IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-005225

BETWEEN	BODY CORPORATE NO.169791 First Plaintiff
AND	MAGDA FODERMAYER & ORS Second Plaintiffs
AND	AUCKLAND CITY COUNCIL First Defendant
AND	LINES DESIGN LTD Second Defendant
AND	S MITCHELL Third Defendant
AND	SYMPHONY GROUP LTD, WAIMARIE MANAGEMENT LTD AND GLANVILLE INVESTMENTS LTD Fourth Defendants
AND	ONYX GROUP LTD Third Party
AND	GENERAL MANUKAU ENTERPRISES LTD Second Third Party
AND	ALUMINIUM CITY (PENROSE) LTD Third Third Party
AND	M VESEY Fourth Third Party
AND	FIRE ENGINEERING CONSULTANTS LTD Fifth Third Party
AND	G A THOMPSON Sixth Third Party

	AND	RON WRIGHT & ASSOCIATES Seventh Third Party
	AND	VERO LIABILITY INSURANCE LTD Eighth Third Party

Hearing: On the Papers

Counsel: M G Ring QC and G D R Shand for Plaintiffs
J G Miles QC and S A Grant for Fourth Defendants

Judgment: 3 December 2009

JUDGMENT (No.3) OF COOPER J
ON COSTS

This judgment was delivered by Justice Cooper on
3 December 2009 at 3.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Grimshaw & Co., PO Box 6646, Auckland
Claymore Law, PO Box 1382, Shortland Street, Auckland 1140
Copy to:
M G Ring QC, PO Box 105521, Auckland 1143
J G Miles QC, PO Box 4338, Shortland Street, Auckland 1140

[1] In my judgment of 19 May 2009, ("the judgment"), I dismissed the application of the fourth defendants ("Symphony") to review Associate Judge Robinson's decision of 14 November 2007. The Judge had dismissed Symphony's strike out application which had been based on the Limitation Act 1950. The plaintiffs now seek costs.

[2] The plaintiffs seek an award in the sum of $40,000 together with disbursements of $34.77. That sum assumes placement in Category 3 but is significantly above the highest amount that could be ordered if all the steps taken were calculated in accordance with Category 3 Band C.

[3] The plaintiffs seek increased costs in relation to preparation for the review hearing (item 15 in Schedule 3): the claim is for a total of seven days preparation, when the hearing lasted for only one and a half days. Then, Category 3 Band B costs are sought for items 4.16 (second counsel), 4.17 (appearance at mentions hearing) and 16 (appearance at the hearing). These claims total $22,871. However, the plaintiffs then seek that that figure be further increased to $40,000 to take into account additional considerations arising under r 14.6(3)(b)(ii) and (iii): respectively, pursuing an unnecessary step or an argument lacking in merit and failing without reasonable excuse to accept a legal argument.

[4] Symphony agree that costs should be fixed now, but argue that they should be reserved so that payment is deferred. Symphony also argues that Category 2 should apply and Category 3 is not appropriate, that Band B should be applied to all steps, that there is no justification for increased costs and that, in any event, the uplift sought is too great. Further, Ms Grant submits that if the Court does award increased costs there should be a reduction of the amount otherwise payable to reflect the fact that preparation for the trial will be to some extent reduced by virtue of the work carried out for the interlocutory hearing.

Should costs be fixed and paid now?

[5] I deal first with the issue of whether costs should be both fixed and paid now. Ms Grant urges that the costs should be fixed but not paid because of an intention to

appeal and because the review hearing concerned an application to strike out proceedings. She relied on *Fairbrother v Commissioner of Inland Revenue* [2000] 2 NZLR 211. That was an appeal against the refusal of the District Court to set aside a judgment obtained by the Commissioner of Inland Revenue against a taxpayer who had relied on a defence that the Commissioner had entered into a binding arrangement with respect to deferred payment of tax and compromising the amount of tax payable. Young J allowed the appeal, but reserved all questions of costs, stating at [37]:

> Given that I have reasonably serious doubts as to the ability of Mr Fairbrother to make good on the facts of the settlement defence, I think it appropriate to reserve costs pending the determination of the proceedings in the District Court.

[6] Ms Grant also relied on *Public Trust v Nicholas* [2005] NZFLR 923 in which Ellen France J declined an application to strike out a claim made under the Property (Relationships) Act 1976 by the estate of one partner in a *de facto* relationship against the estate of the other in circumstances where both had died. The Public Trust applied to strike out the claim on the basis that there was no cause of action. Ellen France J held that the better approach was to reserve costs but as I read the decision that was because she had heard only brief argument and at [57] she timetabled the filing of submissions.

[7] Ms Grant also referred to *Rush v Rush* [1998] NZFLR 365 in which there was an unsuccessful application to strike out a wife's matrimonial property claim. Judge Doogue held that whether the husband should be required to pay costs on the unsuccessful strike out application should be decided following the substantive hearing when all the circumstances were before the Court.

[8] Finally, she drew an analogy between strike out applications and summary judgment applications. She submitted that in a case such as the present it would be appropriate to follow the approach taken with unsuccessful summary judgment applications. She argued that since a limitation defence could equally give rise to a strike out application or an application for summary judgment by a defendant, both should be regarded as equivalent with respect to strike out applications.

[9] I am not persuaded that any of the points made by Ms Grant should result in costs being reserved. Rule 14.8(1) provides that unless there are special reasons to the contrary costs must be fixed in accordance with the Rules when the application is determined and that the costs become payable when they are fixed. Rule 14.8(3) provides a specific exemption with respect to applications for summary judgment. Notwithstanding the analogies which may be drawn between a defendant's application for summary judgment and an application to strike out, it is plainly significant that r 14.8(3) refers only to applications for summary judgment. Moreover, as with the other arguments addressed by Ms Grant it is worth noting that the costs now needing to be fixed are not those relating to a strike out application, but those relating to an unsuccessful application to review an Associate Judge's decision.

[10] Whatever might be the approach appropriate with strike out applications generally there are obvious difficulties in extending that approach to the subsequent stage of an unsuccessful review which has resulted in the same outcome as the Associate Judge's decision. In my view, the appropriate course is to fix costs at this point and for the costs to be paid as envisaged by r14.8(1).

Category 2 or Category 3?

[11] Ms Grant contends that Category 3 is not appropriate. She notes that if Category 3 is allocated now it would apply to the whole proceeding and might subsequently be difficult to change. She referred in that respect to *Paper Reclaim Ltd v Aotearoa International Ltd* CA70/04 28 November 2007 at [10]-[11] and also to *Simunovich Fisheries Ltd & Others v Television New Zealand Ltd & Others* HC AK CP2004-404-3903 15 February 2008 Allan J. Ms Grant further submitted that if Category 3 was appropriate for this proceeding there would be no reason why it would not apply to all "leaky home" type cases. She characterised the present case as a straightforward claim in respect of alleged construction defects and also maintained that the legal and factual issues arising from the application were simple.

[12] Mr Beresford, for the plaintiffs, referred to the number of parties, the high quantum of the claim and the fact that senior counsel had been instructed by the

parties. He noted that the claim involved significantly more parties than those involved in *Body Corporate 188529 & Others v North Shore City Council & Others* HC AK CIV 2004-404-3230 5 December 2007 Heath J, and a significantly higher quantum. That proceeding was placed in Category 3.

[13] Rule 14.3 provides that Category 2 proceedings are those of average complexity requiring counsel of skill and experience considered average in the High Court. Category 3 proceedings are those that require counsel to have special skill and experience in the High Court because of their complexity or significance. I am of the view that the present case falls readily into Category 3 having regard to the number of parties, the sums at stake, and the nature of the claim. There are over 40 plaintiffs and the claim approaches $20 million. Both the plaintiffs and Symphony were represented at the hearing before me by Queen's Counsel.

[14] In the circumstances I see no difficulty in categorising the whole proceeding at this stage notwithstanding the observations made in *Paper Reclaim Ltd*

Preparation-Band B or Band C?

[15] I have earlier explained that Symphony seeks that Band C be applied in respect of preparation for the hearing. The hearing lasted one and a half days and, if Band B were applied, preparation time would be calculated as "the time occupied by the hearing measured in quarter days". This would mean that one and a half days would be allowed for preparation.

[16] Counsel for the plaintiffs justifies Band C on the basis that opposing Symphony's application involved consideration of Symphony's application and affidavit (including a seven page schedule and 520 pages of exhibits) from the perspective of 42 separate plaintiffs as well as consideration of the plaintiffs' 43 affidavits (which, when bound with exhibits, totalled 978 pages) and drafting submissions dealing with the issues raised. Ms Grant, for Symphony, contends that the issues for review were well defined and focused on whether the plaintiffs had knowledge of the defects in the property prior to the limitation date. She pointed out that the submissions covered largely the same ground as had been necessary for the

review hearing before the Associate Judge and argued that preparation of mostly repetitive content could not justify an increase in the time for preparation.

[17] Ms Grant's points are not without merit. On the other hand, by the time the hearing took place before me on 7 and 8 October 2008, almost a year had transpired since Associate Judge Robinson dismissed the application and it would be inevitable that costs would be incurred as counsel reacquainted themselves with the issues.

[18] Coupled with that, the detail of the arguments presented, before me at least, would have properly involved preparation of much more than the one and a half days that would be allowed under Band B. Band C applies "if a comparatively large amount of time for the particular step is considered reasonable". I consider that applies in the present case and I would allow three days for preparation (double the usual amount).

[19] Band B should apply to the other steps.

Increased costs

[20] The plaintiffs seek increased costs. One aspect of their application for increased costs is self contained. It concerns an application that was not discussed in the judgment because it was abandoned at the hearing, namely the Associate Judge's decision to decline the application made by Symphony for production of a report prepared by Alexander & Co. in June 2005. The plaintiffs argue that the application was without merit and that an award of increased costs under r 14.6(2)(b)(ii) would be justified in the circumstances.

[21] Ms Grant submitted that the issue was a finely balanced factual question that could have been decided either way had Symphony chosen to pursue the argument. Further, she contended that abandoning the application had a consequence that time was saved during the hearing.

[22] The plaintiffs' submissions do not particularise how much is sought in respect of the abandoned application. If it was without merit (and that is not a matter

into which I had to inquire) it is difficult to see why it would have occupied much time in preparation for the hearing and any costs associated with preparation could, in my view, be comfortably accommodated by means of the extra sum I have allowed for preparation generally. In the circumstance that the matter was not pursued at the hearing it does not seem to me to justify any increased costs.

[23] In respect of the review application on the strike out issue, the plaintiffs rely on r 14.6(3)(b)(iii). Essentially, they argue that making the review application involved failing to accept a legal argument without reasonable justification in circumstances where it should have been obvious that the review would not succeed. That submission is based on the fact that the plaintiffs were throughout able to rely on evidence that there had been no diminution of the value of the units by the time necessary for Symphony's limitation defence to succeed, and the affirmative defences of concealment and estoppel which the plaintiffs argue could not have been resolved in Symphony's favour on a strike out application. Counsel for the plaintiffs referred to correspondence in which the plaintiffs' solicitors had drawn attention to the affirmative defences and invited counsel for Symphony to withdraw the review application. It was argued that Symphony had inappropriately chosen to proceed to the hearing despite the plaintiffs' correspondence.

[24] Ms Grant submitted that on the proper interpretation of the Privy Council's decision in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 the question of valuation is one of deemed reduction in value not dependent on valuation evidence *per se*. If that is correct, then the commissioning of the Belgravia report could have had the consequence that the limitation period had commenced. It was reasonable to raise and maintain this argument. She pointed out that I had not found that Symphony's argument was without merit.

[25] I would not characterise Symphony's argument as lacking in merit. I note that as I read Symphony's submissions reliance for this aspect of its claim is based on the alleged failure without reasonable justification to accept a legal argument, i.e. it is r 14.6(2)(b)(iii) that is invoked, but one arrives at what is essentially the same issue. I note further that in the judgment I did not hold that the valuation evidence was determinative of the limitation question. Rather, I held that the valuation

evidence which the plaintiffs had called was relevant to the issue of whether the defects were obvious. Further, although Symphony contends that my decision amounted to a straightforward application of principles established in *Hamlin*, it was necessary to explain the manner in which those principles were to be applied on the present facts and I also felt it necessary to distinguish this case from the situation that was before the Court of Appeal in *Pullar v The Secretary for Education* [2007] NZCA 389 6 September 2007. It was not necessary to enquire into the concealment and estoppels issues.

[26] Overall, I do not consider that Symphony's argument was such as to attract an award of increased costs under r 14.6(3)(b).

[27] That means that Symphony's argument that there should be a deduction from the costs otherwise payable to reflect the notional reduction in the costs of preparing for the substantive trial.

[28] Finally, I approve the disbursements claimed in the sum of $34.77.

Conclusion

[29] For the reasons I have given I direct that Symphony pay the plaintiffs' costs of and relating to the review application in accordance with Category 3 Band B, save that in respect of preparation for the hearing there should be an allowance for three days under Category 3 Band C. The disbursements sought are also approved.