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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-001349

BETWEEN	ARNOLD JENSEN (2005) LIMITED Applicant
AND	TREVOR JAMES BILLS First Respondent
AND	WILLIAM GARY FOSTER AND JOHN NEVILLE CREIGHTON AND MALCOLM FINDLAYSON HOLLY AS TRUSTEES OF THE BILLS FAMILY TRUST Second Respondents

Hearing: 21 November 2008

Counsel: A D Marsh for Applicant
Appearance excused for First and Second Respondents

Judgment: 26 November 2008

JUDGMENT OF FOGARTY J

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[1] This is an application for leave to appeal from a judgment of this Court of 10 October last allowing an appeal against a judgment of the District Court and setting aside a judgment for a sum of money in favour of Arnold Jensen.

[2] Arnold Jensen obtained judgment of $52,579.75 together with interest by reason of the application of provisions of the Construction Contracts Act 2002 which enables summary judgment where payment claims have been validly served on a party and the party has not within a statutory time limit filed by way of response a schedule showing the sum in dispute. In this case the original payment claims had been flawed because they were not accompanied by an explanation required by the

statute to be provided to residential customers. The parties had been in dispute over the amount of the claim for some time and had tried alternative dispute resolution. That broke down. The resident had engaged a firm of solicitors in that process.

[3] The contractor, Arnold Jensen, then reissued the payment claims together with the proper notices of explanation and posted them to the Post Office box of the business of the client. He was overseas. Upon his return he sent them to his solicitors who filed a payment schedule out of time. The High Court held that in the course of the alternative dispute resolution process the client had prescribed service on his solicitor and therefore the alternative means of service under s 80 of the Act could not be used in derogation of that request.

[4] The right of appeal to the Court of Appeal is enabled by s 67 of the Judicature Act 1908. The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal. There is no issue of fact. There is, however, one or more issues of law turning on the correct interpretation of s 80 of the Construction Contracts Act. These have been formulated by Mr Marsh as follows:

> (a) In terms of the "prescribed manner" it does not appear that any other Court has considered the meaning of "prescribed manner" at any time prior to the decision of 10 October 2008. That being the case, then it is submitted that appellate guidance on this point would be of general assistance to the public and particularly users of the Act. This is especially so given that very little in the way of case law has developed to date in relation to service pursuant to the Act. Appellate guidance as to service in general and the meaning of "prescribed manner" would be of great assistance to the public
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> (b) In terms of issues (b) and (c), the second and third issues raised by the Applicant, it is respectfully submitted that there is no justification for suggesting that a "prescribed manner" displaces the alternative methods of service as set out in ss.80(a), (b) and (c) of the Act. The view was taken in the judgment that the words "prescribed" or "prescription" do not normally indicate just another alternative. There may indeed be reasons why a recipient considers that service under ss.80(a), (b) and (c) are not appropriate. This cannot however in and of itself displace the ability for a claimant to serve documentation upon a recipient according to those alternative methods. Again, appellate guidance in this regard would be of great benefit to the public.

(c) It is submitted that the effect of that particular aspect of the decision is to leave a situation with two conflicting High Court authorities in terms of s.80. In *West City Construction Limited v Edney* [17 PRNZ 947] Venning J held that the provisions of s.80 are not mandatory or exclusionary. Indeed, Venning J stated that if service is effected in accordance with any of the provisions of s.80 then there can be "no dispute" that service has been effected. This goes directly against the decision of 10 October 2008 in this particular case however which held that even if service is effected pursuant to ss.80(a), (b) or (c), then if there is a prescribed manner of service then any other form of service will not be acceptable. This means that these two decisions are now in conflict, which conflict needs to be resolved.

[5] I agree that these issues are capable of bona fide and serious argument and indeed are of some public interest as well as of interest to the parties to these proceedings. Were there a substantial sum at stake I would have no hesitation in granting leave to appeal.

[6] The problem of cost is three-fold. First, the amount at stake is only $52,000 plus interest and accrued costs. Second, the parties have been litigating this dispute for some time both by alternative dispute resolution and in the District Court and in the High Court. Third, inevitably it seems to me that if this case goes off to the Court of Appeal at least $10,000 to $20,000 of legal fees will be generated.

[7] The amount at stake between these two parties does not justify the litigation that has taken place already, let alone it going off to the Court of Appeal.

[8] Recognising the merits of these propositions Mr Marsh concentrated on arguing that nonetheless the case had such significant public importance as to outweigh the costs and delay of further appeal.

[9] I agree that the Construction Contracts Act is an important statute. It provides a very effective method for isolating what is in dispute and providing for swift judgments of the non-disputed amounts. In that context service of proceedings under s 8 is important.

[10] The problem is that this particular set of facts is not an ideal one to test the robustness of the Construction Contracts Act. It is a peculiar set of facts. Had Arnold Jensen followed the processes of the Act correctly in the first place the

litigation would not have arisen. Although ironically, Mr Bills would more likely than not have identified at the outset back in October of 2006 the amount in dispute. The proceedings are unusual because the contractor in this case has taken advantage of the ability to correct a mistake. He has done this after the parties have been in alternative dispute resolution.

[11] Were this case to go to the Court of Appeal, I suspect that Court would be impressed, as I was, by the particular history of this case. Because of that particular history I do not think this set of facts is a good environment to test s 80. However, there is another point of view and that is that it is a good environment to test the purpose of s 80, for after all, I was persuaded that it would be unjust to allow any one of the available means of s 80 to override the prescribed method, selected for good reason by the residential client. However, there is another point of view which I acknowledge and has in fact been expressed in an obiter dictum by Venning J in *West City Construction Ltd v Edney* (2005) 17 PRNZ 947.

[12] In the end this question of an application for leave to appeal raises a question of judgment as to whether there is sufficient public importance to outweigh the disproportionate cost of pursuing litigation over $60,000 odd through to the Court of Appeal, on a third tier appeal. In the end that is, in my view, a stiff test. I am not satisfied it is of sufficient importance. The appeal is dismissed.

Solicitors:
Saunders Robinson Brown, Christchurch, for Applicant
Cavell Leitch Pringle & Boyle for Respondents