IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-917
[2015] NZHC 3359

BETWEEN	BODY CORPORATE 326030 First Plaintiff
	PAUL DAVID ATTON & ORS Second Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	WATTS & HUGHES LIMITED Second Defendant
	IGNITE ARCHITECTS LIMITED Third Defendant

Continued over page

Hearing:	On the papers
Counsel:	G M Sandelin and I J Stephenson for Plaintiffs F P Divich for First Defendant G J Kohler QC and N G Burton for Second Defendant W A Holden and H W King for Third Defendant and First Third Party P J Wright and J D Ryan for Second Third Party N R Williams for Third and Fourth Third party
Judgment:	21 December 2015

COSTS JUDGMENT OF M PETERS J

This judgment was delivered by Justice M Peters on 21 December 2015 at 3.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: ....

AND

NICHOLAS TURBOTT
First Third Party

SYMPHONY PROPERTIES LIMITED
Second Third Party

FIRE ENGINEERING CONSULTANTS LIMITED
Third Third Party

BRIAN FRANCIS VRANJES
Fourth Third Party

Introduction

[1] The Plaintiffs are the body corporate of, and unit holders in, a unit title development on Hobson Street, Auckland ("property"). They commenced this proceeding in April 2014 and discontinued it in April 2015. This judgment determines matters of principle arising from the numerous applications for costs made since. It does not appear that there are issues as to quantum, at least at present.

[2] The development was constructed between October 2002 and March 2004. In or about April 2014, the Plaintiffs were advised that there was no or insufficient fire protection between the exterior cladding and the wall framing of the building, and that such protection was required to comply with the fire rating requirements of the building code.

[3] In April 2014, approximately a month before the "10 year long stop" provision in the Building Act 2004 would have applied to preclude recovery, the Plaintiffs commenced proceedings in negligence against:

(a) Auckland Council ("Council") which had issued a certificate of code compliance in 2005.

(b) Watts & Hughes Limited ("Watts & Hughes"). Watts & Hughes were engaged as head building contractors by Symphony Properties Limited ("Symphony"), the registered proprietor of the development and the developer (at least at the outset). Watts & Hughes is in liquidation and makes no application for costs.

(c) Ignite Architects Limited ("Ignite") which designed the development.

[4] The parties' experts met in October and December 2014, following which they issued a joint statement dated 17 December 2014 stating that the building had complied with the building code at all material times.

[5] The Plaintiffs discontinued the proceeding on 2 April 2015.

Cross, third party and counter claims

[6] Each Defendant cross claimed against the other.

[7] In addition, the Council joined Mr N Turbott, an employee of Ignite; Symphony; Fire Engineering Consultants Limited ("Fire Engineering"); and Mr B F Vranjes, a director of Fire Engineering, as third parties.[1]

[8] Mr Turbott was alleged to be the architect responsible for the preparation of the design, plans and specifications. Fire Engineering was alleged to have been responsible for fire engineering aspects of the construction and Mr Vranjes for implementation of the same.

[9] Ignite also joined Fire Engineering as a third party.

[10] Fire Engineering counterclaimed against Ignite and cross claimed against Watts & Hughes, Mr Turbott and Symphony.

Issues

[11] The Plaintiffs accept that they are liable to pay the costs that the Council and Ignite incurred in defending the Plaintiffs' proceedings and in pursuing cross-claims, all on a 2B basis.[2]

[12] For their part, the Council and Ignite accept that, in the first instance, they are liable for costs due to third parties. They submit, however, that the Plaintiffs are liable to them for the costs they incurred in commencing third party proceedings and also that the Plaintiffs are liable to pay such costs as are due to the third parties, directly or by reimbursing the Council and Ignite.

[13] The Plaintiffs submit that they are only liable for the third party costs if the claims against those third parties were "inevitable". The Plaintiffs submit the claims were not inevitable.

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1 Under Law Reform Act 1936, s 17.

2 Memorandum of Counsel for the Plaintiffs dated 30 October 2015 at [19].

[14] Accordingly, it is necessary to determine whether the Council and Ignite's claims against third parties, or any of them, were inevitable. If so, the Plaintiffs are liable for those costs. If not, the Council and/or Ignite is liable, as the case may be.

[15] Aside from that point, it is also necessary to determine whether Fire Engineering is liable to Ignite for costs Ignite incurred in responding to Fire Engineering's counterclaim and whether Fire Engineering is liable to Mr Turbott and Symphony for its cross claims against them.

Costs arising from Defendants' claims against Third Parties

[16] The circumstances in which an unsuccessful plaintiff may be required to reimburse a defendant for costs that defendant incurred in issuing proceedings against a third party, and to pay the costs of the third party itself, have been addressed in *Money World New Zealand 2000 Ltd v KVB Kunlun New Zealand Ltd*, *Shirley v Wairarapa District Health Board* and *Tindall & Ors v Far North District Council*.[3] The effect of these authorities is summarised in McGechan on Procedure as follows:[4]

> Normally a defendant who has successfully defended the plaintiff's claim will be ordered to pay the costs of a third party joined by that defendant. However, if the plaintiff's claim is effectively against a third party, or if that claim had the inevitable result of the third party being joined, then the unsuccessful plaintiff may be ordered to pay the third party's costs direct. Alternatively, the defendant may be permitted to add the costs which it has been ordered to pay to the third party, to the costs which the plaintiff should pay the defendant. Thus, a successful defendant should only be called on to meet a third party's costs if the joinder was unnecessary or was for some other reason unjustified.

[17] The Plaintiffs submit that the claims the Council and Ignite brought against third parties were not inevitable but rather were unnecessary or otherwise unjustified.[5]

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3 *Money World New Zealand 2000 Ltd v KVB Kunlun New Zealand Ltd* HC Auckland CIV-2003-404-2542, 23 September 2005; *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523; and *Tindall & Ors v Far North District Council* HC Auckland CIV-2003-488-135, 25 May 2007.

4 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HRPt14.08].

5 Memorandum of Counsel for Plaintiffs, above n 2, at [26].

Claim against Mr Turbott as Third Party

[18] I accept the Plaintiffs' submission that Mr Turbott's joinder was unnecessary. At all material times Mr Turbott was employed by Ignite and Ignite was vicariously liable for any failings in the course of his employment.[6] The Council submits that at the time it commenced its third party claim it did not know whether Mr Turbott was an employee of, or independent contractor to, Ignite. There is no evidence, however, that the Council made any enquiry of Mr Turbott or of Ignite as to Mr Turbott's status before issuing its third party proceedings against Mr Turbott. In those circumstances, I am not persuaded that the Plaintiffs should pay these costs.

Claim against Symphony as Third Party

[19] The Plaintiffs submit that the Council's claim against Symphony was misconceived as "any acts in relation to the construction of the building by Symphony were time barred" and "at all material times H47 Development Ltd was the developer".[7]

[20] The submission is based on the ground that Symphony transferred its interest in the development to a wholly owned subsidiary, H47 Developments Ltd ("H47"), in February 2003. It is not obvious to me that Symphony would have ceased to be the "developer" simply by the transfer to a wholly owned subsidiary. Whether Symphony remained the developer thereafter was a factual issue requiring determination in light of the evidence at trial.[8]

[21] Accordingly, I do not consider it to have been improper or unnecessary for the Council to have joined Symphony. On the contrary, I consider Symphony's joinder to have been inevitable.

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6 Memorandum for Third Defendant and First Third Party in Relation to Costs dated 22 October 2015 at [11.1].

7 Memorandum of Counsel for the Plaintiffs, above n 2, at [42].

8 See the discussion in *Spargo v Franklin* HC Tauranga CIV-2010-470-091, 9 November 2011 at [33] - [47].

Council's claims against Fire Engineering, and Council's claim against Mr Vranjes, both as Third Parties

[22] The Plaintiffs contend that there was no reason for the Council or Ignite to join Fire Engineering. They submit that they did not allege negligence on the part of Fire Engineering but rather a failure by other parties to follow Fire Engineering's advice.[9]

[23] The Council's and Ignite's response to this submission is that, at least at the outset, the Plaintiffs' claim was focused on the insufficiency of the fire protection in place for the development. Fire Engineering was engaged to advise on these matters. Fire Engineering also approved the building for the interim code compliance certificate in May 2004.

[24] I accept the Council's and Ignite's submission that, in those circumstances, it was inevitable that they would join Fire Engineering. The Plaintiffs are liable accordingly.

[25] Mr Vranjes was a director of Fire Engineering and may have had a liability as such. Given that, I am satisfied that his joinder was inevitable and the Plaintiffs likewise are liable for his costs also, if any. No details appear to have been supplied as to what Mr Vranjes' costs are.

[26] To the extent that I have held the Plaintiffs' liable for third party claims, it is to be expected that the Plaintiffs will pay those costs directly to the parties concerned. I reserve leave to apply if any issue arises in that regard.

Fire Engineering's counterclaim and cross claims

[27] Fire Engineering counterclaimed against Ignite and cross-claimed against Watts & Hughes, Mr Turbott and Symphony.[10]

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[9] Memorandum of Counsel for the Plaintiffs, above n 2, at [29] - [33].

[10] Statement of Cross Claim by Third Third Party Against the First Third Party and Second Third Party and Second Defendant dated 13 August 2014; and Statement of Defence and Counterclaim by the Third Third Party Against Claim by the Third Defendant dated 5 September 2014.

[28] Fire Engineering submits that it should not be required to pay any costs to Ignite in respect of its defence of the counterclaim, nor any costs to Mr Turbott and Symphony. No issue arises as to Watts & Hughes for the reason given above.

[29] It is not apparent to me that Ignite could be liable to Fire Engineering for any deficiency in the latter's advice as to the fire protection measures required. Fire Engineering is to pay Ignite's costs on the counterclaim.

[30] I have already referred to Mr Turbott's position in relation to his joinder by the Council. Fire Engineering must have been aware that Mr Turbott was an employee of Ignite at the time it issued its cross claim. Mr Turbott pleaded the employment relationship in his statement of defence to the Council's claim dated 4 August 2014, and that preceded Fire Engineering's cross claim. Accordingly, I consider Fire Engineering's claim against Mr Turbott to have been unjustified.

[31] In its submissions, Fire Engineering also questioned whether Mr Turbott would in fact have incurred the costs he claims, given his (minor) role in the proceedings. I am satisfied from the submissions filed in response that Mr Turbott did in fact incur the costs sought and that he will not profit from the award of costs.[11] Fire Engineering is to pay Mr Turbott's costs accordingly.

[32] That leaves Symphony. I am satisfied that Fire Engineering acted reasonably in cross claiming against Symphony. Those costs are to lie where they fall.

Conclusion

[33] Any issues as to quantum, rather than points of principle, are to be determined by the Registrar. Subject to that, there is leave to apply. I am likely to require any further submissions to be presented orally, and not on the papers.

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M Peters J

[11] Memorandum for the Third Defendant and First Third Party dated 30 October 2015 at [10].

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