

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

CIV-2011-485-001320

UNDER the Companies Act 1993

IN THE MATTER OF an application to put a company into  
liquidation

BETWEEN CLEARWATER CONSTRUCTION  
LIMITED  
Plaintiff

AND CHOW GROUP LIMITED  
Defendant

Hearing: On papers

Counsel: L J Turner for Plaintiff  
G J Toebees for Defendant

Judgment: 2 December 2011

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**JUDGMENT OF HON JUSTICE KÓS**  
**(Costs)**

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**Introduction**

[1] The plaintiff is entitled to the actual and reasonable costs of recovery of sums determined as due to it under the Construction Contracts Act 2002. Ultimately it was compelled to issue liquidation proceedings against the defendant to achieve payment. How should its actual and reasonable costs be calculated?

**Background**

[2] The defendant, Chow Group Limited (Chow), owned a Victorian commercial building at 75 Victoria Street West, Auckland. It was known as the Palace Hotel.

The plaintiff, Clearwater Construction Limited (Clearwater), was contracted by Chow to undertake renovation and construction work on the Palace Hotel in September 2010. On 18 November 2010 cracks appeared in the masonry facade of the building. The facade began to lean perilously out across the footpath of the property. The Auckland City Council, acting under s 129 of the Building Act 2004, concluded that the building posed an immediate danger. It directed the demolition of the building. That occurred that same evening. Thus the Palace Hotel, beloved by generations of Auckland drinkers, disappeared from the face of the city.

[3] On 23 November 2010 Mr John Chow, a director of Chow, terminated the renovation and construction contract. There was of course nothing left to renovate. He asked for all outstanding invoices for any work, up to demolition, to be forwarded to Chow's insurance assessor. Clearwater submitted a final payment on 30 November 2010. It was for \$663,430.25 plus GST. The claim met the requirements of s 20 of the Construction Contracts Act 2002 ("Act").

[4] Chow did not meet the payment claim. Clearwater issued a notice of adjudication on 1 April 2011. A defended hearing followed. The adjudicator, Mr John Walton, issued a determination in favour of Clearwater on 11 May 2011. The amount awarded was \$837,645.36. Costs were awarded against Chow because Clearwater had been "put to unnecessary expense ... by objections which lacked substantial merit". In short, Chow had had the option available to them under the Act of recording their objections to payment in a "payment schedule", pursuant to s 21 of the Act. But they had not done so. In accordance with s 22(b)(ii), Chow not having served a payment schedule, Clearwater's payment claim was payable within 20 days of service.

[5] The adjudicator also gave leave to issue a charging order under s 49 of the Act. But the following day, 12 May 2011, at 9.03 am, Chow transferred ownership of the property to a related company, Ellie Properties Limited. That action defeated registration of the charging order.

[6] On 25 May 2011, Clearwater served a statutory demand on Chow for payment of the adjudicator's determination. Payment was not made. Instead, Chow

applied to set aside the statutory demand. On 28 June 2011, two days before its application to set aside the demand was to be heard, it discontinued that application. On 30 June 2011 Bell AJ made a costs order against Chow in respect of its abandoned application. That action of course made subsequent opposition to the liquidation proceeding all the more difficult.

[7] Clearwater then sought to enforce the determination by having it entered as a judgment of the District Court.<sup>1</sup> That took place on 15 June 2011. As a result, the adjudicator's determination was immediately payable as a judgment debt. But Chow did not pay. On 7 July 2011 Clearwater served notice under s 84 of the District Courts Act 1947 requiring Chow to complete a financial statement as to its income, expenditure, assets and liabilities. Despite being under statutory obligation to complete and return the form within 14 days, Chow did not do so.

[8] On the same day, 7 July 2011, Clearwater commenced liquidation proceedings against Chow in the High Court.

[9] Chow filed a statement of defence on 20 July 2011. Chow purported to rely on a counterclaim or set-off based on alleged negligence by Clearwater (and engineers retained by Chow). Chow issued separate proceedings against them in the High Court at Auckland.

[10] That was not a competent defence. Neither counterclaim nor set-off is available to defeat or deflect the enforcement of debts under s 73 of the Construction Contracts Act 2002.<sup>2</sup> That is simply a reflection of the policy of the Act, which requires contest to construction contract payment obligations to be made via a payment schedule under s 21. The policy of the Act is to ensure an effective cash flow to contractors. Subject to the s 21 objection procedure, claims must be paid. The client may take proceedings against the contractor (as Chow have done), but it must also take the contractor's credit risk in the interim before judgment.

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<sup>1</sup> Under s 73(2) of the Act.

<sup>2</sup> *Laywood & Rees v Holmes Construction Wellington Ltd* [2009] NZCA 35.

[11] Secondly, Chow argued that it was solvent, indeed, unusually, “grossly solvent”. It offered little independent evidence in support of that assertion, beyond the provision of a set of unaudited accounts.

[12] To buttress its position at the hearing on 5 October its counsel advised that the sum of \$850,000 was held in good faith in his trust account.

[13] I made it clear to counsel that I was bound by the Court of Appeal decision in *Laywood & Rees v Holmes Construction Wellington Ltd.*<sup>3</sup> Accordingly no valid basis was apparent why the adjudicator’s determination (entered as a judgment of the District Court) should not now be paid. The fact that Chow contended it was solvent did not entitle it to refuse to pay an indisputable debt, simply because it did not wish to. As the Court of Appeal said in *AMC Construction Ltd v Frews Contracting Ltd*:<sup>4</sup>

If there is no dispute as to the company’s liability, ... it is difficult to imagine circumstances in which the company should be able to avoid paying a debt, merely by proving that it is able to pay that debt. If the debt is indisputably owing, then it should be paid.

[14] The real question was which party had to bear the other’s credit risk. The short answer was that Chow has to bear Clearwater’s credit risk, against the prospect of a favourable judgment in the negligence proceedings some time down the track. As I have already said, that is the way the Act works.

[15] After this exchange of views I adjourned to enable counsel to confer. Counsel for Chow then advised that it would pay the sum due under the judgment, and the various unpaid costs orders made prior to the hearing on 5 October 2011. This all totalled \$875,184.14. I therefore adjourned the plaintiff’s application for liquidation for one week to enable payment to be made. I was later advised that payment had been made.

[16] The issue of costs remained to be dealt with by memoranda. This judgment now deals with that matter.

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<sup>3</sup> *Laywood & Rees v Holmes Construction Wellington Ltd* [2009] NZCA 35.

<sup>4</sup> *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, at [7].

## Statutory framework

[17] Section 59(2)(a) of the Act provides that “actual and reasonable costs of recovery” of an adjudicated sum may be recovered as a debt. It follows that calculation of costs in this case is not controlled by scale, although as Clearwater’s counsel accepts, scale is a relevant reference point.

[18] The \$1,880 category 2 daily recovery rate under the High Court Rules does not constitute either actual or reasonable costs. That rate is set at approximately two-thirds of the rate that practitioners in the relevant category charge, viewed on a national basis.<sup>5</sup> It follows, therefore, that the relevant “actual” rate is likely to be of the order of \$375 per hour.

## Submissions

[19] Clearwater submits that its actual costs (limited only to the fees of Mr Turner, and omitting those of senior counsel, Mr Thorp) were \$23,000 plus GST. Mr Turner’s fee rate is \$400 per hour. Accordingly, he had compiled some 61 hours in respect of the matters requiring attendance in this proceeding.

[20] As a cross-check against the time compiled by Mr Turner, he presented a calculation against scale in schedule 3 of the High Court Rules. This is Mr Turner’s table:

Number	Step	Allocated days
21	Prep/issue demand	0.2
22	Prep claim and other documents	0.6
23	First appearance	0.4
#	Reply to positive allegations in defence (by analogy to .5 of defence allocation)	1
4.10	Memorandum (re stay application)	0.4
4.11	Appearance at conference	0.3
7.1	Prep affidavits for hearing	2.5
8	Prep for hearing	1
9.1	Appearance at hearing	0.25

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<sup>5</sup> That is, without regard to regional variations in practitioner fee rates. See *McGechan on Procedure* (Thomson Reuters, Wellington, Looseleaf) at [14.4.01].

4.10	Memoranda (re payment and costs)	0.8
Total		7.45
7.45 days at 7.5 hours per day at \$400 per hour		\$22,350.00

[21] In addition Clearwater incurred the following disbursements:

Disbursements		
Filing Fees	\$	483.40
New Zealand Gazette Advertising fee	\$	86.00
Fairfax Media Advertising fee	\$	239.63
Neil Group Service Fee	\$	180.00
Taxis	\$	274.70
Airfares	\$	635.00
	\$	735.00
	\$	695.00
Total Disbursements	\$	<b>3,328.73</b>

[22] Clearwater therefore sought a costs order of \$23,000 plus disbursements of \$3,328.73.

[23] For Chow, in a commendably crisp submission, Mr Toebes focused upon the High Court Rules scale comparison. He submitted a number of items claimed in the comparison were not permissible. The scale provides that items 21 to 24 apply instead of items 1, 2, 4.10, 4.11, 8 and 9. That would reduce the permissible hours, on a scale basis at least, to 4.95 days, or \$14,850. Mr Toebes submitted that item 7.1 of the scale also would not apply, as the matter did not proceed to trial. He contested, in particular, the travel disbursements. He said these were Wellington registry proceedings, “nothing out of the ordinary”, and Wellington counsel could easily have been instructed. In particular, there was no justification for claims for three airfares, for three appearances, at least two of which were routine.

## **Analysis**

[24] My task is to discern what are the “actual and reasonable” costs in this proceeding.

[25] I conclude that Mr Turner’s fee rate of \$400 per hour is a reasonable cost. It is only marginally above the \$375 which the scale anticipates as actual (and by definition reasonable), albeit not payable on the part contribution basis that the High Court Rules mandates. Section 59(2)(a) of the Act is not constrained in the same way.

[26] I turn to the question of the scale comparison.

[27] First, I note that it is relevant only by way of a cross-check comparison. The calculation of actual and reasonable costs for the purpose of s 59(2)(a) is not constrained by the application of the schedule. In particular, items 21 to 24 of the schedule anticipate a relatively straightforward company liquidation process. As the narrative set out above indicates, this case was anything but.

[28] Secondly, I conclude that item 7.1 would be applicable in this proceeding, despite the fact that the matter did not proceed to a final defended hearing. Affidavit evidence was required; indeed it was essential to Chow’s submission that it was solvent and should not be placed in liquidation.

[29] Thirdly, the scale anticipates only a single appearance on a company liquidation proceeding. In this case there were three appearances required, and so a further 0.8 hours should be allowed.

[30] Fourthly, the scale makes no provision for the preparation of detailed submissions. Both parties filed reasonably full submissions for the hearing that took place on 5 October 2011. The decision raised a number of potentially difficult questions as to enforcement of the Construction Contracts Act 2002. Clearwater’s counsel were required to prepare detailed submissions meeting the arguments presented by Chow, and did so. They were also required to respond to the

submissions filed by Chow. I would, therefore, allow a further one day for that purpose.

[31] It follows that in my view a more correct scale comparison would allow 6.75 days, or \$20,250. The actual claim of \$23,000, being within 15% of scale calculation, is a reasonable charge. I will order costs accordingly.

[32] I turn now to disbursements. The only material challenge is to charges for travel. Clearwater is based in Auckland, and the events giving rise to the claim all took place in Auckland. But Clearwater was compelled to sue for liquidation in the Wellington High Court, because of Chow's principal place of business is there.

[33] There were three relevant appearances:

- (a) That on 15 August 2011 was a first call of the matter before Gendall AJ. There were a number of contested matters. They concerned both pleadings and discovery issues. It was appropriate, given the history, that Mr Turner attend if the matter was not dealt with by telephone.
- (b) A further hearing was required on 26 September 2011, to deal with a stay application that Chow had filed. This despite the fact that no provision had been made for that in the timetable directions made by Gendall AJ on 15 August 2011. Chow contended that the stay application should be heard before the liquidation application, that more than half a day was required, and that the scheduled hearing on 5 October 2011 could not proceed. It was entirely appropriate that counsel familiar with the proceeding, Mr Turner, attend. The Judge directed that the two matters be heard together on 5 October before me.
- (c) The hearing on 5 October 2011 concerned both liquidation and stay applications. Plainly it was appropriate that Mr Turner attend that hearing.



[34] I therefore confirm the disbursements claimed by Clearwater.

**Disposition**

[35] An order for costs in favour of Clearwater Construction Limited, against Chow Limited, is made in the sum of \$23,000, together with disbursements of \$3,328.73.

**Stephen Kós J**

Solicitors:  
Fleming Foster, Auckland for Plaintiff  
J T Law, Wellington for Defendant