IN THE COURT OF APPEAL OF NEW ZEALAND

CA403/2011
[2011] NZCA 423

	BETWEEN	DONOVAN DRAINAGE & EARTHMOVING LIMITED Applicant
	AND	HALLS EARTHWORKS LIMITED (IN LIQUIDATION) Respondent

Hearing: 23 August 2011

Court: Ellen France, Randerson and Harrison JJ

Counsel: R Bowden for Applicant
D W Grove for Respondent

Judgment: 29 August 2011 at 4:00 PM

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay to the respondent costs as for a standard application for leave to appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant (Donovans) seeks leave under s 67(2) of the Judicature Act 1908 to bring a second appeal from a decision made in the District Court by Judge

Sharp[1] which was upheld on appeal in the High Court by Courtney J.[2] In a subsequent decision, Courtney J declined leave to appeal from her judgment.[3]

[2] The dispute relates to the interpretation of a construction contract entered into in January 2006 between Donovans as head contractor and the respondent (Halls) as subcontractor. The issue was whether the contract was a measure and value contract (as Donovans maintained) or a lump sum contract (as Halls contended).

[3] The resolution of the issue depended upon the interpretation of a revised schedule prepared by Halls which formed the basis of the contract between the parties. In the District Court, Judge Sharp held that the contract was a lump sum contract. This decision was upheld on appeal.

[4] The points which Donovans seek to raise on appeal, if leave is granted, are:

(a) Courtney J wrongly declined to admit a prior document (described as a draft contract schedule) for the purpose of interpreting the revised contract schedule.

(b) A success fee agreement relating to one of Halls' expert witnesses required that the District Court judgment be set aside.

Principles

[5] The principles upon which leave may be granted for a second appeal are well-established. 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 the further appeal. Not every alleged error of law is of such importance, either generally or to the parties, as to justify further pursuit of litigation already twice considered and ruled upon by a

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1 *Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd* DC Auckland CIV-2008-004-6, 1 December 2009.

2 *Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd* HC Auckland CIV-2010-404-29, 10 November 2010.

3 *Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd (in liq)* HC Auckland CIV 2010-404-29, 2 June 2011.

court. The scarce time and resources of this Court are not to be wasted, nor additional expense for the parties incurred, without realistic hope of benefit.[4]

Discussion

[6] We are not persuaded that either of the points Donovans seek to raise on appeal is capable of bona fide and serious argument. In dealing with the applicant's first point, Mr Bowden's submission for Donovans was that the Judge wrongly excluded the draft schedule from consideration on the ground that it was part of the negotiations leading to the final contract. He submitted that, in terms of *Vector Gas Ltd v Bay of Plenty Energy Ltd,*[5] there was an ambiguity in the revised contract schedule and that the draft contract schedule was admissible to ascertain the meaning of the contract from the position of a reasonable person having the background knowledge available to the parties at the time they entered into the contract.

[7] We do not intend to express a view on the admissibility point. This is because we do not accept Mr Bowden's submission that, if the draft contract schedule were admitted, this would or might have led to a different outcome. Mr Bowden's submission in the courts below and before us was that the draft contract schedule showed that a handwritten figure purporting to be the total sum proposed by Halls as the contract price (excluding GST) was not intended to include a profit margin as Halls maintained. Rather, Mr Bowden submitted that the handwritten figure contained demonstrable arithmetical errors when compared with the correct total of all the items in the draft schedule. This, Mr Bowden submitted, supported Donovans' interpretation that a measure and value contract was intended since the incorrect total figure could not have been intended to include a profit margin.

[8] We do not see that the admission of the draft contract schedule would have made a difference to the outcome. The revised contract schedule contained similar arithmetical errors. Mr Bowden says that Donovans' contention would be more

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4 *Snee v Snee* (1999) 3 PRNZ 609 (CA); *Waller v Hider* [1998] 1 NZLR 412 (CA); and *Downer Construction (NZ) Limited v Silverfield Developments Ltd* [2008] 2 NZLR 591.

5 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

obvious if the draft contract schedule were taken into account. We must confess to some difficulty in following this submission. However, if the argument for Donovans had any merit, it was equally available in respect of the revised contract schedule which, it is agreed, was the contractual document.

[9] We see this as a straightforward case in which Donovans accepted a revised contract schedule containing a lump sum figure. It was not until some time after the contractual work had commenced that any objection was raised.

[10] This conclusion was supported by other evidence. Judge Sharp found on the basis of evidence from a witness called by Halls that if the contract were a lump sum contract then Donovans would still make a 13 per cent profit on the subcontract which was consistent with the usual margin for work of this type. Correspondingly, if the contract was a measure and value contract, the profit to Donovans would have been 39 per cent, well in excess of the usual profit margin expected. The District Court Judge also found that the actual profit to Halls on a lump sum contract basis was approximately 24 per cent. These findings have not been challenged and are consistent with the conclusion by the District Court Judge that the contract was of a lump sum nature. It is well established that, in interpreting a contract, it is permissible to consider whether the interpretation contended for would lead to a commercially unrealistic result.

[11] There was also evidence that the prices in the schedule had been inserted as a cost price which meant that the profit margin had to be added in the total. Although this evidence was hearsay, there was no objection to it in the lower courts.

[12] We conclude that there is no proper foundation to attack the finding made in the District Court and upheld on appeal in respect of the nature of the contract.

[13] We reach a similar conclusion on the second point Donovans seeks to raise on appeal. It was accepted in the High Court that it was not desirable for an expert witness to receive a success fee but Courtney J was satisfied that the outcome would not have been different even without the evidence of this witness. We are not persuaded there is any proper basis to question that conclusion.

[14] Even if we were of the view that the issues raised are capable of bona fide and serious argument, we do not consider there is any public or private interest of sufficient importance to outweigh the cost and delay of a further appeal. The amount at issue is a little over $100,000. We note that Halls obtained a favourable adjudication decision on the issue under the Construction Contracts Act 2002 on 12 November 2006 and subsequently obtained summary judgment against Donovans on 18 July 2007.[6] Notwithstanding, Donovans issued further proceedings in the District Court on the same issue. These proceedings led to the decision of Judge Sharp and the subsequent appeal heard by Courtney J.

[15] Mr Grove for the liquidator of Halls accepted there was jurisdiction for the District Court proceedings despite the adjudicator's determination and the summary judgment. We express no view on that issue. We simply observe that the same issue of contractual interpretation has now been determined against Donovans on four separate occasions. No further attention to this issue by this Court is warranted.

Result

[16] For the reasons given, we decline the application for leave to appeal. The applicant is to pay the respondent costs as for a standard application on a band A basis together with usual disbursements.

Solicitors:
Urlich McNab Kilpatrick, Whangarei for Applicant
David Shanahan, Whangarei for Respondent

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6 *Halls Earthworks Ltd v Donovan Drainage & Earthmoving Ltd* HC Whangarei CIV 2007-488-144, 18 July 2007.