IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CIV-2018-012-000098
[2019] NZDC 23557

BETWEEN	CENTO ANGELI LIMITED Plaintiff
AND	MARILYN KAY TOSH First Defendant
AND	KERRY SIZEMORE-GEORGE Second Defendant
AND	NIDD REALTY LIMITED Third Defendant

Appearances: K Logan for the Plaintiff
B Nevell for the First Defendant
A Gaborieau for the Second and Third Defendants

Judgment: 26 November 2019

RESERVED DECISION OF JUDGE M A CROSBIE
ON COSTS

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[1] By a judgment of 11 June 2019, I granted summary judgment against the plaintiff and directed that the parties confer and attempt to agree costs.

[2] By a memorandum of 30 September 2019, the Registrar provided me with costs memoranda filed by counsel for the defendants. Nothing has been filed by the defendant. I assume that the memoranda were provided to counsel for the plaintiff.

Memorandum for First Defendant

[3] Mr Nevell, in his memorandum dated 29 August 2019, advises the Court that the parties have conferred and that counsel for the plaintiff has indicated that it would not be opposing the costs and disbursements claimed by the defendants.

[4] The first defendant claims costs on 2B scale for all steps taken up until 28 February 2019 (one month prior to the hearing) and full indemnity costs for the preparation for, and appearance at, the summary judgment hearing. The basis for the claim for indemnity costs from 28 February onwards is a Calderbank letter to the plaintiff for a financial settlement in the amount of $5,750, which was substantially better than the outcome obtained after the hearing. This offer was declined. Mr Nevell advises that the offer was premised on an expert report obtained by the first plaintiff, putting the cost of remedying the defects at the plaintiff's property at $25,100. Mr Nevell attached the Calderbank letter and supporting expert reports.

[5] As a result, the first defendant seeks a cost award against the plaintiff in the amount of $11,570.75. This includes disbursements of $2,418.00. Mr Nevell advises that counsel for the plaintiff has indicated that costs of this amount will not be opposed and he submits that orders can therefore be made in Chambers.

[6] I accept Mr Nevell's submissions. Quite apart from his advice to the Court that the costs sought are not opposed, the costs claimed appear to be both properly calculated and reasonable.

[7] Accordingly, the Court orders costs against the plaintiff to be paid to the first defendant in the sum of $11,570.75, as broken down in the first defendant's memoranda.

Memorandum for the Second and Third defendants

[8] The second and third defendants seek cost of $16,396.25, including disbursements of $6,855.45. The disbursements include an insurance policy excess of

$5,750. The disbursements aside, the costs sought are almost the same as that claimed by the first defendant.

[9] Ms Gaborieau claims a 20% uplift from the 2B scale following the filing of the application for summary judgment and strike out applications with supporting affidavits. Ms Gaborieau's submissions are extensive. Attached to them are copies of correspondence between the solicitors for the second and third defendants to the plaintiff setting out their position which, counsel submits, is consistent with the Court's judgment.

[10] Ms Gaborieau makes submissions based on unreasonableness by the plaintiff. That submission relies on a decision of the Real Estate Authority dated 9 May 2018 that exonerated the defendants, noting that the agency provided a disclosure document to the plaintiff and that all information available about dampness was passed on, including advising the plaintiff to carry out their own due diligence. The plaintiff, of course, did nothing further and chose not to obtain a building inspection or add an inspection condition as a contractual condition. The plaintiff voluntarily assumed the risk in relation to dampness.

[11] By letter of 25 May 2018, the second and third defendants offered to settle the proceeding on the basis that the plaintiff discontinued the claim with no issue as to costs. That offer was not accepted.

[12] Despite the decision of the Real Estate Authority and the offer of settlement, the plaintiff determined to continue the proceeding.

[13] I accept that there were several efforts by the second and third defendants to settle the proceeding which were not accepted. The offers matched the end result of the hearing.

[14] I attach some weight to the fact that the plaintiff ignored the view of an expert Tribunal in relation to the conduct of the second and third defendants, but nonetheless decided to press on. It is also the case that my judgment saw no merit in the plaintiff's

proceeding. The plaintiff made a bad bargain in the knowledge that the property had problems, which were the very problems they later relied on to resile from the contract.

[15] The second and third defendants' claim for increased costs is both consistent with that of the first defendant and reasonable. Given the observations made above, and in the judgment, relating to the lack of merit of the plaintiff's claim, the defendants ought to be able to claim the deductible as a disbursement.

[16] Accordingly, the Court orders costs against the plaintiff in favour of the first and second defendants for $16,396.25 as broken down in the second and third defendants' memoranda.

M A Crosbie
District Court Judge