

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2007-404-004518**

BETWEEN                      JOSE MIGUEL PORRAZ LANDO AND  
   MONICA RANGEL CAPDEVIELLE  
   Plaintiffs

AND                              AMUR PROPERTIES &  
   CONSTRUCTION LIMITED  
   First Defendant

AND                              CARL PARETOVICH  
   Second Defendant

AND                              PLASTECH SYSTEMS LIMITED  
   Third Defendant

Hearing:            by memoranda

Counsel:            S Robertson for plaintiffs  
                                 R F Karalus for sixth defendant  
                                 D F Dugdale for ninth defendants

Judgment:        22 December 2009 at 5:00pm

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**COSTS JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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*This judgment was delivered by me on 22 December 2009 at 5:00pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Kensington Swan, Private Bag 92101, Auckland 1142 for plaintiffs  
Heaney & Co, PO Box 105391, Auckland 1143 for sixth defendant  
Mahon & Sumpter, PO Box 33142, Auckland 0740 for ninth defendants

AND AGRI-CHEM PRODUCTS LIMITED  
trading as PUTZ-TECHNIK  
Fourth Defendant

AND MARTIN WHENMOUTH trading as  
WHENMOUTH DESIGN  
Fifth Defendant

AND AUCKLAND CITY COUNCIL  
Sixth Defendant

AND CENTRE OF ATTRACTION LIMITED  
(formerly O'HAGAN INDUSTRIES  
LIMITED) (IN LIQUIDATION)  
Seventh Defendant

AND PATRICK O'HAGAN  
Eighth Defendant

AND DALE PARETOVICH and  
NERIDAN MARIE BARTLETT  
Ninth Defendants (discontinued)

AND A GRACE CONSTRUCTION LIMITED  
First third Party

AND ANTONY BRENT BOWLER  
Second third Party

AND FRED ALARCON  
Third third Party

[1] The plaintiffs have applied for a determination of costs payable following discontinuance of their claim against the ninth defendants. This sixth defendant is also affected by the discontinuance, in that it has a cross claim against the ninth defendant for contribution in the event of a finding in favour of the plaintiffs against the sixth defendant. The sixth defendant accepts that its cross claim falls away with the plaintiffs' claim against the ninth defendants.

[2] The plaintiffs accept that the ninth defendants are entitled to costs on a category 2 band B basis but contest some of the items of costs being claimed. They also seek a contribution towards those costs from the sixth defendant on the ground that it issued a cross claim against the ninth defendants.

[3] The sixth defendant says that it should not have to contribute as the ninth defendant did not incur any costs responding to its claim.

## **Background**

[4] This is a claim about building defects in a stand-alone residential property at 26D McArthur Street, St Heliers, Auckland. The building defects have caused the building to leak. The plaintiffs are suing parties associated with the development and construction of the building for the cost of remedying the defects and resultant damage. The plaintiffs are the current owners of the property. The first to eighth defendants between them are the developer, designer, head and sub-contractors, territorial authority, and building consultants associated with the construction of the property.

[5] The plaintiffs filed this proceeding on 26 July 2007. The ninth defendants were not named as defendants at that time. They were joined in a second amended statement of claim filed on 18 July 2008.

[6] The ninth defendants were joined because they had originally held the title to the property, and the plaintiffs formed the view that they had been involved in the

development of the property. The ninth defendants denied that they had any responsibility for the development. They contended that they held the land only by way of security for money advanced to the first defendant for the development.

[7] After the ninth defendants were joined, the sixth defendant council issued a cross claim (on 15 September 2008) seeking contribution or indemnity pursuant to s 17(1)(c) of the Law Reform Act 1936 as a joint tortfeasor (based on the plaintiffs' pleading of breaches of duty of care on the party of the ninth defendants. The ninth defendants did not file a formal statement of defence to that cross claim, or to an amended cross claim filed on 24 October 2008 (following the filing of a third amended statement of claim by the plaintiffs).

[8] At the outset of the claim against them, the ninth defendants contended that the claim against them was misconceived. They invited the plaintiffs to discontinue, or to have the claim determined either summarily or as a preliminary issue. At the same time they requested particulars of the sixth defendant's cross claim (in relation to their alleged involvement in the application for the building consents that were pleaded as the basis for the plaintiffs' claim that the ninth defendants had a role in the development going beyond their security interests).

[9] At a case management conference on 25 September 2008 the Court gave directions for dealing with these matters. As a consequence of those directions the sixth defendant filed its amended cross claim, containing its response to the ninth defendants' request for particulars. However, through inadvertence, the amended cross claim was not served on the ninth defendants at the time.

[10] On 19 December 2008 the ninth defendants filed an application seeking an order for a separate trial or alternatively for determination of the claim against them as a separate and preliminary question. They also applied for an order that the sixth defendant file and serve a more explicit pleading (addressing the particulars they were seeking).

[11] On receipt of that application the sixth defendant noticed and corrected the oversight in respect of service. The ninth defendants subsequently accepted that the amended pleading addressed that part of their application.

[12] The plaintiffs filed notice of opposition to the ninth defendants' application on 2 March 2009. The minute of a case management conference held the following day records that the application of the sixth defendant had been resolved, and noted the sixth defendant's position on the balance of the application:

5. The council will not be participating in the application and/or any hearing of the application.
6. It is understood that the plaintiffs will be filing an opposition to the ninth defendants' applications. In the event that the court determines that the plaintiffs' claim against the ninth defendants is invalid, the council consents to a discontinuance of its cross claim against the ninth defendants.

[13] Directions to bring the ninth defendants' application to hearing were given at a case management conference on 3 February 2009. The parties prepared and filed synopses of argument in accordance with those directions.

[14] On 19 May 2009 counsel for the plaintiffs and ninth defendants filed a joint memorandum requesting that a determination of the ninth defendants' application be deferred until after a proposed mediation between the plaintiffs and other defendants. That mediation did not eventuate, but in August 2009 the plaintiffs elected to discontinue against the ninth defendants in any event.

### **The ninth defendants' claim against the plaintiffs**

[15] The ninth defendants seek the following costs pursuant to schedule 3 to the High Court Rules (this follows amendment of the initial claim as a result of correspondence between counsel):

Number	Work covered	Time allowance under band B (days)
2	Commencement of defence	2
4.5	List of documents	1

4.6	Production for inspection	1
4.7	Inspection	1.5
4.10	case management conference memorandum	.4
4.11	case management conference (2)	.6
4.12	Interlocutory application and affidavit	.6
4.14	Preparation for hearing of interlocutory application (part only, being its synopsis in accordance with a timetable order)	.5
4.17	Appearance at mention hearing	.2
		7.8 days

[16] The plaintiffs contest the claim for inspection (item 4.7) and the claim for the interlocutory application (items 4.12, 4.13 and 4.17):

- a) In respect of inspection they say that the ninth defendants did not inspect in a physical sense (at the offices of the plaintiffs' solicitors) but rather called for copies of only 7 documents. They invite the Court to exercise its general discretion under r 14.1 to award a sum that is reasonable. They suggest that a sum of \$800 would be reasonable, reflecting a time allowance of .5 days rather than the 1.5 days (\$2,400) claimed.
- b) They seek "an equitable reduction" of 25% for the costs claimed in respect of the ninth defendants' application. They say that the application was originally signalled as a strikeout application and that the parties agreed to undertake informal discovery before any application was filed, with a view to allowing the plaintiffs to decide whether to persist with their claim. They say that the ninth defendants provided very limited discovery, and chose to bring their application

for a separate trial or preliminary question without further consultation.

[17] The ninth defendants contend that the claims are fully justified both in accordance with the principles of costs and the facts:

- a) They contend that the provision in schedule 3 is intended to provide speed and certainty, and should not be revisited in the way the plaintiffs suggest.
- b) They contend that they provided discovery of all the documents needed to demonstrate their case, and contend that their case (including the application) is vindicated by the discontinuance.

[18] I accept the submission for the ninth defendants that the allowances in schedule 3 are to provide certainty and expedition. However, the allowance is not intended to provide a recovery which exceeds the actual costs incurred.

[19] There is no evidence of the actual time or costs involved in inspection. As already stated, these parties undertook discovery informally. Counsel for the ninth defendants requested certain key documents (all tending to show that they were not the party who applied for, and continued to deal with the council over, building consents). There does not appear to have been any wish on the part of the ninth defendants to examine other documents discovered by the plaintiffs (the plaintiffs' affidavit of documents lists the documents in groups, and physical inspection would have to have been undertaken if any other types of documents were considered). Clearly counsel for the ninth defendants (correctly as it turned out) focused simply on a very limited aspect of the documentation. It is difficult, however, to see how the work that was undertaken could amount to more than a couple of hours.

[20] Rather than putting all parties to the costs of yet further memoranda, I propose exercising my discretion under r 14.1 and allowing a sum of \$1,000 (rather than the \$2,400 claimed) for inspection.

[21] I see no reason to make the “equitable reduction” sought by the plaintiffs in respect of the ninth defendants’ interlocutory application. The ninth defendants can be regarded as the successful party, in light of the plaintiffs’ decision to discontinue. I do not consider it relevant that the application brought was of a different character to the one first indicated. Counsel was entitled to make a decision as to how best to bring the matter before the Court. The application achieved the desired effect. I accept the claims for all of items 4.12, 4.13 and 4.17.

[22] The overall effect is that the ninth defendants are entitled to costs on all items claimed, as set out above save for reduction of the costs in respect of inspection by the sum of \$1,400.

### **Claim for contribution from sixth defendant**

[23] The plaintiffs seek contribution from the sixth defendant on the grounds that their cross claim should be regarded as a separate action, and the sixth defendant was also directly involved in the interlocutory application. They again ask the Court to exercise its discretion under r 14.1 and allocated one third of the overall costs to the sixth defendant.

[24] I do not consider that there is any basis to require contribution from the sixth defendant:

- a) The sixth defendant’s claim was a cross claim not a counterclaim. It was contingent upon the plaintiffs’ claim against the ninth defendants succeeding. The sixth defendant made it known from an early stage that it would not be pursuing a separate claim if the plaintiffs did not proceed.
- b) The ninth defendants did not file a defence to the sixth defendant’s cross claim.
- c) Although the ninth defendants’ application sought to have the cross claim heard as part of the separate question or preliminary issue, and



sought more explicit pleading by the sixth defendant, the application was not opposed. The sixth defendant accepted that its cross claim stood or fell with the plaintiffs' claim, and had already responded with particulars (even though, through error, they had not reached the ninth defendants). Significantly in respect of the application for particulars, the ninth defendants have not sought costs (there is provision under schedule 3 for such a claim if it was to have been pursued).

[25] The actions of the sixth defendant have not contributed in any way to the costs that are being sought against the plaintiffs. Given that the plaintiffs have either taken no steps in respect of the sixth defendant's claim (in relation to a statement of defence) and have not sought costs against the sixth defendant in respect of the only aspect of the interlocutory application separate from the plaintiffs' claim, I find no basis on which I am prepared to exercise my discretion.

### **Decision**

[26] The plaintiffs are to pay the ninth defendants' costs of \$11,770 together with disbursements of \$690.

[27] There is no order for the sixth defendant to contribute to these costs.

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**Associate Judge Abbott**