

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

CIV-2003-404-006306

BETWEEN	BODY CORPORATE 160361 First Plaintiff
AND	SAMUEL JACKSON & OTHERS Second Plaintiffs
AND	AUCKLAND CITY COUNCIL Defendant
AND	PAXTON CONSTRUCTION MANAGEMENT LTD First Third Party
AND	AKITA CONSTRUCTION LTD (IN LIQUIDATION) Second Third Party

Hearing: 25 June 2007

Appearances: Frana Divich for Defendant

Judgment: 25 June 2007

JUDGMENT OF HARRISON J

SOLICITORS

Heaney & Co (Auckland) for Defendant

[1] In 2003 the first and second plaintiffs, Body Corporate 160361 and others, issued this proceeding. In summary, in December 1992 the owner of a property at 19-35 Fleet Street, Newton, Auckland applied to Auckland City Council for a building permit to construct a housing development. Council granted the permit on 19 August 1993. Construction was carried out between November 1993 and July 1994.

[2] In due course defects appeared in the residential units constructed at Fleet Street. Extensive remedial work was required. The Body Corporate and others, the owners of the units, sued Council alone for special damages for remedial work of \$1.194 million and general damages exceeding \$1 million.

[3] Council joined as third parties the project manager, Paxton Construction Management Ltd, and the builder, Akita Construction Ltd. Council sought an indemnity or contribution from both on the ground that they were joint tortfeasors with Council as against the plaintiffs. For present purposes, I am only concerned with Akita (Ms Divich for Council advises that it is satisfied Paxton is truly insolvent). Akita filed a statement of defence to Council's third party claim in July 2004 but has since failed to take any steps.

[4] Akita was placed in liquidation on 26 January 2007. Ms Divich advises today that the company was then solvent. Council applied for an order granting leave to continue with the proceeding on 9 February 2007: s 248(1)(c) Companies Act 1993. This Court made an order granting leave on 21 April 2007.

[5] In the interim, on 5 April 2007 the Body Corporate and Council attended a mediation. As a consequence they entered into a deed of settlement that day whereby Council agreed to pay the Body Corporate's claim a total of \$250,000 in denial of liability. A notice of discontinuance of the primary proceeding was recently filed.

[6] Council now seeks an order on its third party claim for indemnity or substantial contribution from Akita against its liability to the Body Corporate. Its application was served on the liquidators on 19 June 2007. I am satisfied that

Akita's liquidators have notice that Council's application was to be heard at 10 am today. They have failed to take any steps. I shall deal with the application by way of formal proof.

[7] Originally Ms Divich sought an order for indemnity. However, on reflection she amended Council's claim to one for a contribution of 80% or \$200,000. In my judgment that is an appropriate measure of the parties' relative culpability and causative potency towards the Body Corporate's loss. Without doubt the builder must bear the brunt of liability. It was the primary party responsible for carrying out construction and ensuring that the dwellings were constructed in a watertight manner.

[8] Council's role was secondary. The Body Corporate's allegations of negligence are of a failure to adequately inspect the development. In my experience the normal apportionments of liability accepted by Courts in these circumstances are in the range of 75-85% against the builder and 25-15% against the local authority.

[9] Akita has not raised any allegation that the terms of the settlement between the Body Corporate and Council were unreasonable. Indeed, it seems that the terms are, if anything, favourable to Council given the total amount of the Body Corporate's claim and the risk, cost and uncertainty of litigation. Council has been well served by its advisors.

[10] Accordingly, I enter judgment for Council on its third party claim against Akita for the sum of \$200,000 together with interest at the rate of 7.5% per annum from 20 April 2007 until payment. Council is entitled to costs against Akita fixed according to category 2B together with disbursements as fixed by the Registrar.

Rhys Harrison J