IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2005-406-000091

BETWEEN	ALTIMARLOCH JOINT VENTURE LIMITED Plaintiff
AND	DAVID SEFTON MOORHOUSE AND JILLIAN WINSTONE MOORHOUSE First Defendants
AND	THE MARLBOROUGH DISTRICT COUNCIL Second Defendant
AND	VINING REALTY GROUP LIMITED First Third Party
AND	GASCOIGNE WICKS Second Third Party

Counsel: R M Dunningham for Plaintiff
T C Weston QC for First Defendants
D J Goddard QC and M Radich for Second Defendant
M G Ring QC and A B Darroch for First Third Party
F B Barton for Second Third Party

Judgment: 23 March 2009

JUDGMENT NO. 2 OF WILD J: RECALL; APPORTIONMENT OF DAMAGES; COSTS

Introduction

[1] In the judgment I delivered on 3 July last, I:

- Apportioned the two defendants' liability to the plaintiff 66% to the Moorhouses and 34% to the MDC (paragraph [239]);

- Apportioned the two third parties' liability to the Moorhouses, as between the two third parties, 80% to Bayleys and 20% to GW ([284]);

- Reserved the amount of the judgment I indicated I would be entering in favour of the plaintiff ([286]); and

- Reserved costs ([290]).

[2] Having briefed new counsel, first the MDC (on 7 August) and then Bayleys (on 14 August) appealed against my judgment.

[3] Also on 8 August, the MDC applied for an order that I recall paragraphs [235]-[239] and [287] of my judgment.

[4] An appendix listing the 15 memoranda filed by counsel since I delivered my 3 July judgment is annexed to this second judgment, so that counsel can be assured as to the memoranda I have received and considered.

[5] I have issued four minutes giving directions: 3 July, and 8, 13 and 27 August.

[6] This judgment deals with four matters: recall; damages; apportionment of those damages; and costs.

[7] I have already indicated (in [3] of my 13 August minute) that all of the blame for the need to recall part of my judgment and substitute this one can be apportioned to me. But it will be as obvious to the parties as it is to me that it would have been much preferable if the arguments now advanced, in particular by Mr Goddard for the MDC and Mr Ring for Bayleys, had been put to me at the trial by the counsel then representing those parties. If counsel care to check back, they will see that virtually no submissions were made at trial, either in writing or orally, about apportionment.

Recall

[8] For the reasons outlined in my 13 August minute, I recall paragraphs [236]-[239] and [287] of my 3 July judgment. I do that pursuant to r 11.9. For the reasons mentioned in that minute, I decline to recall paragraph [235].

Damages

[9] The damages sought by the plaintiff, as detailed in the affidavits of Trevor Matuschka sworn on 22 July 2008 and Warren McNabb sworn on 1 August 2008, and the accompanying memorandum of 1 August 2008 filed by Ms Dunningham for the plaintiff, total $1,055,907.16.

[10] I am conscious that some 7½ months have elapsed in the interim, and that economic conditions have changed, perhaps significantly, in that interim. For example, in paragraph 8.1 of his 5 December 2008 memorandum for the second third party, Mr Barton notes that the price of diesel was:

- $1.889/litre when I delivered my first judgment on 3 July (the figure is mentioned in [228] of my judgment.

- Was $1.209/litre in Dunedin on 5 December 2008 (when he signed his memorandum).

Diesel is currently $0.989/litre at service stations in central Wellington. The relevance of this is to the likely cost now to the plaintiff of the earthworks involved in building the water storage dam needed to substitute for the balance of the Class A water rights.

[11] I have wondered whether I should seek a further cost up-date from the plaintiff before entering judgment, or whether I should indicate that I will enter judgment for the amount of the lowest tender (competitively bid) for the dam reservoir construction work. I anticipate that construction work of this type will be keenly sought after, particularly in Marlborough.

[12] On balance, I do not think it fair to the plaintiff to delay the entry of judgment any further. There will be some time costs to the plaintiff, in particular if (as I assume is now the case) it has settled its conditional agreement with Awaroa Vineyards Ltd to purchase 400m^3 per day of Class A water rights.

[13] Accordingly, I fix the damages to which the plaintiff is entitled against the Moorhouses at $1,055,907.16, and will enter judgment accordingly.

Apportionment

[14] Having recalled those parts of my judgment recorded in [8] above, I need to make a fresh apportionment, as between the defendants (the Moorhouses and the MDC) of the damages I have now awarded against them in favour of the plaintiff. The apportionment, as between the third parties, of the damages I apportioned to the Moorhouses stands.

Submissions

[15] Counsel for both defendants and both third parties have filed memoranda. The plaintiff has not, but doubtless because it is indifferent to apportionment.

MDC's submissions

[16] For the MDC Mr Goddard submits liability should be apportioned primarily to the Moorhouses because their liability for contractual (expectation-based) damages is logically prior to MDC's liability for tortious (reliance-based) damages. The MDC's tortious liability resulted from the contractual arrangements between the plaintiffs and the Moorhouses, and should be assessed before the tortious liability. If that is done, it eliminates any reliance based loss.

[17] If I do not accept that, Mr Goddard makes the alternative submission that I should exercise the Court's equitable jurisdiction to apportion the $400,000 loss for which both defendants are liable 34% to the MDC and 66% to the Moorhouses.

Moorhouses' submissions

[18] Mr Weston rejects MDC's categorisation of the nature of the Moorhouses' liability as contractual. He contends it is fundamentally tortious liability, attracting a contractual remedy only by virtue of the Contractual Remedies Act 1979. For that reason, the Moorhouses reject the method of apportionment contended for by the MDC.

[19] The Moorhouses accept the MDC's alternative submission that an equitable contribution from both defendants is appropriate, on the basis that each defendant should contribute to what is a common obligation. Mr Weston refers particularly to the decision of the High Court of Australia in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; (2002) 187 ALR 612, one of the several cases cited by Mr Goddard, to which I will revert.

Bayleys' submissions

[20] Mr Ring contends the Moorhouses have been found liable for negligent misrepresentation inducing contract. He does not accept Mr Goddard's submission that their liability is for breach of a contractual statutory warranty. An expectation measure of damages applies only by virtue of the Contractual Remedies Act. Section 6 of the Act treats the misrepresentation 'as if' it were a term of the contract; it does not actually become a term. The Moorhouses' substantive liability is tortious, not contractual.

[21] Mr Ring argues that the MDC and the Moorhouses are essentially 'joint tortfeasors' for the purpose of s 17 Law Reform Act 1936, permitting contribution between them. As these joint tortfeasors are liable for the same damage and the same loss, it matters not which measure of damages is applied. Contribution should be determined on the twin bases of the causal potency of the conduct of each party and its relative blameworthiness: *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30. The contribution from each defendant should not be constrained by

separate liability to the plaintiff, as I held it was in my 3 July judgment (in paragraph [235], which I have declined to recall).

[22] Mr Ring argues that it was substantially the MDC's negligence that caused the plaintiff's loss. The MDC should contribute 65% to the Moorhouses' liability and the Moorhouses should contribute 35% to the MDC's liability. The overall result on the basis of these reciprocal contributions is 49% liability to the Moorhouses and 51% liability to MDC.

GW's submissions

[23] For GW, Mr Barton aligns himself with the submissions made for Bayleys and the Moorhouses. He submits that the MDC's contention that the Moorhouses' liability is contractual is without authority. GW therefore argues that the Moorhouses may claim contribution from the MDC, and may do so in two ways: through the Law Reform Act or by way of equitable contribution.

[24] Mr Barton submits that the MDC should bear a "reasonably significant" share of the responsibility for the plaintiff's loss. In reliance on *Dairy Containers*, he submits that that share need not be limited to the amount for which the plaintiff sued the MDC. However, given paragraph [235] of my judgment, Mr Barton contents himself with submitting that the MDC should contribute $400,000, which he calculates "would approximate to 34% of the total quantum" (assuming damages at a round $1 million).

Questions

[25] Those submissions give rise to the following questions:

(1) Is the Moorhouses' liability contractual or tortious?

(2) If the answer to question (1) is 'tortious', does s 17 Law Reform Act apply?

(3) If the answer to question (1) is 'contractual', how does that affect the MDC's liability?

(4) Irrespective of the answers to questions (2) and (3), should the Court impose equitable contribution?

(5) If the answer to question (4) is 'yes', what contribution proportions should the Court impose?

Question (1): Is the Moorhouses' liability contractual or tortious?

[26] No assistance in answering this question emerges from the March 1967 report of the Contracts and Commercial Law Reform Committee '*Misrepresentation and Breach of Contract*'. That report was the genesis of the Contractual Remedies Act, although 12 years elapsed in the interim. As the title of its Report indicates, the Committee was established to consider the law relating to misrepresentation and breach of contract. There was a general view that the law, particularly relating to representations inducing a contract, had got into a mess. For example, a party which established that it had been induced to enter into a contract by an innocent misrepresentation, was entitled only to the remedy of rescission: *Heilbut, Symons & Co. v Buckleton* [1913] AC 30. Often rescission was too drastic a remedy, unwanted by the representee and too tough upon the representor. The Committee considered that an award of damages would be a more businesslike solution in many cases.

[27] An important aspect of the Committee's work was to consider whether there was a more appropriate remedy for a contract inducing misrepresentation, whether it be innocent, negligent or fraudulent. That raised the question whether there is a real distinction between an inducing representation and a term of a contract. Whilst the former induces a party to enter into the contract, arguably, it is not part of the contract itself. The latter unquestionably is part of the contract. The fact that some contracts are oral, some written, and yet others partly oral and partly written, was a complicating factor.

[28] The Committee was split as to whether the distinction was real or not. The differing views are recorded in paragraphs 10 and 11 of the Report.

[29] The fact that the Committee made its recommendations without deciding whether an inducing representation is a term of the contract is the reason why I say that its report does not assist in answering question (1).

[30] Section 6 Contractual Remedies Act provides:

> **6 Damages for misrepresentation**
>
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent ***as if the representation were a term of the contract*** that has been broken; and
>
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.
>
> …
>
> (my emphasis)

[31] Section 6 does two things. First it entitles a party, induced to enter into a contract by a misrepresentation, to damages calculated on the contractual measure. That is the effect of the words I have emphasised. By treating an inducing representation as if it were a term of the contract, s 6(1)(a) neatly side-steps the issue upon which the Committee could not agree. Secondly, the section disentitles the party to damages calculated upon the tortious measure, if the inducing misrepresentation was either negligent (i.e. careless) or deceitful (i.e. dishonest).

[32] What s 6 does not do is constitute the misrepresentation a term of the contract. The section is aimed at remedy (or to be more precise at the measure of damages), and not at the quality of the liability. I reiterate that I think the section neatly side-steps that question.

[33] The view I have just expressed is not the view that Barker J took in *New Zealand Motor Bodies v Emslie* [1985] 2 NZLR 569, which Heron J echoed in *Manderson v Violich* (1992) 5 TCLR 124. In *Emslie* at 595 Barker J said:

> The defendants were guilty of misrepresentation when Mr Melville forwarded on their behalf the budget forecasts prepared by him … in terms of s 6 of the Act, ***it became a term of the contract*** that the state of ECI's business was such that the budget forecast for the six months from 1 July 1980 were realistic, reasonable and obtainable.
>
> (my emphasis)

In *Manderson* Heron J said at 132:

> … under the provisions of the Contractual Remedies Act, ***the representations become terms***. This nullifies the need for terms to be express because if they are representations that are actionable, ***they become incorporated into the agreement by virtue of section 6 of the Act***.
>
> (my emphasis)

I respectfully disagree with those statements. Section 6 does not transform representations into terms.

[34] For the MDC, Mr Goddard submitted:

> 5.1 the key is that the liability of the (Moorhouses') is strict liability for expectation measure damages under a statutory deemed warranty, while the liability of the (MDC) is a reliance measure liability based on the loss to the plaintiff as a result of entering into the contract.

Mr Goddard argued that s 6 treats the Moorhouses as if they had warranted to the plaintiff that they held the Class A water rights and could transfer them to the plaintiff with the land. Their inability to do so put them in breach of that contractual warranty, rendering them liable to pay the damages required to restore the plaintiff to the position it would have been in had the water rights been transferred. The Moorhouses' liability is therefore contractual.

[35] Counsel for all other parties who made submissions disagreed. They contended that s 6 does not impose contractual liability, but rather imposes a contractual measure of damages when a party commits what is essentially a tortious

act. Section 6 looks to quantum rather than liability. Thus, although the Moorhouses must pay a contractual measure of damages, they are liable in tort.

[36] I favour Mr Goddard's argument. I consider that the words in s 6(1)(a) that I have emphasised are best interpreted as constituting the form of statutorily deemed warranty contended for by Mr Goddard. Thus, while the Moorhouses' liability is not for breach of a term of the contract, it is essentially contractual in its nature. It is certainly not the tortious liability contended for by counsel for the Moorhouses, Bayleys and GW.

[37] Supporting the view that the Moorhouses' liability is not tortious, is the fact that the plaintiff could have sued the Moorhouses in tort, for negligent misstatement inducing a contract. The New Zealand position on concurrent liability in contract and tort was described by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 529-530.

[38] I answer question (1): 'Essentially contractual: it is liability for breach of a statutory deemed warranty. It is not tortious'.

Question 2: If the answer to question (1) is 'tortious', does s 17 Law Reform Act apply?

[39] In view of my answer to question (1), this question does not require an answer. I simply note that the Moorhouses do not have actual or concurrent liability in tort. They were potentially liable in tort, because the plaintiff could have sued them in tort. The plaintiff did not do that, so the Moorhouses' liability in tort is not established and s 17 Law Reform Act does not apply. The Moorhouses are not joint tortfeasors with the MDC, in fact they are not proved tortfeasors at all.

Question 3: If the answer to question (1) is 'contractual', how does that affect the MDC's liability?

Question 4: Irrespective of the answers to questions (2) and (3), should the Court impose equitable contribution?

[40] These questions are best dealt with together.

[41] Mr Goddard argued that the MDC's liability for reliance-based damages results from the plaintiff entering into a contract with the Moorhouses. That reliance loss can only be ascertained once all the plaintiff's contractual rights, including the s 6 statutorily deemed warranty, have been taken into account. Thus, the Moorhouses' liability to the plaintiffs is logically prior to that of the MDC, and should be satisfied first. As satisfaction of that liability will restore the plaintiff to the position it would have been in had the Moorhouses not breached the contract, there will be nothing further for the MDC to compensate the plaintiff for and no damages should be awarded against the MDC.

[42] That submission is irresistible if its fundamental assumption is correct. That fundamental assumption is that the Moorhouses' liability is 'logically prior' to the MDC's liability. To accept that the Moorhouses' liability is 'logically prior' is to reject that the Moorhouses and the MDC share a 'common liability'. If the Court finds that there is a 'common liability' between the Moorhouses and MDC, then it has the discretion to impose equitable contribution.

[43] The judgments of the High Court of Australia in *Burke v LFOT Pty Ltd* perhaps best describe the doctrine of equitable contribution. The facts in *Burke* are not dissimilar to those here. A vendor represented that retail premises had existing high quality tenants when, in fact, they did not. The purchaser successfully sued the vendor on the basis of breach of the (Commonwealth) Trade Practices Act 1974 for misleading or deceptive conduct. The vendor sought contribution from the purchaser's solicitor, who was found to be negligent in breaching his duty of care to the purchaser. In their judgment Gaudron A-CJ and Hayne J described equitable contribution in this way:

> *Equitable contribution*
>
> [14] In general terms, the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage), either equally where they are liable in the same amount or proportionately, where the amount of their liability differs principle has regularly been applied between cosureties, co-insurers, partners, co-owners,

where payment is made by one in discharge of a common liability, and co-trustees who are in pari delicto.

> [15] The doctrine of equitable contribution applies both at common law and in equity. It is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss". More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, the right to contribution was said to depend on whether the liability was "of the same nature and to the same extent".
>
> [16] The notion of "co-ordinate liability" is one that depends on common interest and common burden. Perhaps because, at common law, there was no general right of contribution between tortfeasors [cf. New Zealand's Law Reform Act], the notion of "co-ordinate liability" has not traditionally been expressed in terms requiring equal or comparable culpability or a requirement that the acts or omissions of the persons in question be of equal or comparable causal significance to the loss in respect of which contribution is sought. However, the requirement that liability be "of the same nature and to the same extent", as stated in *BP Petroleum*, is apt to include notions of equal or comparable culpability and equal or comparable causal significance.

[44] The High Court of Australia allowed the appeal, holding that the vendor had no right to contribution from the solicitor. Gaudron A-CJ and Hayne J said:

> [19] In the present case, if regard were to be had to culpability and causation, there would be much to be said for the view that the culpability of [the vendor] and the causal significance of their conduct to the loss suffered by [the purchaser] was of such a different order from that of [the solicitor] that they should not be entitled to contribution. Their misleading conduct was a positive inducement to [the purchaser] to purchase, whereas [the solicitor's] omission to advise further inquiries merely had the consequence that the respondents' misleading conduct remained undetected.

[45] In his dissent, Kirby J described and applied 'co-ordinate liability' differently:

> [103] The test for "coordinate liabilities" which I would accept as giving rise to contribution is whether "the liabilities of the co-obligors to the principal claimant are such that enforcement by [the claimant] against either co-obligor would diminish that obligor in his material substance to the value of the liability. Any alternative or additional requirement in the doctrine of contribution ... between the liabilities to which the co-obligors are exposed would produce intolerable uncertainty and obscure the true object of the doctrine." [Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992) at [1006]]
>
> [104] The foregoing proposition can be further tested thus. Why should it depend upon whom [the purchaser] chose to sue to determine the ultimate burden of the damage suffered by [the purchaser] Especially, why should that be so where one of the alleged co-obligors has effective control of, or influence over, [the purchaser]? Does the law turn a blind eye to that obligor's defaults, as found by the primary judge, simply because he controls

> or influences the recovery proceedings? Or does equity intervene to recognise the availability of legal remedies against both of the propounded co-obligors, hence the coordinate liabilities, and thus the obligation of each of Mr Burke and the respondents together to contribute to [the purchaser]'s damages?

[46] Kirby J held that equity does intervene in this situation, and applied rateable contributions accordingly.

[47] There has not been such exhaustive consideration of the matter in New Zealand. In *Equiticorp Industries Group Ltd (in statutory management) v Hawkins (No 4)* (1992) 5 PRNZ 484, one defendant claimed it was entitled to contribution from another defendant. The latter defendant argued that, since they were not joint tortfeasors, the former defendant could not claim contribution. Wylie J at 491 held that, since the defendants were constructive trustees who were both alleged to have committed the same breach of trust, contribution was justified:

> The requirement of common liability should not be so strictly applied as to preclude an equitable apportionment of liability between those who may be liable to a common plaintiff for the same loss suffered by that plaintiff notwithstanding insubstantial differences of detail in the circumstances giving rise to their respective liabilities.

[48] In contrast, in *Boon v Australian Guarantee Corporation (NZ) Ltd* (1991) 5 PRNZ 598, Wylie J held that there was no common debt or obligation between the third and fourth parties, who had been found to be partners, but the third party solely responsible for the principal loss to the plaintiff. He found at 602 that there was a "fundamental difference" between the obligations of the two parties:

> Whatever term is used — common debt, common demand, co-ordinate liability, common liability — the sine qua non of contribution is in my respectful opinion simply not present.

[49] The conclusions in *Burke*, *Equiticorp* and *Boon* were partially based on the Scottish case of *BP Petroleum Limited v Esso Petroleum Company Limited* [1987] SLT 345. In that case, contribution was ordered notwithstanding that the causes of action against the two parties arose from statute and contract respectively. Given each party was required to perform 'substantially the same obligation', they had common liability and therefore contribution was legitimate.

[50] These authorities, except *Burke*, were recently accepted in *Centre For Advanced Medicine Limited v Sprott And Ors* HC AK CIV-2004-404-1245 20 August 2004, Associate Judge Lang. *Burke* has not been cited in New Zealand. Thus, as the position stands in New Zealand, there is no barrier to awarding equitable contribution against the MDC simply because it is liable in tort and the Moorhouses are liable upon the (s 6) statutory deemed warranty referred to in [36] above.

[51] The answer depends on whether there is a co-ordinate or common liability between the Moorhouses and the MDC. *Burke* provides two contrasting approaches to this question. The majority in *Burke* required "…equal or comparable culpability and equal or comparable causal significance" for common liability. Kirby J simply required the discharge of one defendant's liability to diminish the effect of another defendant's liability.

[52] I consider either of these tests is met here. First, as the MDC's preferred outcome shows, the liabilities of the MDC and the Moorhouses are co-dependent, so Kirby J's test is easily met. Using the majority's test, it is likely that the MDC and the Moorhouses share an equal or comparable culpability, and an equal or comparable causal significance, for the plaintiff's loss. In *Burke*, the solicitor was independently negligent in not checking the veracity of the vendor's representations. Here, the MDC's negligence sustained the Moorhouses' misrepresentations. But for the MDC's negligence, it is likely the Moorhouses' (earlier) misrepresentations would have been exposed. The Moorhouses' post-contract representations (which are detailed in [11] of my 3 July judgment) were founded upon the MDC's negligence – they could not and would not have occurred had the MDC not been negligent. In *Boon* at 601, Wylie J distinguished *Esso Petroleum* in this way:

> But there the liability of both parties was of the same nature and co-extensive, arising out of the same damage caused by the same incident.

[53] Through separate but co-extensive actions, the Moorhouses and the MDC caused the same damage to the plaintiff, and therefore they share some common liability. On that basis, I apply *Burke*, *Equiticorp* and *Boon*. Although the Moorhouses and the MDC have different types of liability, it is nevertheless a 'common' liability that justifies the imposition of equitable contributions.

[54] Accordingly, and taking into account the way in which I have answered question (3), I answer question (4) 'Yes'.

Question (5): If the answer to question (4) is 'yes', what contribution proportions should the Court impose?

[55] For the MDC, Mr Goddard argued that, even if there is common liability, it extends only to the first $400,000 of the total loss/damage sustained by the plaintiff, because that is the only liability the MDC has. Mr Goddard submits that it is appropriate to attribute 34% or $136,000 of that loss to the MDC.

[56] For the Moorhouses, Mr Weston agrees with that submission.

[57] Mr Barton's argument for GW is that the full $400,000 should be awarded against the MDC.

[58] For Bayleys, Mr Ring takes a quite different line. Applying Kirby J's approach in *Burke* of rateable contributions based on causal potency and relative blameworthiness, Mr Ring contends that the Moorhouses should contribute 35% to MDC's liability, and the MDC 65% to the Moorhouses' liability. The net result would be that the MDC contributed 51% of the total judgment in favour of the plaintiff. Assuming a judgment of $1 million, Mr Ring put the MDC's contribution at $510,000 ($650,000 - $140,000).

[59] Mr Ring's approach is predicated on s 17 Law Reform Act applying, with the result that the Moorhouses and the MDC are jointly liable for the whole of the plaintiff's loss. That was the position in *Burke*, where the vendor and the solicitor were each found liable for the same reliance-based damages. For the reasons I have outlined, that is not the position here. Apportionment is required here, only because without it the plaintiff might potentially over-recover.

[60] Because the common liability here is for $400,000 only, it is that amount that must be equitably apportioned.

[61] The maxim that "equality is equity" is the starting point. I agree with the view expressed by Tipping J in *Trotter v Franklin* [1991] 2 NZLR 92 at 97, that the maxim should be departed from only if justice requires.

[62] GW argues for 100% apportionment of the $400,000 to the MDC. Though it does not attempt to justify this complete departure from equal sharing, the reason is obvious: GW is joined at the suit of the Moorhouses, and not the MDC. The Moorhouses and the MDC both submit that 34% of the $400,000 should be apportioned to the MDC, but they base that on those parts of my judgment which I have recalled. I have recalled them because I accept they are per incuriam. I am not much persuaded by the submission that I should revert to my error.

[63] I can see no reason justifying a departure from equal sharing, as between the Moorhouses and the MDC, of the $400,000 of the judgment for which they have common liability. Accordingly, I apportion $200,000 of that sum to the Moorhouses and the other $200,000 to the MDC. The $200,000 apportioned to the Moorhouses becomes part of the judgment for which the two third parties are liable, in the proportions I have already determined.

Costs

[64] When reserving costs in my 3 July judgment, I expressed the tentative views:

- Costs should be 3B for all stages of the proceeding.
- I should certify for second counsel for the plaintiff.
- The defendants should pay the plaintiff's costs in proportion to their respective liability.
- The third parties should indemnify the Moorhouses for the costs the Moorhouses must pay the plaintiff, on the same basis as I have apportioned liability between the third parties.

[65] In her 1 August memorandum for the plaintiff, Ms Dunningham advised that the plaintiff had recently circulated a costs proposal to other parties. She sought an extension of one week to 8 August to file any submissions the plaintiff had on costs. None have been filed, but I note that Mr Weston, in his 21 August memorandum for the Moorhouses, indicates that "the plaintiff resolved costs payable to it on a 3B basis". Accordingly, I assume agreement has been reached as to the costs the defendants are to pay the plaintiff. In case I misunderstand the position, I reserve leave to the plaintiff to apply in respect of its costs.

[66] Mr Weston has filed two costs memoranda for the Moorhouses: 21 August and 21 November. The latter responds to Mr Ring's 14 November costs memorandum for the MDC.

[67] Mr Weston seeks an order that the two third parties indemnify the Moorhouses for their costs of the proceedings which comprise:

- The Moorhouses' share of the 3B costs the defendants have agreed to pay the plaintiff.

- The Moorhouses' own costs of the proceeding, totalling $131,310 (solicitors $17,479; counsel $113,831). Initially, Mr Weston sought indemnity on the basis of my finding ([240] of my 3 July judgment) that the Moorhouses had done "absolutely nothing wrong", and "in the somewhat unusual circumstances".

[68] In his second memorandum, Mr Weston elaborated on these circumstances:

- The Moorhouses were necessary parties because they were "the conduit by which the plaintiff sought its effective recovery". Mr Weston submitted:

> The real issue at trial was the extent to which each of the two third parties would meet any liability of the (Moorhouses).

- Neither of the third parties put anything in issue as between them and the Moorhouses;

- The Moorhouses' evidence was of an entirely narrative character. The Moorhouses did not allege that the third parties acted improperly or dishonestly. They simply alleged they were careless; and

- Attempts to agree an arrangement obviating the need for the Moorhouses to participate in the trial did not come to fruition.

[69] Mr Weston contended that in combination these "are truly exceptional circumstances which justify full indemnity costs".

[70] Mr Weston's fallback position was to seek costs increased above the 3B level. He was not specific as to what increase he was seeking.

[71] As to the apportionment of costs as between defendants, Mr Weston supported Mr Goddard's submission for the MDC (in paragraph 29 of his 14 November memorandum), that costs should be apportioned in the same way as I apportion liability.

[72] For Bayleys, Mr Ring accepted the Moorhouses' entitlement to 3B costs as against the third parties, save that he pointed out that the daily recovery rate prescribed in schedule 2 of the Rules was $2,150 (as opposed to the current $2,370) in respect of steps taken before 31 May 2006. That reduced total costs and disbursements to $80,519 (as against Mr Weston's calculation of $83,253).

[73] However, Mr Ring strongly opposed Mr Weston's submission that the third parties should indemnify the Moorhouses for their costs of the proceeding. His submissions can be summarised thus:

- Although costs are discretionary, the discretion is to be exercised in a principled manner;

- The Moorhouses have the onus of justifying a costs indemnity;

- The only basis advanced by the Moorhouses is that they were "entirely blameless" in and about what occurred;

- That does not meet the high threshold required for a costs indemnity: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA);

- The Moorhouses cannot bring their indemnity claim within r14.6(4)(a) to (e);

- Only r 14.6(4)(f) could apply, but the Court of Appeal in *Paper Reclaim* made it clear that a party's wrongful conduct should sound in damages and not in costs; and

- Indemnity costs are reserved for cases "where truly exceptional circumstances exist", for example pursuing unfounded allegations of fraud.

[74] In his memorandum of 26 September for GW, Mr Barton indicated that he did not wish to make any submissions on the Moorhouses' claim for indemnity costs:

> … Our position on this question may depend on the outcome of the appeal and we would prefer that this matter only be dealt with after the appeal.

[75] I agree that costs as between the third parties should be apportioned on the same basis as liability, and my award will do that.

[76] The contentious issue is as to the level of those costs: 3B, increased costs or indemnity costs?

[77] I agree with Mr Ring that the Court of Appeal has held that the unfettered costs discretion given by r 14.1 is qualified by the specific costs rules rr 14.2-14.10: *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606.

[78] I also agree with Mr Ring that the Moorhouses can only seek costs indemnity costs here under r 14.6(4)(f). That is, if:

> (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.

[79] The Moorhouses were involved in this litigation because it was their agents who made the loss-causing misrepresentations to the plaintiff. The plaintiff sued the Moorhouses as principal; the Moorhouses joined their two agents. Attempts by the Moorhouses' advisers to find some way of excluding the Moorhouses from the proceeding failed (I am not privy to what was offered/discussed). I have found that the Moorhouses were blameless. The Moorhouses, in turn, did not allege anything against their agents which was not sheeted home. In other words, no unfounded or unnecessary allegations were made by the Moorhouses.

[80] The difference between the Moorhouses' actual costs of $131,310 and the $80,519 of costs they are entitled to on a 3B basis is $50,791. That is 39% (roughly one-third) over 3B costs. Should the Moorhouses be left to foot that $50,791 costs differential – all of it, or just part of it, or none of it?

[81] My intuition, as the Judge who presided over trial of this proceeding, is that the third parties should indemnify the Moorhouses for their costs. But I accept the Court of Appeal's directive that a more principled approach than intuition is required. I consider that principled approach requires looking to see what is the basis for the r 14.2(d) principle that costs recovery should normally be two-thirds of deemed reasonable, actual costs. A non-comprehensive list of reasons is suggested in *McGechan on Procedure* at HR14.2.01(4). This can be summarised as:

- Ensuring access to justice.
- Avoiding the successful party ending up seriously out of pocket in terms of litigation costs.
- Encouraging the settlement of disputes i.e. as a disincentive to resort to litigation.

- Encouraging an efficient and appropriately resourced approach to litigation.

[82] As I have the misfortune to have authored that list, I can hardly disagree with it!

[83] The access to justice consideration is neutral here. The consideration of the Moorhouses ending up seriously out of pocket as a result of this litigation is a very real consideration here. Why should that be so, when the Moorhouses only became embroiled in the litigation because of the carelessness of their agents to whom they entrusted the sale of Altimarloch. Is that not classically the situation where those agents should indemnify their Moorhouses for the resulting legal costs? I think it is.

[84] As to attempts to resolve the litigation, no counsel has disagreed with Mr Weston's assertion that those advising the Moorhouses attempted to find a way of excluding the Moorhouses from the litigation, or at least from the trial.

[85] Lastly, although Mr Weston might be "Rolls Royce" counsel, he did the minimum necessary properly to protect the Moorhouses' interests. I am in no doubt that the Moorhouses were entitled to retain senior counsel: my acceptance of category 3 for the case reflects that.

[86] In the result, pursuant to my general discretion under r 14.1, but pursuant specifically to r 14.6(4)(f), I will order the third parties to indemnify the Moorhouses for their costs of this proceeding.

Result

[87] I recall paragraphs [236] to [239] and [287] of my 3 July judgment. The remainder of that judgment and this one should then be read together.

[88] I enter judgment for the plaintiff against the first defendants (the Moorhouses) in the sum of $1,055,907.16.

[89] I order the second defendant (the MDC) to contribute, to the Moorhouses, $200,000 of that judgment. The result of that is that the Moorhouses are to meet a net $855,907.16 of the judgment.

[90] I give judgment for the Moorhouses against the first third party (Bayleys) for $684,725.73, being 80% of the net $855,907.16 judgment I have given against the Moorhouses.

[91] I give judgment in favour of the Moorhouses against the second third party (GW) in the sum of $171,181.43, being the remaining 20% of the net $855,907.16 judgment to be met by the Moorhouses.

[92] By consent, I order that the plaintiff's costs (calculated on the agreed 3B basis) are to be paid by the Moorhouses and the MDC in the same proportions as their effective liability to the plaintiff. I leave the arithmetic to the parties, but think I am correct in saying that those proportions are 81.06% to the Moorhouses; 18.94% to the MDC.

[93] I order Bayleys to indemnify the Moorhouses for:

- Their costs and disbursements in the sum of $105,048.06, being 80% of the Moorhouses' actual costs of $131,310.07; and

- 80% of the costs the Moorhouses are to pay to the plaintiff.

[94] I order GW to indemnify the Moorhouses for:

- Their costs of this proceeding in the sum of $26,262.01, being 20% of the Moorhouses' actual costs of $131,310.07; and

- 20% of the costs the Moorhouses are to pay to the plaintiff.

Solicitors:
Buddle Findlay, Christchurch for the Plaintiff
Raymond Sullivan McGlashan, Timaru for the First Defendant
Radich Law, Blenheim for the Second Defendant
Duncan Cotterill, Nelson for the First Third Party
Anderson Lloyd Caudwell, Dunedin for the Second Third Party

List of memoranda considered in relation to this judgment

For the plaintiff:

- 30 July 2008
- 1 August 2008
- 22 August 2008

For the first defendant:

- 21 August 2008
- 21 November 2008

For the second defendant:

- 7 August 2008
- 18 August 2008
- 8 September 2008
- 14 November 2008
- 12 December 2008

For the first third party:

- 18 September 2008
- 5 December 2008

For the second third party:

- 19 September 2008
- 26 September 2008
- 5 December 2008