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

CIV 2008-404-005972

IN THE MATTER OF Section 143 of the Land Transfer Act 1952

AND

IN THE MATTER OF Caveat No. 7890986.1 (North Auckland Registry)

BETWEEN AKV2 LIMITED
Applicant

AND AUCKLAND CONCRETE HOMES LIMITED
Respondent

Hearing: on papers

Counsel: D E Smyth for applicant
S C Blackwell for respondent

Judgment: 31 August 2009 at 4:30pm

COST JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 31 August 2009 at 4:30pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Harris Tate, PO Box 1147, Tauranga 3140 for applicant
Blackwells, PO Box 9325, Auckland 1149 for respondent

[1] This matter is before the court for a determination on costs and for discharge of a solicitors' undertaking to hold a fund of money held as security so as to allow discharge of the caveat at issue in this application.

Background

[2] The proceeding arises out of a contract for construction of a house on the applicant's land at 6B Kingsview Road, Mt Eden, Auckland.

[3] On 24 October 2008 I ordered removal of a caveat lodged against the title to that land by the respondent. I reserved costs on that application pending determination of a dispute between the parties over the respondent's final claim under the construction contract.

[4] The respondent's claim has been determined by an adjudicator (under the Construction Contracts Act 2002). The adjudicator allowed credits of \$17,187.50. He also awarded the respondent \$4,934.38 for contract variations but deducted \$1,150 for completion work. However, that was not the end of the matter. The respondent had elected to take a "self help" approach to recovery of its final claim. The adjudicator allowed a credit to the applicant of \$4,000 for items removed from the building and a further \$4,361 to make good damage to the building and surrounds caused by the respondent. His net award in favour of the respondent was \$6,320.88, to which interest of \$561.52 was added resulting in a total award by the adjudicator in favour of the respondent of \$6,882.40 (inclusive of GST).

[5] Since that date the respondent has also become indebted to the applicant for costs totalling \$3,909 in respect of a proceeding for injunction in the District Court at Manukau. The court had issued an injunction on 14 October 2008, in effect preventing the respondent from taking any further "self help" action. The District Court awarded these costs on 8 July 2009. When that award is offset against the balance due under the adjudication an amount of \$2,973.40 remains payable.

[6] On 8 June 2009 the applicant sought costs in this proceeding on a scale 2B basis together with the disbursements incurred in filing its application and sealing the order for removal of caveat. The total sought was \$3,960 (subsequently amended to \$4,160). If these or similar costs are awarded there will be a net amount payable by the respondent to the applicant.

The respective arguments

[7] The applicant says that it is the successful party overall, and should be awarded costs. It says that the respondent was not entitled to lodge its caveat but, in any event, was at fault in not withdrawing the caveat before the applicant applied for its removal, or at any time before the order for its removal was made.

[8] The respondent contends that it was entitled to lodge the caveat (the adjudicator had confirmed that money was due to it). It says that it is arguable that it should be awarded costs on that basis, but in any event it should not be required to pay costs because it did not oppose the application at the first appearance its counsel sought further time to file any opposition but ultimately did not do so, and appeared at the second call of the application only to oppose costs.

[9] The essential issues are whether the respondent had an arguable basis for lodging its caveat and whether it acted reasonably in declining to withdraw the caveat.

Discussion

[10] The respondent lodged its caveat in reliance on a clause in the construction contract under which the applicant agreed to give a mortgage to secure any part of the contract price or other money due and payable to the respondent. The relevant clauses are:

57. Where the Owner has failed to make payment of any portion of the Contract Price or any other monies due and payable to the Registered Master Builder under the Building Contract on the due date for payment, then the Owner shall forthwith upon demand give

and execute in favour of the Registered Master Builder a registrable memorandum of mortgage over the land to secure the amount owing from time to time The Owner acknowledges that the Registered Master Builder is entitled to register a caveat or similar charge against the title to the Land in circumstances where the Registered Master Builder is entitled to demand a registrable memorandum of mortgage.

[11] The respondent submitted its final contract claim (for \$28,085) upon issue of the code compliance certificate on 24 June 2008. The applicant issued a payment schedule pursuant to s 21 of the Construction Contracts Act 2002 (within the statutory period). In its payment schedule the applicant claimed that no amount was due as the applicant was entitled to various (specified) credits and liquidated damages which in total exceeded the amount being claimed. The matters raised in the payment schedule were the same as those subsequently determined by the adjudicator.

[12] The respondent did not take issue with the fact that the payment schedule was embodied in a letter written by the applicant's counsel dated 15 July 2008. Although the point was not formally raised, the adjudicator subsequently indicated that he saw no reason to question the fact that a payment schedule had been issued.

[13] I consider it doubtful that the respondent had a caveatable interest in the land at the time of lodging this caveat. There is force in the submission of counsel for the applicant that the effect of ss 20-24 of the Construction Contracts Act 2002 (providing for payment claims and payment schedules and the consequence of non-payment) is that where a party provides a payment schedule contending that no amount is payable (and provides a proper basis for that position) there is no debt due until the dispute is resolved by adjudication, litigation or some other means. It is not open to the parties to contract out of these provision: s 12 Construction Contracts Act.

[14] However, even if the respondent had an arguable case for lodging the caveat (a question I will leave open in light of the fact that the parties did not argue the point) I accept the submission of counsel for the applicant that it was unreasonable for the respondent to fail to withdraw the caveat in light of an offer by the applicant to lodge the disputed sum in an interest bearing account pending resolution of the

dispute. The offer was made in a letter from counsel for the applicant to the respondent on 26 August 2008. The respondent had some two weeks in which to accept that proposal. The funds were lodged in the solicitor's trust account before the application was filed. The respondent then compounded matters by having counsel appear at the first call of the application and seek time to file opposition and, after deciding not to file that opposition, by requiring the applicant to obtain an order for removal of the caveat (rather than withdrawing the caveat).

[15] The respondent was warned (in the letter of counsel for the applicant of 26 August 2008) of the likely costs that it could incur. There was a reasonable option available to it to preserve its position: the fund held by the applicant's solicitors pending resolution of the dispute. I find that it was unreasonable not to take that course having regard both to the uncertainty over its entitlement to the caveat, and the fact that it was fully protected by the security being offered.

Quantum

[16] Counsel for the applicant initially sought costs of \$3,520, but subsequently submitted a revised schedule seeking \$4,160. I award costs of \$3,840, calculated on a category 2B basis in respect of the following items in schedule 3:

Item 25	1.6 days	\$2,560
Item 28 (2 appearances)	.6	\$ 960
Item 4.18	.2	\$ 320
Total	2.4 days	\$3,840

[17] I also award the applicant disbursements of \$440 (filing fee on the application and sealing fee on the order).

[18] Finally, as the overall outcome is that the respondent is indebted to the applicant in the sum of \$1,306.60, it is appropriate to discharge the undertaking of the applicant's solicitors.

Decision

[19] The respondent is to pay the applicant costs in respect of this application in the sum of \$3,840, together with disbursements of \$440.

[20] The applicant's solicitors (Harris Tate, Tauranga) are released from the undertaking given to the Court by letter dated 11 September 2008. The sum of \$28,085 (together with accrued interest) held pursuant to that undertaking may be released to the applicant.

Associate Judge Abbott