

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV-2009-004-001210**

**PROVISION TECHNOLOGIES LIMITED**  
Plaintiff

v

**DRURY INVESTMENTS LIMITED**  
Defendant

Hearing: 24 March 2010

Appearances: M Keall for Plaintiff  
A Ram for Defendant

Judgment: 30 April 2010

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**JUDGMENT OF JUDGE A-M J BOUCHIER**  
[AS TO COSTS]

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[1] I have received and read the memoranda supplied by counsel for the plaintiff, by Mr Ram and Mr Keall for the plaintiff's reply. I confirm that the judgment given for the plaintiff included interest at the claimed rate.

[2] I have considered the matters raised in Mr Ram's memorandum.

[3] I refer again to the credibility findings that I made – from paras [67] through to [71] of my decision – and the findings of fact made from paras [72] to [77].

[4] I refer also to my discussion of the counter claims in the defendant's documents, which I detail in paras [3] through to [10] of my judgment.

[5] As the plaintiff points out, there is no obligation on the plaintiff to settle the claim and, given the way the hearing progressed, I do not consider there would have been any real progress made in attempting to settle the matter.

[6] The plaintiff was plainly entitled to its judgment on my findings of credibility and fact and, as I said, the hearing was extended in ways that I have already described.

[7] I am of the view that indemnity costs should be given because of the amount of work which was required to pursue what was a small claim and to defend the untenable counter claims of the defendant.

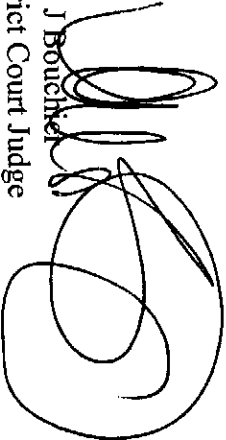
[8] I now consider whether there should be non-party costs awarded against Mr Ram personally if the defendant is unable to pay the costs.

[9] The starting point here is that costs against non-parties are “exceptional” but there is High Court authority for such to occur. In *Asset Traders Limited v Fava's Sports Car World Limited*, a decision in the High Court at Auckland on 13 September 2006, Winkelmann J endorsed the Privy Council’s general approach to determining whether the circumstances of a case are sufficiently “exceptional” to merit an award of costs against non-party. The starting point should be:

“Exceptional” in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit at their own expense. The ultimate question in any such “exceptional” case is whether, in all the circumstances, it is just to make the order. It must be recognised that this is inevitably to some extent a fact specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

[10] Therefore, in my view, and given the particular facts that I have already referred to in this case in my judgment, and highlighted in this costs judgment, I am of the clear view that this is an exceptional case because of the small amount of the claim, the work which was required to prosecute it and defend the untenable counter claims and the lengthening of the hearing which Mr Ram occasioned.

[11] Therefore, if the defendant fails to pay the indemnity costs of \$11,174.12 plus disbursements of \$1,700, there is an award of costs for these amounts against Mr Ram personally.



A-M J Bouchier  
District Court Judge