IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-488-000549

BETWEEN	C E SANKEY Plaintiff
AND	HARRISON CONSTRUCTION LTD First Defendant
AND	WHANGAREI DISTRICT COUNCIL Second Defendant

Hearing: On the Papers

Appearances: A J Witten-Hannah for Plaintiff
A Holgate for First Defendant

Judgment: 17 March 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON
(On the Papers)

This judgment was delivered by me on 17 March 2009 at 12pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Thomson Wilson, PO Box 1042, Whangarei
Witten-Hannah, Takapuna, Auckland

[1] Following the dismissal of the first defendant's application for summary judgment against the plaintiff, the plaintiff seeks costs on an indemnity basis.

[2] The plaintiff's brought these proceedings against the first defendant alleging breach of the contract with the plaintiff to build a house for the plaintiff on her land at Maungakaramea in that the first defendant failed to construct the house with a floor level above the ridge crest of the land and beyond five metres from the stream. It was also claimed that the first defendant owed a duty of care to the plaintiff to construct the house in such a position as to avoid the reasonably foreseeable possibility of flood damage.

[3] The first defendant in its application for summary judgment claimed that as the plaintiff had agreed to be responsible for certain of the work involved in the construction of her house at Maungakaramea, she had accepted responsibility for locating the house on her land. Consequently, the first defendant could not be liable for any loss resulting from the location with a floor level above the ridge crest too close to the stream. For reasons more particularly set forth in my judgment, I considered the first defendant had not established that none of the causes of action pleaded by the plaintiff could succeed.

[4] In support of the application for costs, counsel for the plaintiff claims the first defendant embarked on the application for summary judgment when it knew or ought to have known that there were bona fide questions of fact and law which could only be determined after trial even if the first defendant may not have appreciated the situation when it commenced its proceedings. The plaintiffs submits that once the defendant had been served with the detailed and comprehensive notice of opposition, it must have been patently obvious to the first defendant that there were issues of fact and law which could only be resolved at trial.

[5] It is further submitted that the plaintiff incurred extra expense in defending the claim for summary judgment because plaintiff had to instruct out of town counsel who was required to attend the hearing. The fact that counsel was required to travel from Auckland to Whangarei is, it is submitted, a matter the first defendant ought to

have taken into account before deciding to proceed to a defended hearing on its application for summary judgment.

[6] In opposing the application counsel for the first defendant submits there to be no basis for departing from the general rule enunciated in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 where the Court of Appeal concluded that because of the difficulty of assessing whether the successful party to an application for summary judgment will be ultimately successful at the conclusion of a defended hearing, the question of assessing costs should be reserved until the conclusion of the defended hearing. Counsel for the first defendant also submitted that there was no basis for the plaintiff's claim for indemnity costs.

[7] In the circumstances of the present case, I am in no position to determine whether the plaintiff will be ultimately successful. The first defendant certainly had a basis for maintaining that the plaintiff, when undertaking certain part of the work, had also accepted responsibility with regard to the work she was undertaking and in particular had accepted responsibility for locating the appropriate site to build the dwelling.

[8] I certainly could not conclude that the application by the second defendant for summary judgment had been used erroneously, unreasonably, by way of an experiment or with certain knowledge of its failure. Those are the sorts of cases which the Court of Appeal in *NZI Bank Ltd v Philpott* considered would justify departing from the normal rule of reserving costs in the circumstances. In this regard Heron J at page 405, line 40-45 states:

> There will be other cases where the plaintiff has embarked on summary judgment proceedings erroneously in the sense that the rules do not allow the summary judgment procedure, or in the certain knowledge that there is a bona fide question of fact or law which can be determined only after a trial. In those circumstances the Court should be able in its discretion to deprive the plaintiff of costs in those unsuccessful and abortive proceedings and award costs to the defendant.

[9] Furthermore, counsel for the plaintiff's preparation for the hearing of the defendants application for summary judgment will also be of considerable benefit to

the plaintiff with regard to preparation for the hearing should the matter proceed to trial.

[10] Consequently, I can see no basis to justify departure from the normal rule of reserving costs. If the plaintiff is ultimately successful then the Court can, in awarding costs, take into account the extra costs incurred by the plaintiff in defending the first defendant's application for summary judgment.

[11] In any event, the plaintiff has been unable to advance any basis upon which the Court could invoke the provisions of rule 14.6 and award indemnity costs. The fact the plaintiff instructed out of town counsel is not a factor referred to in rule 14.6 to justify indemnity costs. Out of town counsel can in appropriate circumstances seek the extra costs involved in attending the hearing including the extra time in travel.

[12] In the circumstances therefore the question of costs on the plaintiff's successful opposition to the defendant's application for summary judgment is reserved, as is the question of the defendant's entitlement to costs on successfully resisting the plaintiff's application for costs.

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Associate Judge Robinson