IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-004-003535

BETWEEN	BODY CORPORATE 185960 First Plaintiff
	K J GAITELY AND OTHERS Second Plaintiff
AND	NORTH SHORE CITY COUNCIL First Defendant
	R J DREW Second Defendant
	B GAILER Third Defendant
	CELESTAR PROPERTY DEVELOPMENTS LIMITED First Third Party
	G L NORRISH Second Third Party
	S CAMPBELL Third Third Party
	I DRIVER Fourth Third Party
	HIBISCUS ROOFING COMPANY LIMITED Fifth Third Party

Hearing: 28 April 2009
(On the Papers)

Appearances: M C Josephson, G D R Shand and D M Brown for the Plaintiffs
D J Heaney and F L McGregor for the First Defendant
No Appearance of or for the Second Defendant
Third Defendant (with S Gailer as McKenzie Friend) in Person
No Appearance of or for the First, Second, Third and Fourth Third Parties
C M Brick (previously granted leave to withdraw on 06 10 08) for the Fifth Third Party

Judgment: 28 April 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 28 April 2009 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Grimshaw and Co P O Box 6646 Auckland 1001 for the Plaintiffs
Heaney and Co P O Box 105391 Auckland 1001 for the First Defendant
B K Gailer (Third Defendant) 51 Awanohi Road R D 2 Albany 0792

Copy To: Jones Fee P O Box 1801 Auckland 1001 for the Fifth Third Party

[1] On 22 December 2008, I issued a judgment in this proceeding finding the third defendant, Brian Gailer, liable for losses the plaintiffs had claimed against him. However, I deferred entry of judgment on liability and damages pending final quantification of losses. Some defendants had settled with the plaintiffs, and I wanted to hear further from the parties on the appropriate sum to enter as damages for the losses established. The parties were given the opportunity to file submissions on the quantification of the damages.

[2] The plaintiffs have filed a schedule which sets out the sums of money they seek:

Plaintiff	Repair / Loss	Generals	Lost Rent	Days	at 7.5%	at 8.4%	Interest	Repair Manage-ment Fees	Total per Plaintiff
BC 185960	618.75								618.75
Unit 1 – Gaitely	127,602.72	15,000	2,640.00	913	738	175	506.66	13,928.57	159,677.95
Unit 2 – The laundry	91,000.00			913	738	175	17,464.52		108,464.52
Unit 3 – Djimindi	97,197.05		2,640.00	913	738	175	506.66	13,928.57	114,272.28
Unit 4 – Chan	145,795.43	50,000		913	738	175		13,928.57	209,724.00
Unit 5 – Tiffen	145,487.14	15,000	2,640.00	913	738	175	28,428.23		191,555.37
Unit 6 – Jackson	145,487.13	50,000		913	738	175	27,921.57		223,408.70
Unit 7 – Cox	145,101.78	25,000		913	738	175		13,928.57	184,030.35
Unit 8 – Kerrigan	95,082.23	30,000	2,640.00	913	738	175	506.66	13,928.57	142,157.46
Unit 9 – Yang	113,106.74	30,000	2,640.00	913	738	175	506.66	13,928.57	160,181.97
Unit 10 – Sommerville	97,335.91	50,000		913	738	175		13,928.57	161,264.48
TOTAL	**1,203,814.88**	**265,000**	**13,200.00**				**75,840.97**	**97,500.00**	**1,655,355.84**

[3] Mr Gailer has opposed entry of judgment as sought by the plaintiffs on the ground that the total judgment does not take into account the proceeds of a settlement which was reached between the plaintiffs and the first defendant. He had

earlier opposed the entry of a total amount of damages, rather than the allocation of damages to each plaintiff. The resolution of this issue has been overtaken by the plaintiffs filing a schedule which itemises the damages each unit holder is entitled to.

[4] The issues arising from the parties' memoranda are:

a) Whether the settlement with North Shore City Council needs to be taken into account when calculating damages claimable from Mr Gailer; and

b) Whether the plaintiffs are able to claim a global sum for the damages they are suffering, or whether they need to specify their specific damages.

Issue 1

General principles

[5] Randerson J discusses the principles relating to the impact a partial settlement can have on the quantification of a plaintiff's entitlement to an award of damages in *DB Breweries Ltd v Mainzeal Property and Construction Ltd* HC AK CP418/96 26 June 2000. The Judge summarises the current principles applying to concurrent tortfeasors as follows at [88]:

> [a] Concurrent or several liability as a tortfeasor arises where there is a coincidence of separate acts, which by their conjoined effect, cause damage: per Thomas J in *Allison* [*v KPMG Peat Marwick* [2000] 1 NZLR 560] at 584.
>
> [b] The causes of action against each concurrent tortfeasor are separate and distinct, even though the claims are for the same loss: per Lord Hope in *Jameson* [*and Anor v Central Electricity Generating Board* [1999] 2 WLR 141] at 150.
>
> [c] Under New Zealand law, the release of one concurrent tortfeasor does not release another: Thomas J in *Allison* at 597, Keith J at 599, and Tipping J at 600.
>
> [d] The plaintiff may bring proceedings against another concurrent tortfeasor but may not recover any more than the full amount of the loss (otherwise known as the rule against double recovery): Lord Hope in *Jameson* at 150.

[e] But where the plaintiff has recovered the loss in full from one concurrent tortfeasor, the claim is satisfied and there is no more loss to be recovered from another concurrent tortfeasor: Tipping J in *Allison* at 600 and Thomas J at 588-589 and 591.

[f] For these purposes, recovery may be under a judgment or by compromise agreement but, in either case, the plaintiff's claim is not satisfied until payment is made: Thomas J in *Allison* at 589 citing Professor Glanville Williams' work *Joint Torts and Contributory Negligence* (1951) Ch. 2.

[g] Where a compromise occurs with some but not all concurrent tortfeasors, the question whether the plaintiff's claim has been satisfied will usually depend on an examination of the plaintiff's statement of claim, the true construction of the compromise agreement, and the surrounding circumstances: Thomas J in *Allison* at 596 and Chadwick LJ in *Heaton* [*and Ors v AXA Equity and Law Life Assurance Society Plc and Anor* unreported CA (UK) 19 May 2000].

[6] Where two or more tortfeasors acting independently inflict different damage on the same plaintiff, each is liable for the damage which he or she has in fact caused (*Baker v Willoughby* [1970] AC 467 (HL)). Where, however, two or more tortfeasors cause the same damage to the one plaintiff, the position is different. In this case, a long-established rule of the common law allows the victim to sue all or any of the tortfeasors and obtain judgment against each for the full amount of the loss (*Coleman v Harvey* [1989] 1 NZLR 723 (CA)). It is said that the tortfeasors' liability is in *solidum*. The plaintiff, however, cannot actually recover damages for more than his or her whole loss: full satisfaction of the plaintiff's claim bars further proceedings (*Allison v KPMG Peat Marwick*). The common law rule means that the plaintiff need not prove exactly how large a part each defendant played in causing the damage; and he or she is not prejudiced if not all of the possible defendants can be found, or are solvent, or are insured.

[7] At common law, tortfeasors who are liable in respect of the same damage may be either "joint" tortfeasors or "concurrent" tortfeasors. Joint tortfeasors in law commit the same tort, whereas concurrent tortfeasors are responsible for different torts producing the same damage. An example of concurrent tortfeasors is a builder who puts up a defective house and the local authority inspector fails to discover the defects (*Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 at 613).

[8] On the facts of this case, it can readily be concluded that Mr Gailer and North Shore City Council are concurrent tortfeasors, similar to the builder and building inspector in *Morton v Douglas Homes*, and not joint tortfeasors.

[9] Joint or concurrent tortfeasors are each liable in full for the entire loss of the plaintiff. At common law there were, however, two special consequences attaching only to joint liability:

i) Judgment against one tortfeasor, even if unsatisfied, barred any subsequent action against the other (*Brinsmead v Harrison* (1872) LR 7 CP 547);

ii) The release of one joint tortfeasor operated to release all the others (*Kelliher v Bridges* (1912) 31 NZLR 203).

[10] The first consequence has long disappeared with the enactment of the Law Reform Act 1936. Thus, an unsatisfied judgment against one tortfeasor is not now a bar to recovery against another tortfeasor, whether their liability is joint or concurrent (*Wah Tat Bank Ltd v Chan Cheng Kum* [1975] AC 507 (PC)).

[11] Whether the second consequence has disappeared as well seems uncertain as the decisions of the Court of Appeal in *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134 (CA), *Allison v KPMG Peat Marwick* and *Robinson v Tait* [2002] 2 NZLR 30 (CA) show conflicting approaches. *Todd on Torts* concludes at para 25.2.02 that for the time being the release rules remains.

[12] The release rule only ever applied to joint tortfeasors, but in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455 (HL), the House of Lords effectively applied it to concurrent tortfeasors. In *Allison v KPMG Peat Marwick* the Court of Appeal considered whether the view in *Jameson* should apply in New Zealand. In *Allison v KPMG Peat Marwick* the plaintiffs settled a claim for misrepresentation against the vendors of a company and then brought an action against the company's auditors, alleging negligence in preparing the audit which was used in effecting the sale. The auditors argued, amongst other things, that they were entitled to the benefit of the settlement agreement between the plaintiffs and the vendors. The Court of Appeal unanimously rejected this contention. The vendors

and the auditors were concurrent tortfeasors and, consistently with ordinary principle, the release of the former did not give protection to the latter. Thomas J distinguished *Jameson* on the ground that there the settlement was clearly influenced by the risks and uncertainty of litigation, and could not be seen as intended to release the auditors. Thomas J was also prepared to hold that *Jameson* should not be followed: it departed from long-established, settled and sound principle; it was not required in order to meet any development or need in trade or commerce; and it would lead to further uncertainty and litigation as plaintiffs sought to carve out exceptions to an unjust rule.

[13] In a later decision, the House of Lords emphasised that *Jameson* decided only that on the particular facts the sum accepted had to be taken as fixing the full measure of the plaintiff's loss: the decision did not disturb the ordinary rule that the release of one concurrent tortfeasor did not have the effect in law of releasing another concurrent tortfeasor (see *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] 2 AC 329 (HL)). Lord Bingham in *Heaton* recognised that the terms of the settlement between A and B cannot affect any claim by A against C unless A waives his or her rights against C. Hence, in the New Zealand context, as Tipping J pointed out in *Allison*, a release short of full satisfaction can enure for the benefit of concurrent tortfeasors only where they are appropriately designated in terms of the Contracts (Privity) Act 1982. Actual satisfaction of the full amount of a claim discharges claims against other tortfeasors, whether joint or concurrent, because at that stage there is no loss left to compensate.

[14] It follows from this analysis that Mr Gailer's liability for damages to the units is still "alive", regardless of the settlement the plaintiffs entered into with North Shore City Council, unless Mr Gailer was explicitly mentioned in the settlement agreement as a beneficiary. The settlement agreement is not in evidence. I propose to deal with the quantification of damages issue on the basis the settlement agreement makes no provision for Mr Gailer as a beneficiary. However, to deal with the possibility this may that not be the case, leave is reserved to Mr Gailer to produce evidence to this Court of him being a specified beneficiary. Such evidence is to be produced within 10 working days of the date of the issue of this judgment.

[15] Mr Gailer and North Shore City Council are concurrent tortfeasors and are, therefore, liable in *solidum* for the full amount of the damages caused by their negligence. The in *solidum* rule means that it allows the victim to sue all or any of the tortfeasors and obtain judgment against each for the full amount of the loss (*Coleman v Harvey* [1989] 1 NZLR 723 (CA)). However, this does not mean that the plaintiff can actually recover damages for more than his or her whole loss: full satisfaction of the plaintiff's claim bars further proceedings (*Allison v KPMG Peat Marwick*).

[16] It would thus be unjust and contrary to the common law to allow recovery for the full amount of the damages against Mr Gailer, considering that the Council has settled with the Body Corporate for $980,000. The paramount rule to take into consideration here is that the plaintiff cannot recover damages for more than his or her whole loss (*Allison v KPMG Peat Marwick*).

[17] The plaintiffs acknowledge that they cannot recover more than their loss, but remain of the view that judgment ought to be entered without reference to the settlement received from the Council. It is submitted that the recovery of damages is an enforcement issue and is not the same as an entry of judgment against Mr Gailer.

[18] In *Body Corporate No 199348 v Nielsen* HC AK CIV 2004-404-3989 3 December 2008, Heath J dealt with a similar issue and entered judgment against Mr Nielsen for the full amount of the damages. The judgment stated as follows:

> **Result**
>
> [80] The current plaintiffs are entitled to judgment against Mr Greg Nielsen.
>
> [81] Judgment is entered against Mr Greg Nielsen in the sum of $1,025,000, being the amount paid by settlement by the Council on 28 March 2008 and the sum of $174,389.82 being the balance of the costs of remediation, paid by 30 September 2006. On that basis judgment is entered in favour of the current plaintiffs in the sum of $1,199,389.82.
>
> [82] Interest is awarded on the sum of $1,025,000 at the rate of 7.5% from 28 March 2008 until 1 July 2008 and from 1 July 2008 until the date of judgment at 8.4% per annum. Those rates accord with the changes in interest rates set out in s 87 of the Judicature Act 1908. Interest on the sum of $174,389.82 runs at 7.5% per annum from 30 September 2006 until `1 July 2008 and at 8.4% per annum thereafter until the date of judgment.

> [83] The current plaintiffs are entitled to costs. Costs are awarded on a 2B basis, together with reasonable disbursements. Both costs and disbursements shall be fixed by the Registrar. I certify for second counsel.
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> [84] Mr Greg Nielsen must file and serve any application to issue cross-claims, together with an affidavit in support, on or before 30 January 2009. If an application were filed, the Registrar shall list the application for mention before me on the first available date after 27 February 2009.

Conclusion on issue 1

[19] The plaintiffs are entitled to entry of judgment against Mr Gailer for the full amount of the damages. This comes to a total of $1,655,355.84. However, since the plaintiffs have already settled with the Council for the sum of $980,000, they cannot recover from Mr Gailer an amount which would cause them to recover more than the total amount of $1,655,355.84.

Issue 2

[20] Mr Gailer also contends that the total amount of damages should be itemised in relation to each plaintiff. The plaintiffs have provided a draft Judgment of the Court with an attached schedule with specified amounts for each plaintiff. I propose to adopt the amounts specified in that schedule as I am satisfied that on the evidence I heard, the itemised amounts are an accurate reflection of the damages each plaintiff has suffered.

[21] The schedule of itemised damages includes provision for interest. Interest is sought at the rate of 7.5 per cent from the date of the proceeding's commencement (23 June 2006) to 30 June 2008. Interest at the rate of 8.4 per cent is sought for the period from 30 June 2008 to the date of judgment on liability (22 December 2008). Leave was reserved to the parties either to return to Court or to have the Registrar determine the interest sought. I am satisfied that the rates of interest, the plaintiffs seek are reasonable and appropriate, as is the quantification of those rates.

[22] In my judgment dated 22 December 2008, I made findings on the cross-claims between the Council and Mr Gailer. Given the total sum for which I have found Mr Gailer liable, in relation to the cross-claims the quantification of damages is as follows:

a) On the Council's cross-claim against Mr Gailer, the Council is entitled to damages for the sum of $784,000; and

b) On Mr Gailer's cross-claim against the Council, Mr Gailer is entitled to damages for the sum of $331,071.17.

[23] Questions of costs and of the recovery Mr Gailer can make against the third parties against whom he has claimed are yet to be determined. These can be dealt with separately should the parties be unable to reach agreement on these matters.

Result

[24] Mr Gailer has 10 working days to file evidence of him being a specified beneficiary under the settlement agreement with the Council.

[25] If no such evidence is filed within the time limit imposed, the plaintiffs are entitled to entry of judgment for the sums of money set out in the itemised schedule of damages at [2] herein, the total of this amount coming to the sum of $1,655,355.84. However, since the plaintiffs have already received the sum of $980,000 from the Council, their recovery from Mr Gailer cannot result in them receiving an amount in excess of $1,655,355.84.

[26] The Council is awarded the sum of $784,000, as a result of being successful in its cross-claim against Mr Gailer.

[27] Mr Gailer is awarded the sum of $331,071.17, as a result of being successful in his cross-claim against the Council.

[28] Leave is reserved to the parties to deal with outstanding issues of costs and Mr Gailer's claims against third parties.

Duffy J