Meriton Apartments Pty Limited v The Owners of Strata Plan No. 72381 (No. 3) - [2016] NSWSC 1348

Supreme Court

New South Wales

- Amendment notes

Medium Neutral Citation:	**Meriton Apartments Pty Limited v The Owners of Strata Plan No. 72381 (No. 3) [2016] NSWSC 1348**
Hearing dates:	9 September 2016
Date of orders:	23 September 2016
Decision date:	23 September 2016
Jurisdiction:	Equity
Before:	Slattery J
Decision:	Interest to be calculated on the basis that Apartments suffered a loss of profits monthly from the July 2012 date of repudiation of the Caretaker Agreement. Defendant/cross-claimant ordered to pay 50 per cent of the plaintiff/cross-defendant's costs of the proceedings.
Catchwords:	INTEREST – assessment of interest up to judgment – Civil Procedure Act 2005, s 100 – plaintiff successful on claim for loss of profits due to defendant's repudiation of an agreement to provide caretaker services in a high rise city building – amount of loss of profits ascertained – whether interest on the amount of lost profits should be calculated from the end of the unexpired portion of the repudiated agreement or on the basis that a loss of profits was suffered monthly from the date of repudiation. COSTS – each party has had some success in the proceedings - some failures and some successes in the plaintiff's claim against the defendant/cross-claimant – the defendant/cross-claimant fails on the cross-claim but succeeds on preliminary issues argued on the cross-claim – what is the proper order for costs in the circumstances – proceedings transferred from Local Court to Supreme Court – whether proceedings could have been conducted in the District Court.
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 100 District Court Act 1973 (NSW), s 134 Uniform Civil Procedure Rules 2005 (NSW), rr 42.1, 42.34
Cases Cited:	Ciccarelli v Cavasinni Developments [2004] NSWSC 788 Commonwealth Bank of Australia v Hadfield (2001) 53 NSWLR 614 Hancock v Reinhardt (Costs) [2016] NSWSC 11 Leading Edge Events Australia Pty Ltd v Kiri Te Kanawa (No. 2) [2007] NSWSC 568 Lollis v Loulatzis (No. 2) [2008] VSC 35 Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381 [2015] NSWSC 202 Meriton Apartments Pty Limited v The Owners of Strata Plan No. 72381 (No. 2) [2016] NSWSC 819 Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd (No. 2) [2016] NSWSC 943 Schindler Lifts Australia Pty Ltd v Debelak (1989) 89 ALR 275 Tate & Lyle Food and Distribution v Greater London Council [1982] 1 WLR 149
Texts Cited:	Harvey McGregor, McGregor on Damages, (19th ed 2014, London Sweet & Maxwell)
Category:	Costs
Parties:	First Plaintiff: Meriton Apartments Pty Ltd Second Plaintiff: Meriton Properties Pty Ltd (ACN 000 698 626) Defendant: The Owners of Strata Plan No. 72381
Representation:	Counsel: Plaintiffs: M.G. Rudge SC; M.R. Hall SC Defendant: G.A. Sirtes SC; J.P. Knackstredt Solicitors: Plaintiffs: Zena Nasser, Office of the General Counsel – Meriton Group Defendant: David Edwards, Doyle, Edwards, Anderson Lawyers Pty Ltd
File Number(s):	(2012/148356)(2011/402191)
Publication restriction:	No

Judgment

1. This is the Court's third judgment in these proceedings. The Court delivered its first judgment on 13 March 2015: *Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381* [2015] NSWSC 202 ("the first judgment"). The Court delivered its second judgment on 17 June 2016: *Meriton Apartments Pty Limited v The Owners of Strata Plan No. 72381 (No. 2)* [2016] NSWSC 819 ("the second judgment").

2. A concise summary of the issues decided by the first judgment is set out in the second judgment (at [2] to [14]). The second judgment dealt with the following outstanding issues: whether Apartments' loss of profits claim was made out (at [24] to [57]); whether on Mid Rise's cross-claim, Mid Rise had established its claim for a breach of fiduciary duty against Apartments for material non-disclosure and established an entitlement to consequential relief (at [58] to [73]); a number of other incidental matters (at [74] to [100]) relating to the continuation or discharge of existing interim injunctive relief; whether the Court should vary its findings based on Exhibit E under the slip rule; whether the Court should re-visit its findings at [170] of the first judgment; and the precise form of final orders.

3. Two issues remain outstanding after the second judgment: (1) how should interest be calculated that is due from Mid Rise to Apartments on the judgment sum of $282,502.39 owed to Apartments on the claim for loss of profits; and (2) what is the proper costs order in the proceedings.

4. After the second judgment the parties filed written submissions, to which they spoke on 9 September 2016. Mr M. Rudge SC and Mr M. Hall SC of counsel continue to appear for Apartments in the proceedings. Mr G. Sirtes SC and Mr J. Knackstredt of counsel continue to appear for Mid Rise. The Court has been greatly assisted by the careful submissions of counsel and solicitors throughout various phases of these proceedings.

5. This judgment should be read with the Court's first and second judgments. Persons, events and things are referred to in all three judgments in the same way.

(1) Interest

6. *The Issue.* The Court determined in the second judgment (at [56] and [57]) that Apartments had incurred a loss of profits of $282,502.39 for the period 13 July 2012 to 14 February 2014 for Mid Rise's repudiation of the Caretaker Agreement and that judgment should be entered for that sum. But the entry of judgment was subject to resolution of issues about what final balance is due from one party to the other in respect of debts due under the Caretaker Agreement, which in turn depended upon interest calculations related to the timing of the payment of fees due in debt under the Caretaker Agreement. The parties both accepted that interest was due from Mid Rise to Apartments on the sum of $282,502.39 at the rates prescribed from time to time under *Civil Procedure Act* 2005, s 100 .

7. But the parties disagree about the method of calculation of interest on this sum. Apartments contends that the principled approach to the calculation is to assume that the profit that

Apartments lost by reason of Mid Rise's repudiation would have been earned evenly over the period of 19 months and four days from 13 July 2012 to 14 February 2014. Apartments says therefore that its entitlement to damages should be assessed on the basis of lost earnings of $14,766.71 per calendar month for 19 months and earnings of $1,934.90 for the odd four days of February 2014 (making the total of $282,502.39). The Apartments calculation assumes that the whole of each month's profits during the period would be earned on the last day of each month during the period in question.

8. Apartments presented calculations computing interest up to the date of the second judgment, 17 June 2016, using its method, reaching a total interest figure of $55,992.88 up to that date and thereafter interest at the rate of $44.50 per day, accruing until judgment is entered. Subject to one caveat these calculations do not appear to be in dispute but Mid Rise disputes the principle upon which they are constructed.

9. Mid Rise contends that less interest than Apartments' claim has accrued in Apartments' favour on the outstanding amount. Mid Rise contends that as the damages award for the loss of profits was a result of the wrongful repudiation of the Caretaker Agreement by Mid Rise, it could not be said that the lost profits were earned equally over the full 19 month period. Mid Rise acknowledges Apartments' case that the profit lost was a function of the revenue receivable by Apartments under the Caretaker Agreement and the costs and expenses incurred by Apartments in its role as caretaker, which decreased over the period. But Mid Rise says the quantification of this amount was not certain until the point in which the Caretaker Agreement terminated by the effluxion of time on 4 February 2014 and it therefore follows that interest should only be payable from 4 February 2014. Mid Rise says that if the calculation is done this way, the total interest payable is $41,531.72. But Mid Rise agrees with Apartments that the daily rate applying from, and including 18 June 2016 is $44.50 per day.

10. Thus, the difference between the parties on the issue of interest is whether the interest calculation should commence at the end of the period of 19 months and four days (as Mid Rise contends) or be computed incrementally on a monthly basis throughout that period, commencing at the beginning of that period (as Apartments contends).

11. *The Parties' Submissions.* Apartments submits that its approach to the calculation of interest is orthodox and accords with the methodology actually adopted by the experts who gave evidence in the proceedings.

12. Apartments states the law concerning the accrual of interest on a continuing loss to a claimant at regular or irregular intervals as follows: that for each separate slice of the loss incurred at each interval, the time from which the interest should run will differ, being at the interval when that particular slice of the loss accrues: Harvey McGregor, *McGregor on Damages,* (19th ed 2014, London Sweet & Maxwell) at [18-084] – [18-086]. An example of the application of this method to the computation of interest on continuing loss where interest was calculated on an accumulating total is seen in *Tate & Lyle Food and Distribution v Greater London Council* [1982] 1 WLR 149.

13. Apartments also submits that the experts who calculated the loss of profits, and the Court in paragraph [57] of the second judgment, assumed an even spread of expenses over the whole approximate 19 month post-repudiation period. So Apartments says that calculation of interest on the same basis is now fully justified.

14. In reply, Mid Rise submits that the experts did not agree that there was some fixed position in relation to profits being earned on a continuous basis. Mid Rise submits that calculating the remuneration to be received by Apartments over time and deducting the expenses as they are incurred over time does not produce a fair result. This is said to be because one of the substantial expenses that is to be deducted from revenue, so as to derive profit, is overheads, which cannot be ascertained as a regular monthly outgoing but had to be derived by the experts from Apartments' accounts on an artificial annualised basis. Mid Rise submits that it is far more consistent with the actual economic approach that Apartments takes to calculating its own profits internally, to adopt the approach that Mid Rise now suggests and start the calculation of interest only at the end of the 19 month period, when the amount of the loss of profits was indefinitely ascertainable.

15. *Consideration.* Apartments' submissions correctly state the law. Apartments' submissions are persuasive on the issue of interest for a number of reasons.

16. First, even though Apartments was only capable of calculating its overheads (one component of its lost profits) at the end of each financial year (and as Mid Rise justly points out - with some difficulty) those overheads represent underlying expenses that were likely to have been incurred periodically throughout the whole operating year. Ms Jones, the accounting expert called by Mid Rise did not question the assumption of the Apartments' witness, Mr Rayner, that overheads should be included in the determination of net profit. Her issue with Mr Rayner's methodology was whether the proportion of group overheads to group turnover was an accurate reflection of the overheads incurred under the Caretaker Agreement. The Court ultimately decided in the second judgment (at [54] and [55]) an overheads figure of 7.5 per cent of total remuneration was appropriate. But the Court has already accepted in the second judgment (at [54]) the evidence of Mr Rayner that most of the overheads in question are legal requirements of Apartments' continuing operations. In my view, there is no real basis for either the overheads figure or for any of the other components of Apartments' lost profit, namely revenue foregone less wages, security and cleaning and rent to be calculated on anything other than a continuous basis. These are all continuing revenue and expense items. So calculating interest on the basis that Apartments lost profits continuously during the repudiation period is an appropriate method.

17. Secondly, the approach that the experts took really was to calculate the incurring of profits on a continuous basis. It is true, as Mid Rise submits, that this was not an expressly agreed position between the experts. But what the experts did represents a realistic view of how the loss suffered by Apartments was incurred and illustrates the period for which Apartments has been kept out of its lost profits. It is not a realistic reflection of Apartments' operations, in my view, just to assume that all of Apartments' loss simply commenced 19 months after Mid Rise's repudiation.

18. Subject to the caveat flagged earlier in these reasons, judgment for interest up to 17 June 2016 can be entered in Apartments' favour in the sum of $55,992.88 and thereafter at $44.50 per day until

the entry of judgment. The Court will direct the parties to prepare Short Minutes of Order to give effect to these reasons and do the calculation up to the date of the entry of judgment. Once submitted these orders can be made in chambers.

19. But there is one minor caveat. The dates in Apartments' calculation do not appear to perfectly coincide with the repudiation period mentioned in the second judgment (at [23]), namely 13 July 2012 to 14 February 2014. It may be that the parties have agreed upon a different period and nothing arises from this observation. On the other hand, some very slight re-calculation of interest may be required, notwithstanding that the parties seem to have agreed with Apartments' calculation.

(2) Costs

20. *Apartments' Submissions.* Apartments submits there is no reason for the Court to depart from the principle that costs should follow the event. It submits that Mid Rise should pay all its costs of the proceedings.

21. Apartments says that it has had substantial success on every issue litigated in the proceedings and where it has not been entirely successful, for example on its submission that it owed no fiduciary duty to Mid Rise, that Mid Rise has been no more successful on that issue. Apartments says to the extent that on discrete matters it was unsuccessful, such as in the argument before the second judgment that the Court should apply the slip rule, these matters were subsidiary to the issues on which it did succeed and occupied only minor amounts of Court time.

22. Apartments took a useful course of setting out a table identifying the many issues that it says arose in the proceedings. Then Apartments examines who it says won or lost on that issue. The issues in the Apartments' table are as follows: whether the Caretaker Agreement was validly made; Apartments' alleged breach of the Caretaker Agreement; whether any breach is sufficient to found a notice of termination; whether Mid Rise could terminate unilaterally; whether Mid Rise complied with the procedural requirements for termination; whether Apartments owed fiduciary duties to Mid Rise; the content of the fiduciary duty Apartments owed to Mid Rise; whether Apartments breached any fiduciary duty it owed; whether Apartments' claim for loss of profits should be entertained; whether Mid Rise has established its claim for breach of fiduciary duty for material non-disclosure; if a breach of fiduciary duty were established, whether Mid Rise is entitled to an account of profits; whether there is a discretionary answer to the claim for relief; should the injunction of February 2012 be discharged; should the injunction granted in April 2013 be made permanent; and, should the principal judgment be corrected in accordance with the slip rule as it related to Exhibit E.

23. Apartments says that it succeeded on all issues but three, namely: whether it owed a fiduciary duty to Mid Rise; the discharge of the February 2012 injunction; and, the slip rule correction. It concedes it did not succeed on the issue of whether the procedural requirements for termination of the Caretaker Agreement were satisfied but notes that that issue ultimately did not arise because of the Court's other findings.

24. Apartments' table of issues is reasonably complete. But it contains a degree of duplication which slightly exaggerates the number of issues on which Apartments succeeded; for example, whether Apartments breached any fiduciary duty owed to Mid Rise, overlaps substantially with whether Mid Rise has established its claim of breach of fiduciary duty for material non-disclosure. And Apartments' table of issues omits a number of issues to which Mid Rise's submissions point.

25. But it is true, as Apartments submits, there are many different ways that the issues in dispute could be enumerated. The issue of whether Apartments breached the Caretaker Agreement encompassed a wide range of factual disputes on which much evidence was adduced: the swipe cards, the fire control action dispute, and the undercharging and overcharging dispute to name some of the larger ones. And these did occupy significant amounts of Court time. On each of these disputes Apartments points out that it prevailed.

26. In substance Apartments submits that none of the losses on what it characterises as smaller matters should prevent it from recovering an overall costs order in its favour.

27. *Mid Rise's Submissions*. First, it is convenient to give an overview of Mid Rise's costs submissions. Mid Rise submits that separate costs orders could be made in each of the two proceedings before the Court. In proceedings numbered (2011/402191) ("breach, termination and fiduciary duty issues"), Mid Rise submits that the fairest result consistent with the outcome of the various issues in those proceedings is that each party should bear its own costs of the proceedings. As to proceedings numbered (2012/148356) ("the historical over/under charging issues"), Mid Rise submits that it was successful in those proceedings and that Apartments should pay Mid Rise's costs of those proceedings in accordance with *Uniform Civil Procedure Rules 2005* ("*UCPR*"), r 42.1.

28. But in overview Mid Rise acknowledges that because both proceedings were conducted on a consolidated basis that it is difficult to precisely separate the various issues for the determination of costs that should be payable and that a global approach is warranted, such as was taken for example by Bergin J (as her Honour then was) in *Leading Edge Events Australia Pty Ltd v Kiri Te Kanawa (No. 2)* [2007] NSWSC 568 at [25] – [26]. Given the costs orders that would be made in each proceeding, Mid Rise submits the appropriate costs order, when the proceedings are looked at as a whole, is that Apartments should pay 25 per cent of Mid Rise's costs of all the proceedings. Mid Rise then further developed its arguments with respect to each set of proceedings as follows.

29. As to proceedings (2011/402191), Mid Rise submits that Apartments failed in its attempt to obtain its contractual fee for the remaining duration of the Caretaker Agreement and was confined to a claim in damages, which reduced its claim in those proceedings from an amount in excess of $1 million plus interest to just $282,502.39 plus interest. Moreover, Apartments abandoned all the other relief that it sought in those proceedings including its claims for declarations that the Caretaker Agreement remained on foot and specific performance of it. Mid Rise submits that this ultimately abandoned relief had formed the initial impetus for the commencement of those proceedings, when interlocutory injunctions were sought in this Court by Apartments to restrain Mid Rise from undertaking certain work on the common property of the World Tower building. Moreover, Mid Rise submits that these initial injunctions were sought in the absence of any

standing by Apartments to commence such proceedings alone, a problem which was not rectified until the Statement of Claim was filed on 24 August 2012 naming Low Rise and High Rise as additional parties to the proceedings. Ultimately, Mid Rise submits, the abandonment of this relief meant that there was no need for Low Rise or High Rise to be parties and that all costs expended before 24 August 2012 were wasted.

30. In respect of the same proceedings (2011/402191), Mid Rise submits that its Cross Claim was successful in establishing that Apartments owed it a fiduciary duty as a promoter, even though it was unsuccessful in demonstrating that that duty had been breached by non-disclosure.

31. As to proceedings (2012/148356), Mid Rise submits that Apartments' attempts to recover the alleged underpayment of fees during the Caretaker Agreement has failed. Mid Rise submits that while the Court has held on Scenario B that Apartments was entitled to $23,209 from Mid Rise in respect of underpayments that sum has been largely offset by interest payable by Apartments to Mid Rise in respect to overpayments that Mid Rise made throughout that same period. When that interest offset was taken into account at the time of the second judgment the net result of the over/under payment issue was that Apartments owed Mid Rise $584: second judgment (at [91]).

32. Mid Rise reminds in its submissions that the Court has maintained this finding notwithstanding Apartments' attempts to invite the slip rule to dislodge it. The result is that after the accrual of some further interest in Apartments' favour an amount is now owing as at 18 August 2016 by Mid Rise to Apartments, but it is a mere $1442. Apartments and Mid Rise have now agreed and indicated to the Court that because this amount is so small Apartments will not seek to have judgment entered in respect of it.

33. But Mid Rise submits on the basis of this history that the fact that the original result of the proceedings was that Apartments owed Mid Rise money, albeit a small sum, rather than the other way around establishes that Apartments really has failed in its claim and Mid Rise has been successful.

34. Finally, Mid Rise argues that to the extent that Apartments has had success it was a product of two major amendments to the Statement of Claim, where on each occasion the pleading was struck through and recast in its entirety, thereby substantially increasing the parties' costs.

35. Mid Rise then succinctly summarises these costs submissions as follows. In proceedings (2011/402191) Apartments was only successful in obtaining a money judgment of just over one quarter of the amount it had originally claimed as its fee arising from Mid Rise's termination of the Caretaker Agreement and it abandoned large amounts of the relief that it had sought, which provided the original impetus for the commencement of the proceedings and made unsuccessful interlocutory applications such as the slip rule application and an application to separate liability and quantum issues following the main hearing and unsuccessfully resisted interlocutory applications by Mid Rise for further discovery because of deficiencies in Mr Rayner's evidence. And Mid Rise was unsuccessful in obtaining the relief sought on its Cross Claim. But was successful in respect of some of the other issues on that claim.

36. Once again Mid Rise breaks down its global submission that Apartments should pay 25 per cent of its costs. Mid Rise submits that the fairest result consistent with the outcome of the issues in proceedings (2011/402191) would therefore be that each party bear its own costs of the proceedings because of the mixed result: see for example *Lollis v Loulatzis (No. 2)* [2008] VSC 35 at [28] – [29] ; (Kaye J) and *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275, 319-320 (Pincus J). And Mid Rise submits that the proper result in respect of proceedings (2012/148356) is that Apartments pay Mid Rise's costs.

37. *Consideration.* The consideration of the parties' respective submissions is best undertaken by isolating the matters on which they joined issue in their replies and dealing with each of those matters. Those matters were the following:

    1. Abandonment of a claim for relief under the Strata Management Statement;
    2. The question of standing at an early stage in the first proceeding;
    3. The outcome of the "overpayment/underpayment" dispute;
    4. The quantum of damages achieved by Apartments in its contract claim;
    5. The history of amendments by the parties to their pleadings; and
    6. Proceeding in the Supreme Court, not the District Court.

38. These reasons deal with each of these issues and then weigh the relevant considerations.

39. *Abandonment of a claim for relief under the Strata Management Statement*. Mid Rise contended that in its principal costs submission that Mid Rise had breached the Strata Management Statement and that the Court should weigh the abandonment of this claim against Apartments, when considering the overall costs order to be made.

40. But Apartments has successfully answered this contention. It is clear that Mid Rise itself based some of its contentions upon the Strata Management Statement. Moreover, it is clear from the transcript that after discussion with the Bench the issue of the Strata Management Statement was withdrawn by mutual agreement. Its disappearance from the proceedings should not, in my view, be weighed against either party on the issue of costs.

41. *The question of standing at an early stage in the first proceeding*. Mid Rise has submitted that when Apartments first commenced the (2011/402191) proceedings in this Court its failure to join High Rise and Low Rise as co-plaintiffs meant that Apartments had no standing to pursue the proceedings, and that therefore until High Rise and Low Rise were ultimately joined in August 2012 Apartments could not have been successful, and that all costs expended before the amendment of the Statement of Claim on 24 August 2012 have been wasted.

42. Apartments' answer to this particular submission is persuasive. I accept Apartments' submission that at no point before August 2012 was its standing to bring the proceedings raised. As the point was not taken at the time, so as to show Apartments was proceeding in the face of a contention that it had no standing, it is difficult to see how this now weighs against Apartments on the issue of costs. And without deciding the issue, it is not clear that Apartments did not have standing to bring the proceedings.

43. *The outcome of the "overpayment/underpayment" dispute*. In proceedings (2012/148356), Mid Rise says that the relevant "event" was a win for Mid Rise because on the overpayments/underpayments issue a small amount was ultimately held due from Apartments to Mid Rise. As earlier stated this position has been slightly eroded by interest in the meantime and now a small amount is due from Mid Rise to Apartments. And it is true as Mid Rise says that considerable expert time and resources was devoted to resolving this issue.

44. But Apartments also properly points out that this issue was also one of the grounds upon which Mid Rise sought to justify its termination and on which it ultimately failed, because it was unable to show sufficiently serious overcharging by Apartments as would warrant termination of the Caretaker Agreement.

45. Ultimately, in my view, this is an issue on which Mid Rise should not be denied the benefit of having the discretionary costs advantage of having successfully defended the transferred Local Court proceedings, which after their removal to the Supreme Court involved expenditure of a not insubstantial sum in costs. In my view, this is a clearly definable and severable issue on which, in accordance with established principle, not only should Apartments have its costs, but because its claim was in substance defeated, Apartments should pay Mid Rise's costs: these principles have been most recently discussed in *Hancock v Reinhardt (Costs)* [2016] NSWSC 11 at [7] and [8] .

46. But when weighing costs overall it should be remembered that very substantial legal and expert resources were devoted to litigating the facts relating to the termination issue on which Apartments was successful, and on which the overpayments/underpayments issue was only one part.

47. *The quantum of damages achieved by Apartments in its contract claim*. Mid Rise submits that Apartments was only successful in proceedings 2011/402191 by recovering about one quarter of its claim. But in reply Apartments says it was successful nevertheless in obtaining financial compensation for Mid Rise's wrongful repudiation of the Caretaker Agreement and that it would be entirely artificial to take into account the diminished quantum of financial relief that Apartments recovered in isolation from all other matters.

48. In most cases Apartments' contentions on this matter could be accepted: it has had some financial success in recovering lost profits after Mid Rise's repudiation. But in my view, that success is diminished by its co-relative failure to obtain specific performance of the Caretaker Agreement

and by its lack of success in showing that the Caretaker Agreement remained on foot and was enforceable after February 2012. As the first judgment shows, this issue involved not inconsiderable legal complexity (first judgment [319] – [344]).

49. Mid Rise then argues that Apartments was always destined to fail on this issue and that costs could have been saved by the proceedings being commenced in the District Court. But in my view Apartments' case on the issue was quite arguable.

50. *The history of amendments by the parties to their pleadings*. Each party complains that the other made amendments to the pleadings in these proceedings that caused costs to be thrown away and they are both correct. I do not regard this issue as decisive either way.

51. *P roceeding in the Supreme Court , not the District Court*. Mid Rise submits that the District Court would have had the requisite jurisdiction to entertain Mid Rise's Cross Claim seeking an accounting or equitable damages up to the jurisdictional limit of the District Court. The District Court's equitable jurisdiction is conferred under s 134 of the *District Court Act*, which relevantly provides as follows:

> "134 Jurisdiction in equity proceedings
>
> (1) The Court shall have the same jurisdiction as the Supreme Court, and may exercise all the powers and authority of the Supreme Court, in proceedings for:
>
> ...
>
> (h) any equitable claim or demand for recovery of money or damages, whether liquidated or unliquidated (not being a claim or demand of a kind to which any other paragraph of this subsection applies), in an amount not exceeding the Court 's jurisdictional limit ."

52. The District Court's jurisdictional limit is $750,000. The provision has been held to mean what it says: that the Court has power to enforce an equitable claim for recovery of money or damages: *Ciccarelli v Cavasinni Developments* [2004] NSWSC 788 (McDougall J), see also *Commonwealth Bank of Australia v Hadfield* (2001) 53 NSWLR 614 at [53] – [54] and [65], [66] .

53. Mid Rise submits that the costs consequences of Apartments not commencing the proceedings in the District Court are set out in *UCPR* , r 42.34 , which provides as follows:

> "42.34 Costs order not to be made in proceedings in Supreme Court unless Court satisfied proceedings in appropriate court
>
> (1) This rule applies if:
>
> (a) in proceedings in the Supreme Court, other than defamation proceedings, a plaintiff has obtained a judgment against the defendant or, if more than one defendant, against all the defendants, in an amount of less than $500,000, and

(b) the plaintiff would, apart from this rule, be entitled to an order for costs against the defendant or defendants.

(2) An order for costs may be made, but will not ordinarily be made, unless the Supreme Court is satisfied the commencement and continuation of the proceedings in the Supreme Court, rather than the District Court, was warranted."

54. I agree with Apartments that whether these proceedings should have been conducted in the District Court is a matter of complexity. *UCPR* , r 42.34 has recently been interpreted by Meagher JA sitting at first instance in *Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd (No. 2)* [2016] NSWSC 943.

55. But given the complexity of these proceedings, as is evidenced by the issues dealt with in the principal judgment and the higher amount claimed by Apartments, which was certainly not a claim without arguable merit, in my view, this is not a matter where Apartments should be automatically deprived of its costs under *UCPR* , r 42.34 .

56. *General Considerations*. When the matter is looked at in the broad, a substantial part of the factual and legal disputes in these proceedings were occupied with matters (mainly on the issue of termination) upon which Apartments was successful. But the various issues to which Mid Rise has pointed to on which Apartments was unsuccessful, and on which it was successful, did occupy time and in my view cannot be ignored in the weighing of the overall costs burden. And Mid Rise's success on the existence of a Fiduciary Duty is to be taken into account in its favour. Doing the best the Court can, in my view the appropriate result in this case is that Mid Rise be ordered to pay Apartments 50 per cent of its costs of the proceedings.

Conclusions and Orders

57. For the reasons given, the Court will order that Mid Rise pay 50 per cent of Apartments' costs of the proceedings. The parties have agreed upon the orders in relation to Low Rise and High Rise. The Court will order the parties to bring in Short Minutes of Order to give effect to these reasons.

****

Amendments

23 September 2016 - Title was incorrect

Decision last updated: 23 September 2016