

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2006-485-1824**

BETWEEN                      CHIU CHUI-I, TIEN CHUNG CHING,  
LIN CHE-WEN, LIN YEOU-LUNG, LIN  
CHAO TANG, CHEN TANG "BY HIS  
LITIGATION GUARDIAN" CHIU MEI  
CHEN, HO SUEI LAI, YANG PEI CHI  
Plaintiffs

AND                              TANG SHUO DEVELOPMENT CO  
LIMITED  
First Defendant

AND                              KENSINGTON SWAN  
Second Defendant

Judgment:    30 September 2009 at 3.00 pm

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**JUDGMENT AS TO COSTS  
OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment was delivered by Associate Judge Gendall on 30 September 2009  
at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.*

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## **Introduction**

[1] On 27 August 2009, four of the plaintiffs in this proceeding Chiu Chui-I, Lin Che Win, Lin Yeou-Lung and Chen Tang the first, third, fourth and sixth plaintiffs respectively (“the applicants”), were granted leave to issue summary judgment proceedings, and were also granted summary judgment, against the first defendant, Tang Shuo Development Co Limited (“Tang”) by consent.

[2] The applicants now seek indemnity costs or, in the alternative, increased costs against Tang.

## **Facts and Background**

[3] The applicants were part of a group of eight plaintiffs who sought summary judgment against the first defendant with respect to debts that were alleged to be owing to the plaintiffs as shareholders of Tang, the first defendant company.

[4] On 15 July 2008, counsel for the plaintiffs sent a settlement offer to Tang’s solicitor, demanding the sums of \$60,000.00 and \$70,0000.00 plus interest and costs in respect of each applicant plaintiff. The letter stated that the plaintiffs were willing to accept a payment of \$190,000.00 per shareholder and a payment towards their costs of \$15,000.00. The offer was rejected.

[5] On 4 September 2008 I granted summary judgment to the eighth named plaintiff, Mr Yang Pei Chi. I declined the applications for summary judgment, however, by the first, second, third, fourth, fifth, sixth and seventh plaintiffs on the basis that I was unable on those applications to determine the accuracy and authenticity of contested share documents. The order was for the sum of \$70,000.00 together with pro rata interest from 18 September 2000 to the date of final payment and for the sum of \$60,000.000 together with pro rata interest earned on this from 28 March 2002 to the date of final payment.

[6] The second, fifth and seventh plaintiffs subsequently appealed to the Court of Appeal against the refusal of summary judgment. The appeal was granted by consent

on 21 May 2009, and the Court awarded costs to those appellants on the basis of one quarter of the category 2 C rate for costs in the High Court and usual disbursements.

[7] This appeal was granted on condition that the appellants would file an undertaking to the first defendant that, in the event it was established that the share certificates were a forgery or otherwise false, the sum of money they had received from Tang was to be repaid with interest. In addition, the appellants were to file affidavits deposing that they had sufficient assets to support the undertaking.

[8] The Court of Appeal noted that the contentions of the appellants were unanswerable unless the defendant could prove that they had been party to a forgery or were otherwise involved in the creation of a false document, and that all other issues had been disposed of satisfactorily by the evidence before the High Court.

[9] With respect to the remaining four plaintiffs, the applicants here, the Court recorded that there was a possibility of consent being reached, and reserved leave to those plaintiffs to apply to the Court for extension of time to appeal and for like orders to be made. The leave did not extend to applications which were not the subject of consent.

[10] At [8] of its 21 May 2009 decision, the Court of Appeal emphasised that any further delays in achieving resolution, for which there was no substantial justification, would be viewed seriously by the Courts, which might order increased or indemnity costs against those responsible.

[11] On the same day as the Court of Appeal's decision, counsel for the plaintiffs sought the consent of the first defendant to an application for leave to appeal out of time by the remaining plaintiffs, and to the appeal being granted on the same terms and conditions as the previous appeal. The first defendant however it seems was unwilling to consent to the appeal on those terms.

[12] Counsel for the plaintiffs in a letter dated 23 June 2009 again proposed to settle the matter on the same terms as in the Court of Appeal. Tang did not respond to the letter.

[13] On 14 July 2009, I made an order for costs in favour of the eighth plaintiff, which, in accordance with the costs award by the Court of Appeal, amounted to a one quarter share of the total Category 2C costs and disbursements incurred by the plaintiffs in the proceeding to that date. The total costs and disbursements amounted to \$62,560.00 and \$5,016.00 respectively. Accordingly, the eighth plaintiff's one quarter share was \$15,640.00 for costs and \$1,254.00 for disbursements.

[14] Then, in a hearing before me on 27 August 2009, the applicants, being the first, third, fourth and sixth plaintiffs applied for leave to issue summary judgment proceedings and for summary judgment against the first defendant, Tang. Tang did not file a notice of opposition.

[15] Both the applications for leave and for summary judgment were finally granted to the applicant plaintiffs by consent. I made orders accordingly, granting summary judgment to the applicant plaintiffs against Tang in terms of their summary judgment application filed 29 July 2009 as follows:

(a) In the sum of \$70,000.00 payable from 18 September 2000;

(b) Interest on the sum of \$70,000.00 as specified in the judgment of 4 September 2008 from 18 September 2000;

(c) In the sum of \$60,000.00;

(d) Interest on the sum of \$60,000.00 as specified in the judgment of 4 September 2008 from 28 March 2002.

[16] On the question of costs, I reserved my decision and directed the parties to file and serve memoranda. Counsel for the applicant plaintiffs has done so. The first defendant and its counsel, however, have failed to do so. I therefore proceed on the basis of the material before the Court and the plaintiffs' submissions.

## **Counsel's Submissions and My Decision**

[17] The applicants seek costs arising from both the first and the second application for summary judgment. As outlined previously, the first application has already been the subject of costs awards. A proportion of total costs of \$62,560.00 and disbursements of \$5,016.00 for that first application were awarded as I have noted at para. [13] above and at paras. [5] and [8] of my earlier 14 July 2009 costs judgment in favour of the eighth plaintiff. The applicants say that the previous awards may not have provided for all recoverable costs but I cannot see any material before the Court to justify this contention.

[18] The applicants submit that, given the earlier costs decisions in these proceedings, the appropriate approach is to set all costs here at category 2C. This is no doubt true with respect to costs arising from the first application. I am not satisfied, however, that the second summary judgment application would have required a similarly large amount of time. Instead, category 2 B appears to me to be a more appropriate time band for that application.

[19] Returning to the issue of costs on the first application for summary judgment, total costs of \$62,560.00 and disbursements of \$5,016.00 have already been established and accepted by this Court and one quarter shares of these have been ordered in favour of the eighth plaintiff on the one hand and in favour of the second, fifth and seventh plaintiffs on the other. It is appropriate here for an order for the remaining one-half of these costs and disbursements to be made in favour of the applicant plaintiffs. An order to this effect is to follow.

[20] Turning now to the issue of costs on the second application for summary judgment the applicants seek indemnity, or alternatively increased, costs on this application on the basis that Tang should have informed the Court or the applicants that it would consent to judgment when, following the Court of Appeal decision, it was aware that the applicants were intending to apply for summary judgment. It is argued that there was nothing in reality to distinguish the applicants' case from that of the three successful appellants in the Court of Appeal, and that Tang's actions caused undue prolongation of the case. The applicants further submit that they made

their position clear, seeking payment on the same terms as in the Court of Appeal, and that Tang acted frivolously and unnecessarily in defending the matter.

[21] The applicants also appear to claim indemnity costs with respect to the first application on the basis of what was said to be a settlement offer that was sent on 15 July 2008, but this was not seen as significant when the initial costs orders noted at paras. [13] and [17] above were made.

[22] The situations in which indemnity costs may be awarded are outlined in r 14.6 of the High Court Rules, which provides as follows:

“14.6 Increased costs and indemnity costs

...

(4) The court may order a party to pay indemnity costs if—

- (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
- (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or
- (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
- (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or
- (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
- (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.”

[23] The plaintiffs submit that Tang’s conduct here must be placed within para (a) of r 14.6(4).

[24] Claims for indemnity costs however will only succeed in rare cases, “generally entailing breach of confidence or flagrant misconduct”: *Prebble v Awatere Huata* (No 2) [2005] 2 NZLR 467 at [6]. Accordingly, indemnity costs are not to be awarded in cases of mere unreasonableness, but require exceptionally and distinctly bad behaviour: *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR

400 at [26] and [28]. A high threshold must be passed before an order for indemnity costs is made – *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188. “Truly exceptional circumstances” are required – Goddard J. in *Hedley v Kiwi Co-operative Davies Ltd* (2002) 16 PRNZ 694.

[25] In my view, the case before me does not fall within this category. Tang’s preparedness to consent to the previous appeal being granted cannot as such be taken to mean that it acted vexatiously or frivolously in resisting settlement with the applicants as the remaining four plaintiffs. The Court of Appeal acknowledged that the appellants’ case before them was unanswerable as long as Tang could not prove that the appellants had been party to a forgery or had been otherwise involved in the creation of a false document. Although it is likely that Tang was motivated to consent to the appeal by its inability to prove such matters, I do not think that indemnity costs can be awarded on that basis.

[26] Moreover, Tang did not in fact defend the applicants’ second application for summary judgment, which prevented further delays and costs being incurred. Its failure to consent to the appeal being granted, or to otherwise agree to settlement of the matter on the same or similar terms, can hardly amount to “flagrant misconduct” in light of its later decision not to oppose the applicants’ second summary judgment application.

[27] It follows that, in the present circumstances, I am not satisfied that Tang’s refusal to settle the proceeding warrants an award of indemnity costs being made against it.

[28] Different considerations apply, however, with respect to the applicants’ alternative claim for increased costs. I refer again to r 14.6 of the High Court Rules, which provides as follows in relevant parts:

“14.6 Increased costs and indemnity costs

...

(3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

- (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
  - (i) failing to comply with these rules or with a direction of the court; or
  - (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
  - (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
  - (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
  - (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
- ...
- (c) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.”

[29] As noted previously, the applicants made several offers to Tang effectively to settle the matters which were the subject of the application for summary judgment before this Court. It is clear that such offers of settlement can form the basis of an order for increased costs if the party opposing costs fails to accept the offer without reasonable justification: r 14.6(3)(b)(v). Given that the applicants’ offers of 21 May 2009 and 23 June 2009 were on the same or similar terms as the summary judgment orders that were finally made by consent, I am satisfied that Tang’s refusal to accept the offers contributed unnecessarily to the time and expense of the proceeding: see r 14.11(3)(b). Had Tang accepted the offer, the applicants would not have been required, for the second time, to apply for leave to issue summary judgment procedures and to seek summary judgment.

[30] I note also the Court of Appeal’s warning in [8] of its decision that a failure to achieve resolution, for which there was no substantial justification, would be viewed seriously by the Courts. In my view, considering Tang’s willingness to consent to the appeal in relation to what were substantively similar claims, it was unreasonable for Tang to insist on effectively opposing the applicants’ claims until a



second set of summary proceedings were issued. I therefore conclude that an order for increased costs for the period following 21 May 2009 is justified.

[31] It is generally accepted that, following categorisation of the proceeding under rr 14.3 and 14.5, any increase in costs so calculated will rarely be above 50%: *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897. Under the circumstances prevailing in the present case, an increase of 50% appears to me to be appropriate.

### ***Conclusion***

[32] For the reasons outlined above, the plaintiffs' claim for indemnity costs is declined.

[33] The plaintiffs are, however, entitled to one-half of the Category 2C scale costs and disbursements determined earlier and relating to steps taken in support of the first application for summary judgment, as set out at para. [19] above.

[34] In addition, the plaintiffs' are entitled to increased costs, calculated on a Category 2B scale, for steps taken after 21 May 2009 in relation to the second application for both leave to issue summary judgment proceedings and for summary judgment as follows.

4.10	Filing memorandum for consent orders for application to vary injunction (22 May 2009)	0.4
4.10	Filing memorandum for directions conference (15 June 2009)	0.4
4.10	Filing memorandum for adjournment (16 June 2009)	0.4
4.12	Preparing and filing interlocutory application and supporting affidavit re application for further and better discovery (10 July 2009)	0.6
4.10	Filing memorandum for case management conference (14 July 2009)	0.4
4.11	Appearance at case management conference (14 July 2009)	0.3
4.18	Sealing order or judgment	0.2
4.10	Filing memorandum for case management conference (24 August 2009)	0.4
4.11	Appearance at case management conference (24 August 2009)	0.3
5.1	Preparing and filing summary judgment application and supporting affidavits July-August 2009 x 4	0.6

5.3	Preparation for hearing of defended summary judgment application.	0.5
5.4	Appearance at hearing of summary judgment application and related applications (27 August 2009)	0.5
4.18	Sealing order or judgment x 4	<u>0.2</u>
<b>Total Days</b>		<b>5.2</b>
<b>Total 2B scale costs</b>	<b>5.2 x \$1,600.00</b>	<b>\$ 8,320.00</b>
<b>Uplift of 50%</b>		<b>\$ 4,160.00</b>
<b>Total increased costs</b>		<b>\$12,480.00</b>

[35] Reasonable disbursements on the plaintiff applicants' second application for both leave to issue summary judgment proceedings and for summary judgment are also awarded to the applicants at amounts to be determined by the Registrar.

### **Orders**

[36] Orders are now made that the first defendant Tang is to pay to the applicant plaintiffs, Chiu Chui-I, Lin Che Win, Lin Yeou-Lung and Chen Tang costs and disbursements on this proceeding as follows:

- (a) The sum of \$31,280.00 for their share of Category 2C costs and the sum of \$2,508.00 for their share of disbursements in relation to steps taken in support of the first application for summary judgment and related matters in this proceeding up to 20 May 2009.
- (b) The sum of \$12,480.00 for Category 2B costs (including a 50% uplift) in relation to the second application for leave and for summary judgment and for related matters in this proceeding from 21 May 2009.
- (c) Reasonable disbursements for all matters from 21 May 2009 and otherwise in relation to this proceeding as determined by the Registrar.

**'Associate Judge D.I. Gendall'**