

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

CIV 2008-488-203

BETWEEN MICHAEL JOHN SCANDLE
 Plaintiff

AND FAR NORTH DISTRICT COUNCIL
 First Defendant

AND CORINA LILI MULLANE AND
 MICHAEL JAMES MULLANE AS
 TRUSTEES OF THE MULLANE
 FAMILY TRUST
 Second Defendants

Hearing: On the Papers

Appearances: J D Turner for Plaintiff
 F Divich for Defendant

Judgment: 11 February 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 11 February 2009 at 4 pm,
Pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: McVeagh Fleming, PO Box 300 844, Albany
 Heaney & Co, PO Box 105391, Auckland

[1] The defendant's application for summary judgment in its favour against the plaintiff set down for hearing on 4 November 2008 was withdrawn by the defendant. The plaintiff now seeks costs on the withdrawal of the defendant's application for summary judgment.

[2] The plaintiff points out that it was not until 30 October 2008, four days before the hearing that the first defendant advised the plaintiff of the first defendant's decision to withdraw the application. By that time, counsel for the plaintiff had prepared for a hearing having completed submissions and was awaiting service of submissions from counsel for the first defendant.

[3] The plaintiff seeks costs on a category 2B basis and points out that the actual costs of the plaintiff substantially exceed the costs that would be awarded on that basis.

[4] The plaintiff brings these proceedings against the first and second defendants for damages, loss and costs in relation to defective foundations and poor construction of a residential dwelling house at Doves Bay Road, Kerikeri. The first defendant being the Far North District Council issued the building consent and subsequently undertook initial inspections during the construction of the dwelling including construction of the foundations.

[5] Subsequently, the first defendant also issued a notice under the Building Act 1991 to the second defendants to stop work and to rectify the works. The first defendant set out the obligations on that notice which only it could enforce under the Building Act 1991.

[6] The claim against the first defendant is in negligence. The alleged duty of care owed and the breach of that duty is set out more particularly in paragraphs 20 and 21 of the statement of claim. The particulars of the breach are broad and include negligently processing and issuing the building consent, failing to ensure that there were sufficient inspections, failing to carry out sufficiently thorough inspections, failing to issue a code compliance certificate, failing to ensure that after it issued the

notice to rectify that the defects had been rectified, failing to satisfy itself that the building work complied with the building code when the certifier issued a code compliance certificate.

[7] When the plaintiff's affidavits in reply to the application for summary judgment were received by the first defendant, those documents were referred to the expert employed by the first defendant. The documents filed by the plaintiff in opposition were received by the first defendant on 18 September 2008. According to the first defendant it wasn't until 30 October 2008 that its counsel received instructions to withdraw the summary judgment application.

[8] Counsel for the first defendant points out that the application for summary judgment has provide some focus on the basis of the plaintiff's case against the council. That is, that the council did not satisfy itself that the notice to rectify it issued had been complied with.

[9] Counsel for the plaintiff submits that because of the late notice from the first defendant of its intention to withdraw the application, the costs incurred by the plaintiff have been increased and include the costs of preparing for a hearing to occur on 4 November 2008. It is also submitted on behalf of the plaintiff that the first defendant should have been well aware that its application would have no chance of success. Consequently, it is submitted that notwithstanding the Court of Appeal decision in *NZI Bank Limited v Philpott* [1990] 2 NZLR 403, the Court should make an award of costs against the first defendant.

[10] On the other hand, counsel for the first defendant submits that the application was not entirely without merit, that the evidence produced by the plaintiff has assisted in focussing on the real and substantial basis of the plaintiff's case against the first defendant and consequently applying the principles in *NZI Bank Ltd v Philpott*, the question of costs should at this stage be reserved pending the outcome of the substantive hearing.

[11] In the case of *NZI Bank Ltd v Philpott*, the Court of Appeal held that the question of costs should be approached on broad principles. That case dealt with an

application by a plaintiff for summary judgment which was dismissed after a hearing taking one day. The Court considered that if the plaintiff is ultimately successful in the litigation the Court may enquire as to why the summary judgment application was dismissed and if satisfied that this was due to some fault on the part of the plaintiff, it may decline to award costs on the earlier hearing. Otherwise the plaintiff would be normally entitled to costs on both hearings. The Court considered it difficult to assess those questions before the result in the litigation had been finally determined.

[12] In the circumstances of the present case, the plaintiff can hardly complain about the decision of the first defendant not to proceed. That decision was made after full consideration of the evidence adduced by the plaintiff. According to rule 244 of the High Court rules, the plaintiff was to file his notice of opposition and affidavits by 10 July 2008. Had the affidavits been filed in accordance with the rules by the plaintiff, then it is most likely that the first defendant would have advised the plaintiff long before 30 October 2008 of its decision not to proceed with the application for summary judgment. In those circumstances, I do not consider it appropriate to make any order for costs at this stage. It could hardly be said that the circumstances in this case are exceptional and that the defendant's use of the summary judgment procedure amounts to an abuse of the process of the Court.

[13] In the circumstances therefore I am satisfied that there are no grounds for departing from the normal rule set forth in *NZI Bank Ltd v Philpott* and that the question of costs in respect of the application by the first defendant for summary judgment should be reserved. I direct that the costs of an incidental to this application for costs should also be reserved.

Associate Judge Robinson