**John Everest & Heidi Borner v Robin Schwass Construction Ltd, Christopher Robin Schwass, QB Insurance (International) Ltd, Vero Liability Insurance Ltd, Masterbuild Services Ltd & AHI Roofing Ltd.**

**JUDGMENT AS TO COSTS OF ASSOCIATE JUDGE D.I. GENDALL :** High Court. New Zealand. Auckland. 30th November 2005.

[1] In a judgment I gave in this matter on 28 September 2005, I dismissed the second defendant's application for summary judgment, reserved costs, and invited counsel to provide memoranda as to costs,

[2] The issue of costs has not been agreed. Counsel for the plaintiffs has filed memoranda as to costs on 19 October 2005 and 31 October 2005.

[3] Counsel for the second defendant has filed his memorandum on 26 October 2005.

[4] I now deal with the costs question on the basis of the memoranda that have been filed.

[5] In his 19 October 2005 Memorandum, counsel for the plaintiffs, noting that the plaintiff has been successful in opposing the defendant's application, seeks an award of increased costs of $17,400.00 equating to actual costs incurred by the plaintiff, plus disbursements. A detailed breakdown of this calculation has been provided.

[6] This is opposed by the second defendant, who contends that costs should be reserved to be set at trial by the Trial Judge.

[7] Rule 48E High Court Rules provides that unless there are special reasons to the contrary, costs on an opposed interlocutory application are to be fixed when the application is determined, and are to be payable at that time.

[8] Rule 48E(3) states, however:

(3) This rule does not apply to an application for summary judgment.

[9] In the commentary under Rule 142.7 Sims High Court Practice states:

**HCR142.7 Costs**

*Rule 48E provides an exception in the case of summary judgments to the usual rule that the costs of an opposed interlocutory application should be fixed when the application is determined. When the application is successful and this is a final determination of the proceeding, it is appropriate to award costs to the successful plaintiff. See RR 46-48B and the Second and Third Schedules, and the commentary to R 48E.*

In ***NZI Bank Ltd v Philpott*** [1990] 2 NZLR 403 (CA), the Court of Appeal held that, if the plaintiff is unsuccessful in its application for summary judgment, the usual course is for costs to be reserved. However, where proceedings have been embarked upon erroneously or in full knowledge of a bona fide defence, costs may be awarded against the unsuccessful plaintiff, ***DB Breweries Ltd v Hsu*** (High Court Auckland, CP401/01, 1 March 2002, Nicholson J). See also ***Air Nelson Ltd v Airways Corporation of NZ Ltd*** (1992) 6 PRNZ 1 (CA).

Where the defendant's opposition to summary judgment is wholly unmeritorious it may be appropriate to award costs exceeding a "reasonable contribution": ***Trans Tasman Properties Ltd v Holruden Horrocks*** (High Court Auckland, CP300/97, CP819/91, 11 September 1997, Master Kennedy-Grant).

Where the defendant's application for summary judgment against the plaintiff is opportunistic and fails to comply with the principles applicable to such applications, the Court is likely to award costs and may in appropriate cases award solicitor and client costs: Bernard v Space 2000 Ltd (Court of Appeal, CA232/00, 5 July 2001); ***Eady v Dunsford*** (High Court Auckland, CP501/99, 10 May 2001, Master Faire).

In **Radio Tarana (NZ) Ltd v Moir** (High Court Auckland, CP152/02, 15 November 2002) O'Regan J refused to award costs after dismissing an application for summary judgment because the poor state of evidence presented by the party opposing judgment contributed to the other party believing the summary judgment was available.

[10] Heath J. in ***Wallace Corporation Ltd v International Marketing Corporation Ltd*** (HC AK, unreported, CIV-2003-404-7227, 28 February 2005) a case involving a plaintiff's unsuccessful application for summary judgment, discussed the NZI Bank Limited decision of the Court of Appeal as confirming the normal practice to reserve costs on summary judgment applications by plaintiffs, but then went on to state at paragraph (14) of his judgment:

*Nothing I say is intended to apply to a defendant's application for summary judgment for which different considerations are relevant.*

[11] Heath J. did not elaborate on this comment in his judgment.

[12] Subsequently, the issue of costs on a partially successful defendant's summary judgment application came up for determination in ***Hornell Industries Limited v Automated Sheetmetal Technologies Limited and Ors*** (HC AK, unreported, CIV-2004-4004-4141, 15 June 2005, Associate Judge Sargisson). In that case the Associate Judge, albeit with limited discussion on the point, found it appropriate to follow the normal rule in NZI Bank Limited and order that costs on the defendant's summary judgment application be reserved for trial.

[13] A different conclusion was reached, however, in **Eady v Dunsford Marine Limited** (HC AK, 10 May 2001, CP501 SD99) Master Faire. There, in a situation where the defendant withdrew applications for summary judgment against the plaintiff, but not until the date allocated for their hearing, an award of costs in favour of the plaintiff was made.

[14] And, in ***Bernard v Space 2000 Limited*** (CA232/00, 5 July 2001) the Court of Appeal said at paragraph 39:

> *39. This Court in **Kembla** rightly discouraged opportunistic applications by defendants pursuant to Rule 136(2). Where such applications fail to comply with the principles which have been identified, defendants can expect short shrift from the Court. In appropriate cases solicitor and client costs may be awarded to the plaintiff to offset the unnecessary costs which will have been incurred.*

[15] In the present case, counsel for the plaintiffs in seeking costs, and at an indemnity level, submitted that the second defendant's application for summary judgment lacked merit, was unnecessary and should never have been brought.

[16] Counsel provided to me a range of Calderbank-type correspondence between the plaintiffs' solicitors and the defendants' solicitors both before the summary judgment application was filed, and again before the hearing. In this correspondence counsel for the plaintiff indicated that the outcome of the defendant's proposed summary judgment application was inevitable in that it must fail and that his case for summary judgment lacked any merit.

[17] These letters from the plaintiffs' solicitors were dated 16 June 2005, 17 June 2005 and 4 August 2005. The responses from counsel for the second defendant were dated 30 May 2005, 16 June 2005 and 11 August 2005.

[18] The letters noted in the preceding paragraph were all marked "without prejudice save as to costs" and relate generally to Rule 48G High Court Rules which broadly recognises in the rules Calderbank offers.

[19] Rule 48GA states in part:

> *(1) The effect (if any) that the making of an offer under rule 48G has on the question of costs is at the discretion of the Court.*

[20] It is clear that Rule 48G encourages settlement negotiations and offers by giving the Court a discretion to impose appropriate costs consequences - ***McDonald v FAI (NZ) General Insurance Co. Ltd*** (1998) 11PRNZ 531.

[21] This correspondence, in my view is quite significant here. The general approach by the second defendant in this correspondence, as I see it, relies very much on one earlier decision of this Court. As to this, the letter of 30 May 2005 from the second defendant's solicitor states:

> *It seems to me that my client's position is entirely similar to that of the defendant in Drillien v Tubberty & Ors ... In that case the defendant was successful in obtaining defendant's summary judgment against the plaintiff.*

[22] The plaintiffs' response communicated in this correspondence is broadly to the effect that the Drillien decision was distinguishable from the facts of the present case, given the personal involvement of the second defendant here in all areas of the construction and repair process which resulted in the defects, and also his assumption of personal responsibility. Further, counsel for the plaintiffs noted that the second defendant's summary judgment application was entirely unsuitable here, given what was likely to be disputed facts and evidence.

[23] When asked by counsel for the second defendant to provide that evidence to establish that the Drillien case was distinguishable from the present circumstances, counsel for the plaintiffs in his 17 June 2005 letter set out in some detail four matters to justify this, and attached supporting correspondence from James Hardie New Zealand Limited and from the first defendant company. This drew no response from counsel for the second defendant. The second defendant simply filed this summary judgment application.

[24] Subsequently, on 4 August 2005 counsel for the plaintiffs in a further "without prejudice save as to costs" letter suggested that the second defendant's summary judgment application should at the very least be adjourned, given that, as counsel noted in that letter:

> *... as discussed on Friday our clients will now pursue Masterbuild Services for the full amount of repairs, general damages and costs under the Masterbuild Services guarantee transferred to them by your client (now that it is apparent that this is an unlimited guarantee). It is likely that the claim between the plaintiffs and Masterbuild Services will be stayed to arbitration. In that instance our clients propose that the High Court proceedings with the remaining parties be adjourned pending resolution of the arbitration proceeding. If our clients recover the full amount of their losses from Masterbuild Services then we expect their instructions will be to negotiate settlement with the other parties involved in the High Court proceedings on a walk away basis with each party bearing their own costs.*
>
> And
>
> *We would seek an adjournment of the summary judgment application and the High Court proceedings pending disposal of the arbitration proceeding with any party reserved leave to bring the High Court matter back before the Court upon two weeks notice.*

[25] The response from counsel for the second defendant was simply to indicate that the second defendant was proceeding with this application, and would seek costs. As to that issue of costs, in his earlier letter dated 30 May 2005 counsel for the second defendant had stated:

> *I anticipate that it will cost in the order of $15,000 to prepare and argue the (summary judgment) application and if this is necessary our client will seek increased costs on the basis of this open letter.*

[26] As I have noted, in my view, this correspondence between counsel for the respective parties is significant.

[27] Turning to my judgment dated 28 September 2005, in that judgment I noted at paragraph [48]:

*...the conclusion (is) that these types of action are generally unsuitable for summary judgment.*

[28] And, throughout that judgment I made it clear that the present case involved a range of evidential matters which certainly would be the subject of considerable dispute at trial. The enquiry as to whether a duty of care was owed by the second defendant and whether it may have been breached would require thorough analysis and testing of these contested facts, and therefore it needed the benefit of a full trial.

[29] That said, and given the need in a defended summary judgment application for the defendant to overcome the significant burden of establishing that none of the plaintiffs' causes of action could succeed, I am satisfied here that in the sense mentioned in Bernard v Space 2000 Limited and Kembla, the present application by the defendant under Rule 136(2) should be seen as simply opportunistic and erroneously brought.

[30] The plaintiffs' through their solicitor made a number of Calderbank offers in correspondence to the second defendant. They invited him specifically to withdraw the summary judgment application, or to adjourn it pending separate determination of issues with Masterbuild Services, should Masterbuild's claim be stayed to arbitration. Clear statements were made by counsel for the plaintiffs that a summary judgment application from the defendant was inappropriate here. Reference was made by the plaintiffs first to facts later disputed by the second defendant which suggested personal involvement or personal responsibility by the second defendant in this matter, and secondly to a range of authorities where applications of the type threatened by the second defendant were declined, and costs orders made.

[31] Notwithstanding this, and in the face of clear warnings from the plaintiffs' solicitor, the second defendant chose to proceed with his summary judgment application.

[32] Counsel for the plaintiff seemed to rely almost entirely on the decision in ***Drillien v Tubberty and Ors*** (HC AK, unreported, CIV-2004-404-2873, 15 February 2005, Associate Judge Faire). On the facts prevailing in that case, the Court found that there was no direct personal involvement by the defendant director to the extent necessary to establish a duty of care, and therefore the defendant director's summary judgment application succeeded.

[33] But the facts here pointed out in counsel for the plaintiffs' Calderbank correspondence were different to those in Drillien. And the references in that correspondence to the opposite conclusions reached in the decisions in Maddren, Carter and Banfield should have alerted the second defendant to the inappropriateness of a summary judgment application here.

[34] As I see it, therefore, it is appropriate here for costs to be awarded now against the unsuccessful second defendant. The costs incurred by the plaintiffs in opposing this summary judgment application should not have been necessary. In my view, this is an appropriate case for increased costs approaching solicitor and client costs to be awarded to the plaintiff - ***Bernard v Space 2000; Kembla,*** and Rule 48C High Court Rules

[35] I say this mindful, too, of the "warning" issued by the second defendant to the plaintiffs in his solicitor's letter of 30 May 2005 (noted at paragraph [25] above) that his costs on bringing a summary judgment application would be "in the order of $15,000" and he would be seeking "increased costs" on this basis unless proceedings against the second defendant were withdrawn within seven days.

[36] The plaintiffs seek total costs here of $17,400 calculated on the basis of twelve days preparation at a category 2 daily recovery rate of $1,450.

[37] The hearing here occupied half a day. In my view, the plaintiffs' claim for $17,400 as a reasonable contribution to costs is on the high side.

[38] Noting my comments at paragraph [35] above, I am satisfied that costs of $15,000 are appropriate here.

[39] Costs of $15,000 are therefore awarded to the plaintiffs against the second defendant, together with an amount for disbursements to be agreed between the parties.

[40] Leave is reserved for either party to approach the Court further if there is any disagreement or issue concerning the quantum of disbursements sought by the plaintiffs.

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