

CITATION: *Andrew Thurlow & Suzanne Innocenzi v The Architect Studio Pty Ltd*
[2008] NTMC 005

PARTIES: ANDREW THURLOW
 SUZANNE INNOCENZI

 v

 THE ARCHITECT STUDIO PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20307071

DELIVERED ON: 23 January 2008

DELIVERED AT: Darwin

HEARING DATE(s): Written submissions

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Practice and Procedure – Interest on judgement sums paid on judgement set aside –
Costs – Plaintiff successful in part

REPRESENTATION:

Counsel:

Plaintiff: Ms Kelly
Defendant: Ms Gearin

Solicitors:

Plaintiff: Withnalls
Defendant: Cridlands

Judgment category classification: C
Judgment ID number: [2008] NTMC 005
Number of paragraphs: 15

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20307071

[2008] NTMC 005

BETWEEN:

**ANDREW THURLOW AND SUZANNE
INNOCENZI**
Plaintiffs

AND:

THE ARCHITECT STUDIO PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 23 January 2008)

Ms FONG LIM RSM:

1. This matter has had a chequered history. In the first instance the Plaintiff's claim was heard by Her Honour Ms Blokland SM (as she then was) and Her Honour found in favour of the Plaintiff on the contract claim. Her Honour's judgement was then overturned by the Supreme Court (whose decision was confirmed by the Court of Appeal) and the matter was remitted to this court for an adjudication on the negligence claim.
2. The negligence claim was argued before me and on 17 September 2007, I found against the Defendant in the negligence claim finding that even though there may have been negligence in one aspect of the Defendant's service to the Plaintiff, no damages arose consequential to that negligence.
3. The matter now comes back before me for the issue of costs to be decided.
4. Before I address the issue of costs, I note that the Defendant makes application for interest on judgment monies and costs which had been paid

to the Plaintiff upon Ms Blokland's judgement and only repaid on 18 October 2007 and 1 November respectively. It is trite law that upon the overturning of Her Honour's judgement, the Defendant was entitled to be repaid the judgement monies by the Plaintiffs (see *Commonwealth v McCormack* (1984) 155 CLR 273). No information was provided to me about whether requests had been made prior to the matter coming before me in August 2007 and indeed there was no mention of restitution in the decision of the Supreme Court or the Court of Appeal.

5. Noting the capacity in which this matter is heard by me, that is in the original jurisdiction of this court on the negligence cause of action, there is clearly no jurisdiction of this court to make the orders requested by the Defendant for interest. Any order for restitution and interest arising from failure to pay restitution must come from the Court of Appeal as it is an order consequential upon that court's judgement. Accordingly I will not be making an order in relation to that claim for interest.
6. **Costs** – the Defendant has already been granted its costs in the Court of Appeal and it is now for this court to decide the issue of costs between the parties in relation to the claim for negligence. The costs on the contract part of the Plaintiff's case also remain at large, as the Supreme Court has overturned Her Honour Blokland's original order that the Defendant pay the Plaintiff's costs but did not replace it with a contrary order. It is an unusual situation where this court, hearing only the negligence claim that had been remitted, also has to decide the costs on the contractual issue, however as I have had the opportunity to review the transcript and the benefit of the written decisions of this Court, the Supreme Court and the Court of Appeal, I do not find any difficulty in considering and deciding that issue.
7. While accepting that the usual course is that the successful party be granted costs against the unsuccessful party, the Plaintiff submitted that the

circumstances of this particular matter constituted a situation where an exceptional order should be made (see *Foster v Farquhar* [1893] QB 564).

8. There is no doubt that the court has the discretion to order costs in the manner it thinks fit (section 31 *Local Court Act* and rule 38.03 Local Court Rules).
9. The Plaintiff claims that because Justice Angel, and later the Court of Appeal, found against the Plaintiff on a pleadings point, then that is not really a finding on the merits of the claim and therefore is a situation where an exceptional order should be made. The Plaintiff further claims that as I found that there was some breach of duty of care by the Defendant, then some credit should be given to the Plaintiff in relation to costs on the negligence action.
10. I disagree with the Plaintiff on both counts. Justice Angel did more than find against the Plaintiff on a pleadings issue in the final page of his judgement and His Honour found:

“As I have said the respondents only ever pleaded one contract. They never pleaded or sought to prove a contract other than that constituted by exhibit P2. Nor did they plead any variation or variations of P2. Thus post contractual conduct of the parties was inadmissible as evidence of what the contract between the parties constituted by Exhibit P2, meant.....

The respondents’ breach of contract case miscarried. The Learned Magistrate found the respondents had failed to make out their case based on either alleged time limits or Government Grant requirements. The respondents’ otherwise pleaded breach of contract case should have been dismissed as unproven (my emphasis). There was no evidence that the appellant contracted to design a house with all the features contained in the “wish list” for \$250000 or less, or warranted that such a house could be built.”

11. His Honour clearly found that the contract case as pleaded was not supported by the evidence in any event.

12. In relation to my ruling on the negligence issue, the fact that I have found that there was a breach of duty of care in relation to communication between the parties, that should not in anyway be characterised as a success on behalf of the Plaintiffs. The Plaintiffs have not succeeded in their claim because they have not proved damages. Simply put, if there are no damages, then there is no cause of action, damages are an element of the cause of action in negligence. For a Plaintiff in negligence to be successful, they have to prove a duty of care, breach of the duty of care, injury (damages) resultant from that breach of duty of care and the absence of any contributory behaviour by the Plaintiff (if raised by the Defendant) (see Fleming on Law of Torts Ninth edition page 113).
13. In both the contract and negligence actions, there has been some criticism laid in relation to the form of pleadings, however that is not a problem that should be laid at the successful defendant's door.
14. There are no circumstances in this matter that lead me to find that an exceptional order regarding costs should be made.
15. I order that the Plaintiffs pay the Defendant's costs of the proceedings both for the contract and tort claim in this court 80% of the Supreme Court costs scale and I certify the matter fit for counsel.

Dated this 23th day of January 2008.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE