

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

**CIV-2011-404-008215
[2012] NZHC 2679**

BETWEEN	TIAN MIN (MAGGIE) MA Plaintiff
AND	TONY MENG HIANG TAY First Defendant
AND	SELINA SIAW NYUNG TAY Second Defendant
AND	JIREH HOTEL INVESTMENT LIMITED Third Defendant
AND	TONY TAY TRUST LIMITED Fourth Defendant
AND	TONY MENG HIANG TAY, SELINA NYUNG TAY AND RONALD WILLIAM EDWARD CHERRY Fifth Defendants
AND	ROSGO FINANCIAL SERVICES LIMITED Sixth Defendant
AND	ROSHNI GOLIAN Seventh Defendant

Hearing: 4 October 2012

Counsel: PJ Dale for Plaintiff
AM Swan for First to Fifth Defendants

Judgment: 4 October 2012

**JUDGMENT OF ASHER J
(Costs)**

Solicitors/Counsel:
PJ Dale, PO Box 130, Shortland Street, Auckland 1140. Email: pauldale@45chancery.co.nz
AM Swan, PO Box 5444, Wellesley Street, Auckland. Email: andrewswan@xtra.co.nz

Introduction

[1] The plaintiff has been granted summary judgment against the first to fourth defendants. A claim for general damages was not disposed of in that judgment. That general damages claim was set down for hearing today. There is a minute of Rodney Hansen J of 8 August 2012 directing the hearing and providing that if the first to fourth defendants wished to respond to the plaintiff's evidence they could do so by filing affidavits no later than 15 September 2012. In the event, the defendants did not file any further affidavits.

[2] Mr Dale on behalf of the plaintiff filed submissions on Tuesday, 2 October 2012. Mr Swan for the defendants filed his submissions at 6pm on Wednesday, 3 October 2012. There were no directions made as to when submissions should be filed. This morning Mr Dale has sought an adjournment of the general damages claim. This is because the plaintiff has decided to pursue the other causes of action in the statement of claim, in particular the fraud and conspiracy to defraud allegations against Mr Tay and his associates. A hearing will be sought for that aspect of the claim. The Associate Judge had refused to enter summary judgment in respect of those causes of action. The purpose of pursuing those other causes of action will be to obtain a basis for seeking indemnity costs

[3] The reason for the adjournment is that Mr Dale has reflected on Mr Swan's submissions, and in particular the point made by Mr Swan that the causes of action based on contracts in October 2011 on which the plaintiff succeeded in the summary judgment claim, arose after the period in which the events relied on for the general damages claim occurred. Mr Dale accepts that the point may have some force and wishes to have the general damages claim heard in conjunction with the cause of action alleging the initial fraud and conspiracy to defraud. That allegedly took place quite some time earlier and of course prior to the distress that the plaintiff relies on to support her general damages claim.

[4] There is a further point. Should the fraud claim succeed the plaintiff's position in seeking general damages will be stronger. The reservations that are on

occasions expressed about ordering general damages on contract claims will not apply if the fraud claims are proven.

[5] Mr Swan is ready to go ahead. However, he has not strongly opposed the adjournment request. The thrust of his submission is that there should be a costs order in his favour. Mr Dale opposes that.

[6] It is first necessary to deal with the adjournment application. I am prepared to grant it. If there is to be a hearing of all the claims then it is appropriate for the general damages to be determined at that point. However, I am also prepared to make an order for costs in the defendants' favour. Mr Swan has prepared for the hearing today and it is no fault of the defendants that the plaintiff has chosen not to proceed. The situation is equivalent to a discontinuance or withdrawal of any interlocutory application or proceeding at the start of the allocated hearing.

[7] Mr Dale in opposing costs has pointed out that there was a need for a Court hearing in any event to make a variety of interlocutory orders. I accept that. He has also submitted that much of Mr Swan's preparation work will not be wasted as there may ultimately be a general damages hearing when it can be used. That may be so, but there is equally a possibility that for one reason or another general damages for contract will not ultimately be pursued and that the work will indeed have been wasted.

[8] Looking at the matter in the round I am satisfied that there should be a costs award. There is no category in Schedule 3 that directly fits a defended costs application arising after a summary judgment. By analogy the provision for defended interlocutory applications is of some assistance. The allocation on scale 2 is one and half days for the preparation of written submissions, and on a 2B basis the preparation of the submissions would be approximately \$3,000. That would be in my view an excessive award for the work done given that some appearance was necessary in any event and the fact that at least some of the work in preparing for a general damages argument is likely to be re-useable.

[9] In all the circumstances I consider the appropriate costs award to be \$1,750 and I award that sum in favour of the defendants in respect of this adjournment.

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Asher J