

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

CIV 2007-404-001771

BETWEEN ROGER THOMAS PHILLIPS AND
 SUSAN PHILLIPS
 Plaintiffs

AND LOUCAS PETROU
 First Defendant

AND JAMES DOUGLAS ALEXANDER
 Second Defendant

AND TERENCE HUGH ARNOLD
 Third Defendant

AND NORTH SHORE CITY COUNCIL
 Fourth Defendant

(On the papers)

Counsel: DM Salmon for first, second and third defendants
 SA Thodey for fourth defendant

Judgment: 21 July 2008 at 1030

JUDGMENT OF ASSOCIATE JUDGE ROBINSON
[Decision as to costs in favour of first, second and third defendants against
fourth defendant on fourth defendant's withdrawal of cross-claim against first,
second and third defendants]

Solicitors: Neumegen & Company, PO Box 5968, Auckland for plaintiffs
 LeeSalmonLong, PO Box 2026, Auckland for first, second and third defendants
 Heaney & Co, PO Box 105 391, Auckland for fourth defendant

[1] In these proceedings the plaintiffs, who are the owners of an apartment in Castor Bay, bring proceedings against the first, second and third defendants who constructed the apartment and the fourth defendant as the local authority. In their claim the plaintiffs allege that their apartment was not constructed properly and, as a result, claim damages being the costs of repairs from the first, second and third defendants as the builders of the apartment and the fourth defendant, claiming that the fourth defendant breached a duty of care it owed to the plaintiffs.

[2] The fourth defendants filed and served a notice of cross-claim against the first, second and third defendants. The cross-claim alleges that if the fourth defendant is liable, which is denied, the first, second and third defendants are liable as concurrent tortfeasors with the fourth defendant and liable to contribute to any losses which the fourth defendant for which the fourth defendant may be found liable. The fourth defendant claims to be entitled to contribution to the extent of a complete indemnity pursuant to s 17(1)(c) Law Reform Act 1936.

[3] On 7 March 2008 the fourth defendant discontinued its cross-claim against the first, second and third defendants. On the filing of that discontinuance the first, second and third defendants seek costs from the fourth defendant. Included in the schedule of costs claimed by the first, second and third defendants are the following amounts:

a)	Preparing and filing summary judgment application and supporting affidavits	\$960.00
b)	Preparation for hearing of defended summary judgment application	\$1,600.000
	Total	<hr/> \$2,560.00 <hr/>

[4] The fourth defendant accepts that the above amounts are properly claimable as being amounts incurred by the first, second and third defendants in meeting the cross-claim brought by the fourth defendant and does not object to a judgment requiring the fourth defendant pay these costs.

[5] The fourth defendant does, however, object to an order requiring it to pay costs relating to discovery, inspection, preparation and appearance at a case management conference on 26 February 2008.

[6] With regard to discovery and inspection, counsel for the first, second and third defendants acknowledges that the discovery and inspection would also have been required in respect of the proceedings brought by the plaintiff and, consequently, reduces the claim to one half of the total costs involved. There is no evidence to support the conclusion that the fourth defendant's cross-claim has increased the costs incurred by the first, second and third defendants in providing discovery and disclosure. Indeed, it is a reasonable inference that the bringing of the fourth defendant's cross-claim did not significantly increase the costs to be incurred by the first, second and third defendants in complying with their obligations to provide disclosure and discovery. In the absence of any firm evidence as to an increase in the first, second and third defendants' obligations with regard to discovery and disclosure caused by the fourth defendant's cross-claim, I am not prepared to make any order requiring the fourth defendant to contribute to such discovery.

[7] The case management conference convened for 26 February 2008 was at the request of counsel for the fourth defendant. At that time, these proceedings had a fixture before me on 29 February 2008 to consider, amongst other things, determining issues arising out of the cross-claim between the fourth defendant on the one part and the first, second and third defendants on the other part.

[8] The fourth defendant sought an adjournment of the hearing on 29 February 2008 because counsel was involved in a five-week trial which would include 29 February 2008. The hearing for 29 February 2008 had been fixed at the hearing of these proceedings on 26 November 2007. The application for an adjournment was opposed. Consequently, a short hearing was necessary. At the conference on 26 February 2008 I adjourned the hearing set down for 29 February 2008 to 10 March 2008.

[9] The conference for 26 February 2008 was caused by counsel for the fourth defendant being unavailable for the hearing on 29 February 2008. As it happens, the request for adjournment was successful. However, the request for an adjournment related, to a large extent, to the claim by the fourth defendant against the first, second and third defendants. Although the fourth defendant's application for an adjournment was successful, having regard to the fact that the application was brought about because the fourth defendant's counsel would not be available for 29 February 2008, that date having been fixed with the consent of all counsel in November 2007, I am satisfied that the fourth defendant should make a reasonable contribution towards the costs involved for preparation and attendance at that conference. In the circumstances, I am satisfied that one-half of the costs claimed should be allowed. That gives adequate recognition to the fact that the fourth defendant's application at that conference was successful. The total costs claimed for preparation and attendance at that conference is \$1,120. In the circumstances, I allow costs of \$560.

[10] In summary, the fourth defendant shall pay the following costs to first, second and third defendants:

	\$
a) Preparing and filing summary judgment application and supporting affidavits	960
b) Preparation for hearing of defended summary judgment application	1,600
c) Preparation and appearance at case management conference on 26 February 2008	560
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Total	\$3,120
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In addition, the first, second and third defendants are entitled to their disbursements

as fixed by the Registrar.

MD Robinson
Associate Judge