IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-000968

BETWEEN	NORTHERN CLINIC MEDICAL & SURGICAL CENTRE LIMITED Plaintiff
AND	P S KINGSTON First Defendant
AND	KINGSTON PARTNERS LIMITED Second Defendant
AND	B F HULENA (TRADING AS HULENA CO ARCHITECTS) Third Defendant
AND	R J THORBURN Fourth Defendant
AND	ROGER THORBURN CONSULTING ENGINEERING LIMITED Fifth Defendant
AND	M VESEY (T/A CLADRIGHT DEVELOPMENTS) Sixth Defendant
AND	J R SLECHT LIMITED Seventh Defendant

Counsel: R J Scott for Applicant/Sixth Defendant
T J Rainey for Plaintiff/Respondent

Judgment: 11 June 2009

COSTS JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 11 June 2009 at 12pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

[1] On 3 December 2008 I gave summary judgment in favour of the sixth defendant Matthew Vesey, who once traded as Cladright Developments. I said that he was entitled to costs, as it seemed to me in scale 2B. I invited memoranda to be filed if costs and disbursements could not be agreed.

[2] Matthew Vesey seeks an award of $27,360, mostly calculated at scale 2B but as to discovery in scale 2C. He seeks also $9,917.51 disbursements, the principal disbursement, a fee incurred for expert assistance, from a building consultant, slightly exceeding $4,600. Leaving aside the filing fee, most of the balance was incurred in photocopying.

[3] Northern Clinic accepts that, if costs are calculated at scale 2B, it should be liable to pay $19,840. It does not accept any liability for the fees of the expert, who played no part in the grant of summary judgment, which turned other considerations. It questions the photocopying, $1,674.10, as excessive. It considers that disbursements should be limited to $3,400.

Costs

[4] This Court's ability to award costs is ultimately discretionary: r 46. (I will assume the old rules apply.) Costs however are not at large. They must reflect the complexity and significance of the case: r 47(b). And normally they are to be assessed on the basis set out in the ensuing rules.

[5] Actual costs incurred are no more than a notional point of reference. In *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 the Court of Appeal said at 610, para 14:

> The new (and statutory) High Court scheme has at its heart the proposition that a successful party should receive a reasonable contribution towards his or her costs, being two-thirds of the costs *deemed* (under the new scheme) to be reasonable in a proceeding …, having regard to the complexity and significance of the matters which were at issue and the time which was reasonably required to be taken.

[6] In making an award, the Court said at 611, para [24], this Court can on the one hand rely on the 'relatively obvious logic to the monetary allowances' made, but retains a discretion 'to enable the unexpected and the unforeseen to be fairly accommodated'. As the Court remarked 'the rules are complementary and designed to produce an effective whole'.

[7] There is a large measure of agreement in the costs calculations supplied. Two points are in contention. And the first, Mr Vesey's claim for memoranda prepared by others is rightly objected to. He cannot claim costs if his counsel did not prepare the draft: *Body Corporate 161334 v Auckland City Council & Ors* (HC AK, CIV 2005-404-1646, 21 July 2008), Doogue AJ.

[8] The second and larger issue is as to Mr Vesey's six day claim for inspection of documents. Northern Clinic would allow him 1.5 days. There was nothing, it says, especially complex or significant about inspection in this case.

[9] It is contended for Mr Vesey, however, that inspection was especially significant to him. He retained minimal documents himself. He needed to be aware of any that might implicate or assist him. Northern Clinic listed 700 documents. The list of the architect third defendant was of an equal order. The liquidators of Goodall Construction Limited, not ultimately a party, gave access to a room of documents.

[10] Northern Clinic is only answerable, I consider, for the time taken to inspect the documents it disclosed. It is not answerable for that taken to inspect the documents of other parties even if they might have proved to have some bearing on its claim against Mr Vesey. I will allow Mr Vesey's claim as to two days.

Disbursements

[11] Mr Vesey's claim for disbursements totalling $9,917.51 is disputed as to two aspects, the larger being the claim for $4,617.46 for expert advice as to the state of the cladding and the remedial work called for; the smaller as to the photocopying.

[12] The issue in each case is whether the disbursement claim satisfies r 40H(2). As to that I must be satisfied the disbursement is of a class that I ought to approve, that it is specific to and necessary for the conduct of the case and that it is reasonable in amount.

[13] As to the first point, Northern Clinic points out that Mr Vesey's expert did not assist him in his successful application for summary judgment, which turned exclusively on law. That, however, is not in itself decisive: *The Beach Road Preservation Society Inc v Whangarei District Council* (2001) 16 PRNZ 13, at 17, Chambers J. The threshold the rule sets is more general.

[14] Mr Vesey justifies seeking expert advice, in order to defend Northern Clinic's claim. In issue was whether he had met the standard of a reasonably competent cladder and complied with the Building Code. Also in issue was why there had been water ingress and the extent of the damage. Also whether the repairs were reasonable in nature and cost.

[15] Further, he says, he could not afford to hold back. The repairs were made in late 2006 and completed towards the end of 2007. An expert assessment had to be made before the repairs made that impossible.

[16] Both points have merit. To defend Northern Clinic's claim against him Mr Vesey had to obtain the advice he did. He could not assume he would succeed on summary judgment. Indeed my decision is under appeal. Having succeeded in that way, he is still entitled to this necessarily incurred cost. There is no issue as to the reasonableness of the charge.

[17] The final issue as to photocopying is the same as that concerning the extent of discovery. Mr Vesey is entitled to any photocopying he incurred to answer the claim made against him by Northern Clinic. But that does not seem to me to extend to photocopying of the documents of other parties. I cannot make that calculation myself. It will be enough if I state the principle.

Conclusion

[18] Mr Vesey will have the costs and disbursements he claims except to the extent that I have disallowed them. Northern Clinic seeks to have the award stayed until the outcome of the appeal. I do not consider that justifiable. Mr Vesey is entitled now to the fruit of his judgment whether or not he retains it. I decline that application.

_____

P.J. Keane J