's assets are located. In addition, the Borrower, as and after the time when a default has occurred under the Loan Agreement, must immediately upon request by the Lender, sign:

- (a) a mortgage over any real property of which the Borrower is a registered proprietor;
- (b) if the Borrower is a company, a fixed and floating charge over all of its assets and undertaking in favour of the Lender;
- (c) if the Borrower is a natural person, a bill of sale over any chattels of which the Borrower is the owner;
- (d) a mortgage over shares that the Borrower owns in any company; and
- (e) such other forms of security as the Lender may require in order to

² [1984] 3 NSWLR 365, 378.

³ [2013] NSWSC 1861 [25].

⁴ [2013] NSWSC 1931 [17].

secure the Debt,

and all such mortgages, fixed and floating charges, bills of sale and other forms of security, must be in the then current form of document used by the Lender, as certified by the Lender's solicitors, and will be security for the repayment of the Debt. The Lender may at its option, execute the mortgage, fixed and floating charge, bill of sale and other forms of security (as the case may require) as attorney for the Borrower.

11 There is no doubt that a charge of the nature described in clause 11.2 is a security.

In *Re Charge Card Services Pty Ltd*,⁵ Millett J stated as follows:

Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.

12 Given that the underlying objective of the doctrine of subrogation is to put the party that pays out a debt in as advantageous a position (at least with respect to the capacity to realise a security) as the original lender, then I find that Titles Strata is entitled to assume the entitlements of STSL under clause 11.2 of the first loan agreement. Accordingly, I will order that Mr and Mrs Nirta execute a mortgage over the home to secure any debt due to Titles Strata. However, I will also make orders to give effect to what is no doubt the preferred position of all parties, being that Titles Strata should only have recourse to the equity in the home to the extent that the amount owing to it under the judgment cannot be satisfied from the sale of the pizza shop.

13 Accordingly, by reason of the principles of subrogation and the terms of clause 11.2 of the first loan agreement, Titles Strata is entitled to call upon the Nirtas to execute a mortgage over the home to secure any shortfall arising from the pizza shop. The size of the shortfall will depend, of course, upon the current value of the pizza shop, and the amount which accumulates by way of interest up until the settlement of the sale of the pizza shop. The evidence at trial is that as at December 2011 the value of the pizza shop was \$725,000. One might assume that its value will have

⁵ [1987] 1 Ch 150, 176.

increased since that time, but there is no evidence as to how much. The amount of the debt owing to Titles Strata, including statutory interest, was \$879,379.02 as at 10 July 2015, accumulating at a rate of \$182.80 per day.

14 The legal costs which are in issue in this proceeding include:

- (a) Titles Strata's costs;
- (b) Mrs Nirta's costs; and
- (c) the Registrar's costs.

15 The key issue with respect to costs is whether there ought to be some reduction in the costs payable by Mrs Nirta to Titles Strata by reason of Titles Strata being unsuccessful on some of the issues at trial. The principles governing an award for costs of relevance to this application are helpfully summarised by Robson J in *GT Corporation Pty Ltd v Amare*,⁶ as follows (omitting footnotes):

1. The award of costs is in the discretion of the Court or Judge: s 24 *Supreme Court Act 1986*.
2. The discretion must be exercised judicially: *Donald Campbell & Co v Pollak; Cretazzo v Lombardi*.
3. The discretion cannot be exercised arbitrarily or capriciously and it cannot be exercised on grounds unconnected with the litigation: *Cretazzo v Lombardi*; or the circumstances leading up to the litigation: *Oshlack v Richmond City Council*.
4. Costs are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings. The order is not made to punish the unsuccessful party: *Latoudis v Casey*.
5. As a general rule, costs should follow the event, and a successful party should obtain all of the costs of the action even though it failed to establish some of the alternative heads of its claim: *Ritter v Godfrey; McFadzean v CFMBEU*.
6. Rule 63.04(1) permits the Court, in its discretion, to make an order not only as to a distinct question or issue in the pleading sense, but also to any part of the proceeding: *Woolf v Burmon; Cretazzo v Lombardi*.
7. The court may, in its discretion, decline to order costs in favour of a successful party, or may order the successful party to pay the costs of the unsuccessful party, where the plaintiff failed to establish discrete heads of claim or failed to establish issues which it pursued in its

⁶ [2008] VSC 296 [59].

claim, although ultimately succeeding on the basis of another discrete head of claim: *McFadzean v CFMBEU*.

8. It is not necessary that the issue concerned was raised unreasonably by the party: *Rosniak v GIO*. Although, a relevant consideration may include whether the issue was raised unreasonably: *Mickelberg v Western Australia*.
9. The Court may, in its discretion, make an order that is a single order, fixing what proportion of a party's costs should be paid by another party, thus obviating cross-orders or particular orders as to particular costs: *Byrns v Davie*; *McFadzean v CFMBEU*; *Nolan v Nolan*.
10. The caveat referred to by Jacobs J in *Cretazzo v Lombardi* may have less weight today than when it was decided: *Primcom Pty Ltd v Sqarioto*; *Mickelberg v Western Australia*; and *Victoria v Master Builders Association of Victoria*.

16 His Honour also noted that although the quantum of damages recovered compared to that claimed may be a relevant consideration to the Court in exercising its discretion, greater emphasis should be given to the failure or loss on discrete claims or issue and the time occupied in relation to them.

17 Counsel for Titles Strata submitted that there was no basis to depart from the ordinary rule that costs should follow the event. Titles Strata was successful in this proceeding. Counsel for Titles Strata did concede that, based upon Mrs Nirta's success on some key issues, it would not be an unreasonable outcome if the Court ordered that Mrs Nirta be entitled to set off her legal costs (such as they are) against the costs payable by her to Titles Strata.

18 The solicitors for Mrs Nirta submitted that the costs in the proceeding should reflect the ultimate successes and failures of the parties on an issue by issue basis. On balance, although Titles Strata was partially successful on its subrogation claim and in obtaining orders for sale of the pizza shop, Mrs Nirta was successful in connection with the majority of the issues before the Court, as follows:

- (a) Mrs Nirta was successful in her claim that the second loan documents were not signed by her but that her signature was forged by a third party;
- (b) Mrs Nirta and the Registrar were successful insofar as the finding that the covenant to pay Title Strata was not incorporated into the mortgage over the

pizza shop and that, as a consequence the mortgage secured nothing;

- (c) Mrs Nirta was successful in resisting the claim that Titles Strata was entitled to interest on any amount ultimately awarded at the rates in either the second agreement or pursuant to the first loan agreement and, rather, that interest is payable at the statutory rate;
- (d) Mrs Nirta was also successful insofar as it was determined that, if the findings were wrong as to the loan documents being a forgery and/or the mortgage over the pizza shop securing nothing, that the interest charged under Title Strata's loan agreement was a penalty; and
- (e) Titles Strata was partially successful in respect of its subrogation claim. However, it failed with respect to its claim for interest in accordance with the first loan agreement, and otherwise failed to make out any of its claim. In particular, the quantum of its claims was reduced significantly as a result of the findings in favour of Mrs Nirta.

19 The solicitors for Mrs Nirta submitted that Titles Strata ought to pay Mrs Nirta's costs of the proceeding on a party-party basis up to and including 31 March 2013, and thereafter on a standard basis, and otherwise bear its own costs; or, alternatively, Titles Strata ought to pay 90 per cent of Mrs Nirta's costs, and Mrs Nirta ought to pay 10 per cent of Titles Strata's costs.

20 Another issue which needs to be considered is whether, in the event that, and to the extent that Mrs Nirta is required to pay Titles Strata's costs, the amount payable in respect of those costs ought to form part of the debt which is secured by the security interests Titles Strata hold over the pizza shop and the home by reason of the principles of subrogation. Counsel for Titles Strata submitted that Titles Strata's legal costs should be treated as ancillary to its costs of enforcing its securities, and therefore ought to be secured by the pizza shop and the home, and be payable on a solicitor-client basis, consistent with the entitlements of STSL under the first loan agreement.

21 In my view, the following orders ought to be made with respect to costs:

- (a) consistent with my finding with respect to Titles Strata's entitlement to claim interest at the rates charged by STSL under the first loan agreement, there is no basis for making a special costs order in favour of Titles Strata, or making an order that the costs form part of the secured sum, because these are mere contractual entitlements. This is consistent with the approach adopted by Hargrave J in *Perpetual Trustees Ltd v Xiao* ('Xiao'),⁷ where his Honour held that where a forged registered mortgage ought to be discharged because it 'secures nothing', costs claimable by the lender under the underlying loan agreement could not be secured;⁸
- (b) Titles Strata should only be entitled to recover half of the costs incurred by it after 25 March 2014, being the date it received the letter from the solicitor for the Registrar annexed to the Registrar's submissions, and some 11 days after the forensic handwriting report commissioned by it was finalised;
- (c) Mrs Nirta is entitled to set off her legal costs against any legal costs awarded to Titles Strata; and
- (d) Mrs Nirta ought to pay the Registrar's costs of the counterclaim, but Titles Strata should indemnify Mrs Nirta for those legal costs.

22 The basis upon which I have determined Titles Strata's entitlement to costs is as follows:

- (a) there ought to be some apportionment of costs on an issue basis, but I do not accept the submissions made on Mrs Nirta's behalf as to how to do so. Both parties were in fierce agreement that if there were to be any apportionment, on an issues basis, it ought to be expressed as a percentage of total costs, rather than leaving the apportionment exercise to the Costs Court. I also agree with that approach;

⁷ [2015] VSC 21.

⁸ See the transcript of the hearing on 24 February 2015, T20-29.

- (b) Titles Strata was entitled to bring the proceeding to recover the money it had paid out, and, on the basis of the evidence available to it at the time, in particular, the sworn evidence of Mr Blackney, to defend the application to set aside the default judgment against Mrs Nirta;
- (c) however, by 25 March 2014, it was on notice of the following matters: the evidence of its own handwriting expert regarding the issue of whether Mrs Nirta's signature on the mortgage over the pizza shop and the second loan agreement had been forged was equivocal at best, and that the Registrar would contend that the mortgage over the pizza shop was not protected by the principles of indefeasibility;
- (d) notwithstanding the above, and the fact that its subrogated claim was almost certainly likely to succeed, Titles Strata fought the trial on all issues, which in my view substantially prolonged the trial. The trial ran for six days, albeit not six full sitting days, and I estimate that substantially more than half of the trial time was taken up by issues upon which Titles Strata was ultimately unsuccessful, in particular, the question of whether Mrs Nirta's signatures on the second loan documents were forged;
- (e) there was a substantial reduction in the quantum of the sum awarded to Titles Strata compared with the amount claimed by it, largely by reason of its failure to make good its claim for interest. That is, its failure on a number of issues made a material difference to the ultimate result.

23 I accept that, given that the state of the law regarding the enforceability of the mortgage was, at the time of the trial, unsettled (and, indeed, it at least arguably remains so), Titles Strata was entitled to contest this question at trial. However, it did not succeed, and I note that in the Reasons I observed that, given the absence of any Memorandum of Common Provisions, Titles Strata would have been unlikely to succeed on this issue even if I had adopted the more beneficial approach to

construction offered by Pagone J in *Solak v Bank of Western Australia Ltd* ('*Solak*').⁹ If Titles Strata had chosen not to contest the issue of forgery, and the enforceability of the mortgage, all that would have been in contest would have been the extent to which Titles Strata was entitled to stand in the shoes of STSL, particularly with respect to the charging of interest and its rights to a charge over all of the assets of Mr and Mrs Nirta, and the Registrar would not have needed to participate in the proceeding. Such a trial would have been of very short compass indeed.

24 As for Mrs Nirta's costs, she was successful in making out the main thrust of her defence, being that her signatures on the second loan agreement and associated mortgages were forged. She conceded during the course of the trial that Titles Strata was entitled to be repaid the funds advanced by it. Further, I am conscious that given the stage of the proceeding at which her former solicitors ceased to act, a substantial proportion of the costs incurred by her are likely to have been incurred in making the application to set aside the default judgment, which were reserved, and should, given the ultimate outcome at trial, follow the event.

25 Turning to the position of the Registrar, he is entitled to judgment in his favour on the counterclaim, and thus is entitled to an order that Mrs Nirta pay his costs by reason of the terms of s 110(5) of the *Transfer of Land Act 1958* (Vic) ('TLA'). The question is whether I ought order that these costs, which I am informed are largely the costs incurred in briefing counsel for trial, be the subject of an order that Titles Strata indemnify Mrs Nirta for these costs. Counsel for the Registrar also welcomed the suggestion by the solicitor for Mrs Nirta that these costs be paid, in the first instance, from the proceeds of sale of the pizza shop, and that, in effect, Titles Strata account to Mrs Nirta for those costs.

26 The Registrar relied upon the following matters in support of its contention that Titles Strata indemnify Mrs Nirta for the Registrar's costs of defending Mrs Nirta's counterclaim:

⁹ [2009] VSC 82.

- (a) Titles Strata was on notice that the indefeasibility provisions of the TLA would not apply where the underlying loan agreement was not incorporated into the registered mortgage;
- (b) Titles Strata's reliance on the doctrine of indefeasibility in the event that the registered mortgage was forged was almost certain to fail due to the fact that there was no concomitant Memorandum of Common Provisions retained by the Registrar;
- (c) Titles Strata should have expected that Mrs Nirta would seek indemnity from the Registrar as part of this proceeding given the allegations made by Mrs Nirta;
- (d) the costs decision of Hargrave J in *Xiao*,¹⁰ where his Honour ordered the plaintiff to pay the Registrar's costs, even though the Registrar had been joined by way of counterclaim by the registered proprietor, is sufficiently analogous to the present case, and should be followed. The mortgage documentation in *Xiao* was an 'all monies' clause and was thus comparable to the position in *Solak*¹¹ which Hargrave J declined to follow; and
- (e) in *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* ('*Kheirs*'),¹² the Court of Appeal discussed the principles applicable to the discretion to award costs where a third party claim is dismissed because the plaintiff's claim against the defendant has failed, noting that an order for the plaintiff to pay the defendant's costs may include the defendant's liability to pay the third party's costs of the third party proceeding. These principles should also apply where a defendant's counterclaim fails because the relevant plaintiff's claim that resulted in the commencement of the counterclaim has not succeeded.

¹⁰ The Court of Appeal refused leave to appeal on 27 May 2015 (shortly after publication of the Reasons).

¹¹ [2009] VSC 82.

¹² (2010) 31 VR 46.

- 27 Titles Strata opposed the orders sought by the Registrar on the basis that:
- (a) Mrs Nirta elected to join the Registrar even though she had no defence to Titles Strata's alternative claim based upon subrogation, and would always be held liable for the principal debt, even if there was a finding that her signatures on the second loan documents had been forged;
 - (b) Titles Strata is just as much a victim of fraud as Mrs Nirta;
 - (c) the Registrar had his own interests to pursue in this proceeding, being his view of the law regarding the enforceability of registered 'all monies' mortgages in circumstances where the underlying loan agreement was forged, because the decision of Pagone J in *Solak* was disadvantageous to the Registrar in that it exposed the Registrar to more claims under s 110 of the TLA; and
 - (d) the circumstances of the current case are different from those applicable in *Xiao* where orders substantially in the form sought by the Registrar were made.

28 I agree with counsel for the Registrar that the analysis in *Kheirs* is applicable to the current case. In *Kheirs*,¹³ the Court of Appeal stated as follows:

The following principles can be derived from these authorities:

- (1) The usual rule as to costs applies to proceedings as between defendant and third party, the 'event' being the success or failure of the defendant's claim against the third party.
- (2) Where the third party claim is dismissed because the plaintiff's claim against the defendant fails, the defendant will ordinarily be liable for the third party's costs of the third party proceeding.
- (3) The award of costs remains a matter of discretion, however, and there may be circumstances of the case which justify a departure from the usual rule.
- (4) In deciding (in a case of the kind referred to in (2)) whether any departure from the usual rule is warranted, the Court will ordinarily need to consider at least the following matters:

¹³ At [28].

- the reasonableness of the defendant's decision to join the third party;
- whether the joinder of the third party was reasonably foreseeable by the plaintiff, such that the plaintiff might be viewed as having some responsibility for the costs of the third party proceeding. (An order for the plaintiff to pay the defendant's costs may thus include the defendant's liability to pay the third party's costs of the third party proceeding.);
- the responsibility of the plaintiff, defendant and third party, respectively, for the time taken up in the hearing of the third party proceeding.

29 In the current case, the Registrar was successful in defending the counterclaim brought against it by Mrs Nirta because Titles Strata failed to establish that the mortgage over the pizza shop was protected by the principles of indefeasibility, first because Mrs Nirta was successful in her contentions that her signature on the second loan documents were forged, and secondly, Titles Strata failed to establish that the registered mortgage secured the funds paid out by it (largely owing to the submissions made on behalf of the Registrar).

30 I cannot see how the circumstances of the current case are materially different from *Xiao*, at least insofar as the position of the Registrar is concerned. As in the current case, there were allegations made that the mortgages relied upon by the plaintiffs were forged, and both the lender and the borrower in *Xiao* were victims of fraud. Given the defence propounded by Mrs Nirta in the proceeding, that is, that her signatures on the second loan agreements were forged, it was entirely reasonable, and foreseeable, that she would join the Registrar to the proceeding. While at the time of the trial the only Victorian authority concerning the incorporation point was *Solak*, it is apparent from the range of intermediate appellate decisions referred to by the Registrar in his submissions at trial that *Solak* might well be regarded as an 'outlier' decision, and had been expressly referred to with disapproval by the New Zealand Court of Appeal.¹⁴ Some reservations regarding the correctness of the approach in *Solak* had also been expressed by the Court of Appeal in an interlocutory

¹⁴ *Westpac v Clark* [2000] 1 NZLR 82.

appeal in *Xiao*.¹⁵

31 The fact that the Registrar might have his own institutional interests in litigating the *Solak* point is not, in my view, a relevant consideration in determining the question of costs. Certainly, the decision in this proceeding and in *Xiao* may have the indirect effect of reducing the number and value of successful claims under s 110 of the TLA, but perhaps not until the question is finally resolved by the Court of Appeal or the High Court. However, the fact that a litigant may have its own broader commercial interests, or the interests of the taxpayer in mind in prompting the development of or the interpretation of the law in a particular direction does not, of itself, disentitle a successful litigant of costs which would otherwise be ordered in its favour.

32 Counsel for the Registrar expressed some concern that the terms of s 110(5) of the TLA precluded me making an order in the terms made in *Xiao*, being that the plaintiff pay the Registrar's costs of the proceeding directly. This concern may be overcome by making orders directing that upon crystallisation of the liability of Mrs Nirta to the Registrar in respect of costs, the plaintiff pay to Mrs Nirta's solicitors an equivalent amount to enable her to satisfy the costs order in favour of the Registrar.

33 Upon reflection, while attractive in some respects, I do not propose to make orders that the Registrar's costs be paid out of the proceeds of sale of the pizza shop. It is in the interests of the main parties that the pizza shop be sold and the proceeds of sale be applied to the outstanding debt as soon as possible. There is nothing to suggest that Titles Strata would be unable to satisfy any costs order made against it from its own funds. The evidence is that it operates a continuing business, and it has been able to fund the costs of this proceeding.

34 As for the terms of the orders to be made, I do not find it necessary to deal with the question of whether I should make declarations with respect to the mortgages over the pizza shop and the home in general terms, or referable to Mrs Nirta's interest

¹⁵ [2012] VSCA 316 [78].

alone. The Registrar submits that I should not make orders dealing with Mrs Nirta's interest alone, on the basis that such an order would be ineffective given that Mr and Mrs Nirta are joint tenants of both properties. In any event, there is no practical basis for making any differentiation, in that orders will be made for the sale of the pizza shop, the application of the proceeds of sale, and for the Nirtas to execute a mortgage over the home.

35 Finally, draft orders have been circulated, taking into account the helpful suggestions of the parties to make the necessary declarations and orders to give effect to the Reasons.

SCHEDULE OF PARTIES

TITLES STRATA MANAGEMENT PTY LTD (ABN 32001119331) Plaintiff

FRANK NIRTA First Defendant

LUISA NIRTA Second Defendant

AND BETWEEN

LUISA NIRTA Plaintiff by Counterclaim

TITLES STRATA MANAGEMENT PTY LTD (ABN 32001119331) First Defendant by Counterclaim

REGISTRAR OF TITLES Second Defendant by Counterclaim