

RESERVED JUDGMENT OF P.COURTNEY J AS TO COSTS : High Court of New Zealand. Auckland Registry. 3rd July 2006.

- [1] I have reviewed the memorandum of counsel in respect of costs. The first defendant does not seek costs. The fourth defendant does seek costs on the basis that they should follow the event in this case. The plaintiff resists this claim for costs on the following grounds:
- a) The fourth defendant succeeded on a technical point whereas Mr Dustin was vindicated on the substantive issue;
 - b) On a proper interpretation of the Building Act 1991 the plaintiff should not have been joined into the WHRS claim but is now trapped in the claim because the adjudicator was bound by the decision in **Cromwell Plumbing Drainage & Services Ltd v De Geest Bros Construction Limited** (1995) 9 PRNZ 218 which (on my view) was wrongly decided. The plaintiff is suffering a substantial injustice as a result;
 - c) There were no disputed facts;
 - d) The fourth defendant did not serve the plaintiff with a statement of defence and did not give any advance notice of its argument based on *stare decisis*. The first indication that the plaintiff had of this argument was on receipt of written submissions the day before the hearing, as a result of which plaintiff's counsel was unable to deal with that argument in his written submissions and may have approached the hearing differently.
- [2] I have some sympathy with Mr Dustin's position. I am in no doubt that, save for the binding effect of the **Cromwell Plumbing** decision, Mr Dustin would not be a party to the WHRS claim. Argument on this point took up dominated the hearing. The *stare decisis* argument advanced by the fourth defendant had the appearance of a last minute thought. It was not referred to in the statement of defence. It was not alluded to any earlier discussions between counsel, including when an interim order staying the WHRS claim was made by consent. The fourth defendant's written submissions, filed the day before the hearing, devoted just single paragraph to this part of its argument. In argument, there was no authority cited and no real attempt to elaborate on the rather sparse written submissions.
- [3] It seems clear to me that both the plaintiff and fourth defendant proceeded on the basis that the main issue between them was whether *Cromwell Plumbing* was correctly decided. Had the fourth defendant raised the argument that there had been no error of law at an earlier stage it seems likely that Mr Dustin may have taken a different approach. I consider that any costs incurred by the fourth defendant in relation to this hearing were incurred at least in good part because of the late identification of the issue on which it ultimately succeeded.
- [4] Under Rule 48D the Court may refuse to make an order for costs in certain circumstances. These include:
- 48D(d). Although the party claiming costs has succeeded overall, that party has failed in relation to a cause of action or issue which significantly increases the costs of the party opposing the costs; and
 - 48D(f). Some other reason exists which justifies the Court refusing costs or reducing costs despite the principle that determination of costs should be predictable and expeditious.
- [5] I consider that both these subsections apply and I decline to award costs in this case.

S R G Judd for Plaintiff instructed by *Davies Law*,
J A L Oliver for First Defendant instructed by *Crown Law Office*,
P A Robertson for Fourth Defendant instructed by *Heaney & Co*