

#79

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

CIV-2009-406-286

BETWEEN ANDREW LAWSON BUILDING LTD
 Plaintiff

AND JEAN-PIERRE SWENNEN & VEERLE
 GIELEN
 Defendants

Hearing: 18 February 2010

Appearances: B.A. Fletcher - Counsel for Plaintiff
 L. Radich - Counsel for Defendant

Judgment: 19 February 2010 at 2.00 pm

**JUDGMENT AS TO COSTS
OF ASSOCIATE JUDGE D.I. GENDALL**

*This judgment was delivered by Associate Judge Gendall on 19 February 2010 at
2.00 pm pursuant to r 11.5 of the High Court Rules.*

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 Radich Law, Solicitors, PO Box 842, Blenheim

[1] When this matter was called for hearing before me on 18 February 2010 there were two applications before the Court for consideration:

- (a) An opposed application by the plaintiff for summary judgment against the defendants.
- (b) An application (effectively by way of Memorandum) from the plaintiff to transfer the balance of the proceeding to the District Court.

[2] The plaintiff's claim against the defendants in this proceeding relates to a "payment claim" dated 10 December 2009 issued to the defendants as employers for work carried out by the plaintiff as builder on a building project in terms of the Construction Contracts Act 2002.

[3] It appears now to be accepted by the plaintiff that this "payment claim" was technically invalid in that it did not contain certain information required to be included for residential occupiers in accordance with s. 20(3) Construction Contracts Act 2002.

[4] In addition, as counsel for the defendants also noted here, another issue arose. This is that, even if the purported payment claim were not rendered invalid by this deficiency, in terms of s. 22(b)(ii) Construction Contracts Act 2002 the defendants had 20 working days from receiving the claim to respond to it by providing a payment schedule but here it seems the plaintiff filed its claim in the present proceeding only 9 working days after serving the payment claim upon the defendants. The Construction Contracts Act 2002 provides that the 20 working day period for providing a payment schedule may be shortened by agreement in the contract between the parties. Whilst the building contract between the parties in this case, as I understand it, did specify that responses to invoices were to be provided within 5 days, the contract did not provide that payment schedules had to be issued in any shorter period than that allowed by s. 22(b)(ii) Construction Contracts Act 2002.

[5] As a result of these matters, before me on 18 February 2010 counsel for the plaintiffs acknowledged that the summary judgment application could not proceed and sought leave to discontinue it.

[6] An order followed on 18 February 2009 granting leave to the plaintiff to discontinue the summary judgment application against the defendant.

[7] Costs were reserved on this application and I indicated at the hearing that my decision on costs would be issued shortly.

[8] This judgment now deals with the costs question.

[9] Before addressing that issue, however, I need to mention the second application which was before the Court, this being an application to have the proceeding transferred to the District Court. On that application at the 18 February 2010 hearing, an order was made under s. 46 District Courts Act 1947 transferring this proceeding to the District Court at Blenheim. This order was made on the basis that the proceeding was within the jurisdiction of the District Court and in my view there were no special features of this case or special issues raised in the proceeding which would require it to be retained in the High Court.

[10] On this, the comments at McGechan on Procedure at para. HR12.12.10 are apposite:

“HR12.12.10

Under s. 46 District Courts Act 1947, the High Court has the power to transfer to the District Court, proceedings within the jurisdictional limits of the Court. This power is frequently used where summary judgment has been refused in the High Court, and such an order may be expected where there are no special features of the case: *Ross Asphalt Ltd v Neame* 12/7/96, Master Venning, HC Blenheim CP5/96.

[11] I now return to the one presently outstanding issue before the Court which is the defendants' claim to costs in this Court on the plaintiff's discontinued summary judgment application.

[12] Although in the present case the plaintiff has discontinued its summary judgment application against the defendants and r 15.23 High Court Rules provides for a plaintiff who discontinues a proceeding against a defendant to pay costs up to

and including that discontinuance, here the proceeding itself has not been discontinued.

[13] Turning to the position regarding costs on a generally unsuccessful summary judgment application, McGechan on Procedure notes at para. HR12.12.08(1) that applications for summary judgment are expressly exempted from the general rule requiring costs on interlocutory applications to be fixed and paid when those applications are determined – r 14.8(3).

[14] The position concerning dismissed summary judgment applications is that costs are generally to be reserved to be dealt with at trial in the absence of some fault being established or some other exceptional circumstances – *NZI Bank Limited v Philpott* [1990] 2NZLR 403 (CA) *Air Nelson Ltd v Airways Corporation of NZ* (1992) 6 PRNZ1 (CA).

[15] Notwithstanding the general position, however, in *Vision Aluminium Limited v McLaughlan* High Court, Christchurch, 8 June 1990, Master Hansen CP123/90, the Master also stated that he saw nothing in the decision in the *Philpott* case to suggest that where it was clear to a plaintiff from the outset that the defendants had an arguable defence, the Court was in some way inhibited from awarding costs at the summary judgment stage. Master Hansen considered that this is the only means available to the Court to ensure that unmeritorious applications for summary judgment do not flood the lists – see *McGechan on Procedure* HR12.12.08(2).

[16] Reaching a similar conclusion, Master Williams QC in *Apostolatos v NZI Co Limited* High Court Wellington, 1 June 1990 CP118/90 awarded costs and disbursements against the plaintiff because in his view the plaintiff should have realised at an earlier stage either that applying for summary judgment was not warranted or that if it was warranted, the application ought to have been abandoned soon after the comprehensive opposition from the defendant became apparent.

[17] As I have noted above, in the present case, Mr. Fletcher for the plaintiff acknowledged at the hearing before me that the plaintiff's summary judgment application should not have been issued as a reasonably arguable defence existed.

This defence was at least to the effect that the payment claim issued by the plaintiff was defective, although Mr Fletcher, counsel for the plaintiff, did note that this particular payment claim was the second to last one issued by the plaintiff for what was a large building project and all previous payment claims had included the required residential occupier notice.

[18] From all the circumstances here, what is clear to me is that this was not an appropriate case for a summary judgment application to be made and indeed, by discontinuing the application, the plaintiff has effectively gone some way to acknowledging this.

[19] Further, given that an order has now been made transferring this proceeding to the District Court, this case bears the slightly unusual circumstance that this is the last occasion on which it will be before the High Court such that in my view, costs on the summary judgment application should be awarded now.

[20] That said, I am satisfied that at this point costs should be fixed and awarded here and that the defendants, in successfully opposing the application, are entitled to those costs and disbursements on the plaintiff's discontinued summary judgment application.

[21] An order is now made that the plaintiff is to pay to the defendants costs calculated on a Category 2B basis together with disbursements as fixed by the Registrar with regard to the plaintiff's discontinued summary judgment application.

'Associate Judge D.I. Gendall'